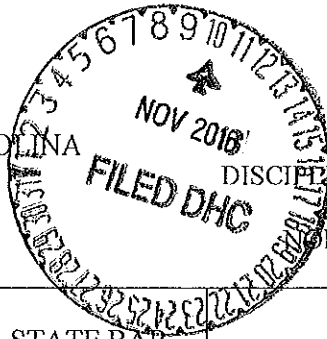


STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
16 DHC 25

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

GEORGIA S. NIXON, Attorney,

Defendant

CONSENT ORDER
OF DISCIPLINE

THIS MATTER was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of Joshua W. Willey, Jr., Chair, William O. King, and Warren G. McDonald pursuant to 27 N.C. Admin. Code 1B § .0114. Plaintiff, the North Carolina State Bar, was represented by Carmen Hoyme Bannon. Defendant, Georgia S. Nixon, was represented by David B. Freedman. Defendant waives a formal hearing in this matter and both parties stipulate and consent to the entry of this order and to the discipline imposed. Defendant waives any right to appeal this consent order or to challenge in any way the sufficiency of the findings.

Based upon the 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, 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 promulgated thereunder.

2. Defendant, Georgia S. Nixon, was admitted to the North Carolina State Bar in 1991, and is an Attorney at Law subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. Nixon was properly served with the summons and complaint in this matter.

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4. During the relevant period referred to herein, Nixon was actively engaged in the practice of law in High Point, Guilford County, North Carolina.

5. Nixon represented Lyndell Fuller on various drug-related charges in *State v. Fuller*, Guilford County file nos. 13-CRS-23085, 13-CRS-23169, 13-CRS-74635-36, & 13-CRS-80539 (“Fuller’s 2013 charges”).

6. Nixon negotiated a plea agreement wherein four of Fuller’s 2013 charges would be dismissed in exchange for his guilty plea on four other charges. The plea agreement was reduced to writing in a Transcript of Plea hand-written by Nixon and signed by Nixon and the prosecutor (ADA Jones) on 12 March 2014. The Transcript of Plea was not presented to the Court until 12 May 2014.

7. The ADA who was in court on 12 May 2014 (ADA Green) had no prior involvement in Fuller’s case. In court on 12 May 2014, Nixon asked ADA Green to alter the plea agreement that had already been signed by ADA Jones to include language indicating that Fuller would not be charged with any crimes he may have committed before 12 May 2014. Nixon told ADA Green that ADA Jones had agreed to include this language in the plea agreement.

8. Although during their discussion of the case ADA Jones said something to the effect that he would not allow the police to “play dirty pool,” Nixon knew or should have known that ADA Jones had not agreed give Fuller amnesty from any criminal offenses he might have committed prior to the date of his guilty plea.

9. Nixon contacted ADA Jones by phone on the morning of 12 May 2014 regarding the additional term she sought to add to Fuller’s Transcript of Plea. During that conversation, ADA Jones did not agree that Fuller would have amnesty for any crimes he might have committed before 12 May 2014.

10. In response to Nixon’s request, ADA Green also contacted ADA Jones, who again stated that there was no such agreement, and that no alterations were to be made to Fuller’s existing Transcript of Plea. ADA Green relayed to Nixon what ADA Jones had said, and offered to continue the case so she could have an opportunity to address the issue directly with ADA Jones. Nixon declined, and proceeded to present the existing Transcript of Plea to the Court.

11. During the presentation of Fuller’s plea to the Court, Fuller confirmed that the plea arrangement set forth in the Transcript of Plea was the complete agreement, and that no other promises had been made to cause him to plead guilty.

12. At the conclusion of the presentation to the Court on 12 May 2014, Nixon implied to the court that ADA Jones had agreed not to prosecute Fuller on crimes pre-dating the entry of the plea, stating that ADA Jones “didn’t feel comfortable putting anything in a plea arrangement, not knowing if he is being investigated for some unrelated murder, sex offense, something like that, but Mr. Fuller is under the

impression this encompasses everything that has to do with these drug charges as of today.” The presiding judge did not acknowledge these remarks by Nixon, entered Fuller’s plea without further inquiry, and sentenced him to the agreed-upon 11-23 months of incarceration.

13. Fuller was subsequently charged in Guilford County with additional drug-related offenses which occurred between 18 February 2014 and 1 April 2014. (*State v. Fuller*, Guilford County file nos. 14-CRS-76387-91) (“Fuller’s 2014 charges”).

14. On 9 January 2015, Nixon filed a motion to dismiss Fuller’s 2014 charges on the grounds that her “agreement” with ADA Jones regarding Fuller’s plea to the 2013 charges precluded the State from bringing the 2014 charges.

15. After a hearing, the Court found that there was no such agreement between Nixon and ADA Jones. Accordingly, Nixon’s motion to dismiss Fuller’s 2014 charges was denied.

16. On 24 July 2015, Nixon filed a motion to suppress evidence related to Fuller’s 2014 charges on the grounds that he was not advised of his *Miranda* rights before he made certain statements to law enforcement. Nixon’s associate of 15 years prepared the motion, which was signed, filed, and argued by Nixon. In the motion, Nixon contended that the investigating officer had not read Fuller his rights, and that no signed waiver of rights form had been produced by the State in discovery.

17. A waiver of rights form signed by Fuller was among the documents attached to Nixon’s 24 July 2015 motion to suppress.

18. The State’s first witness at the hearing on Nixon’s motion to suppress pointed out that the executed waiver of rights form had been attached to Nixon’s motion. Nonetheless, Nixon neither acknowledged her demonstrably inaccurate assertion regarding the production of a waiver form, nor did she seek to correct the allegations she had made in the motion to suppress.

19. After a lengthy hearing, the Court found that the 24 July 2015 motion to suppress was “based on a fundamental mistake” and that one of the primary “underlying reasons for filing the motion was utterly destroyed almost at the outset of the hearing.”

20. Nixon represented Daniel Blakely on a charge of driving while impaired in *State v. Blakely*, Guilford County file no. 13-CR-66454.

21. Following Blakely’s 16 January 2013 arrest for DWI, the North Carolina Division of Motor Vehicles revoked Blakely’s commercial driver’s license (CDL) for a period of one year, as authorized by N.C. Gen. Stat. § 20-17.4(7).

22. When Nixon appeared in Guilford County District Court on Blakely’s behalf on 11 March 2014, she argued that the DMV’s revocation of Blakely’s CDL

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amounted to punishment, and therefore further prosecution of Blakely for the DWI would constitute double jeopardy.

23. At the time Nixon made this argument, the question of whether prosecution for DWI and revocation of a defendant's CDL under N.C. Gen. Stat. § 20-17.4(7) constituted double jeopardy had already been raised by the appellant in *State v. McKenzie*, 225 N.C. App. 208 (2013), *rev'd* 367 N.C. 112 (2013).

24. On 15 January 2013, a divided panel of the Court of Appeals had issued its opinion in *McKenzie*, holding that a CDL revocation constituted punishment and therefore precluded the underlying DWI prosecution on double jeopardy grounds.

25. On 23 January 2013, the Supreme Court of North Carolina issued a temporary stay and writ of supersedeas, staying Court of Appeals decision in *McKenzie*. Accordingly, the mandate for the Court of Appeals decision in *McKenzie* did not issue and that decision did not become controlling law in North Carolina.

26. On 4 October 2013, the Supreme Court reversed the Court of Appeals decision in *McKenzie*, holding that the revocation of a CDL is a civil penalty, not a criminal sanction, and therefore prosecuting the underlying DWI does not infringe upon a defendant's protection against double jeopardy.

27. The Supreme Court decision in *McKenzie* was issued more than five months before Nixon made the double jeopardy argument on Blakely's behalf in district court.

28. Nixon had an obligation to her client and the Court to ensure that her arguments on Blakely's behalf were based on accurate statements of law.

29. Nixon argued that at the time Blakely was charged with DWI (on 1 January 2013), the Court of Appeals decision in *McKenzie* was controlling law, and that the Supreme Court's subsequent opinion in *McKenzie* should not be applied "retroactively" to Blakely's case.

30. Nixon presented the judge with a proposed order granting her motion to dismiss Blakely's DWI charge on double jeopardy grounds. It stated that the "North Carolina Appellate Courts have addressed double jeopardy claims on license revocations in three separate cases," but *State v. McKenzie* was not among the three decisions discussed in the proposed order.

31. Apparently based on Nixon's argument that the Court of Appeals decision in *McKenzie* was controlling law on the date of Blakely's arrest, the judge added language indicating that the dismissal was *nunc pro tunc* to 22 February 2013.

32. The order dismissing Blakely's case on double jeopardy grounds was signed by the judge and entered on 11 March 2014.

33. On 20 March 2014, the State requested a meeting with Nixon and the presiding judge to discuss the dismissal order in Blakely's case. At the ensuing meeting, the State raised concerns about the fact that the order was contrary to controlling law, and about the *nunc pro tunc* date. After some discussion and over Nixon's objection, the judge entered an order striking the 11 March 2014 dismissal order.

34. Nixon then filed a motion seeking to preclude the State from seeking rehearing of Blakely's motion to dismiss on the grounds that the order striking the prior dismissal order was void, and the time for seeking rehearing of the 11 March 2014 order had expired. After a contested hearing in district court, the motion was granted. Several weeks later, Blakely was charged with DWI in Superior Court, *State v. Blakely*, Guilford County file no. 13-CRS-66454.

35. Nixon then filed motions to dismiss the Superior Court DWI charge on double jeopardy grounds and for lack of jurisdiction. There was a contested hearing on these issues in July 2014.

36. During the course of the July 2014 hearing, Nixon withdrew her motions to dismiss.

37. Blakely entered an *Alford* plea to DWI on 30 July 2014.

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the Disciplinary Hearing Commission has jurisdiction over Defendant, Georgia S. Nixon and over 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. Gen. Stat. § 84-28(b)(2) in that Defendant violated the Rules of Professional Conduct in effect at the time of her actions as follows:

- (a) By asserting to ADA Green that ADA Jones had agreed to the inclusion of an additional term in Fuller's plea agreement when she knew or should have known that ADA Jones had not agreed to the addition of that term, Defendant engaged in conduct involving misrepresentation in violation of Rule 8.4(c);
- (b) By contending in her motion to dismiss that ADA Jones had agreed Fuller would not be charged with offenses predating his 12 May 2014 guilty plea when she knew or should have known that ADA Jones had not agreed to any such arrangement, Defendant asserted an issue without basis in fact in violation of Rule 3.1;
- (c) By filing the motion to dismiss Fuller's case and requiring the Court to devote time and resources to a hearing when she knew or should have

known that the grounds for the motion lacked factual basis, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);

- (d) By filing the motion to suppress that alleged no waiver of rights form signed by Fuller had been produced by the State in discovery when the waiver of rights form was attached to the motion, Defendant failed to exercise reasonable diligence on behalf of a client in violation of Rule 1.3, and asserted an issue without basis in fact in violation of Rule 3.1;
- (e) By proceeding throughout the hearing without acknowledging or correcting the demonstrably inaccurate allegation in her motion to suppress, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
- (f) By arguing that the Court of Appeals decision in *McKenzie* was controlling law at the time Blakely was charged with DWI, Defendant asserted an issue without basis in law in violation of Rule 3.1 and failed to exercise reasonable diligence in representing a client in violation of Rule 1.3; and
- (g) By obtaining dismissal of Blakely's case by making an argument without legal basis, and consuming court time and resources pursuing multiple subsequent motions arising out of that erroneous dismissal, Defendant engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

Based upon the foregoing Findings of Fact and Conclusions of Law, and with the consent of the parties, the Hearing Panel finds by clear, cogent, and convincing evidence the following

ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. Defendant has no prior professional discipline.
2. Defendant's intentional acts, as described above, created a foreseeable risk of harm to the administration of justice and to third parties, namely attorneys for the State.
3. Defendant's actions described herein were intended to benefit her client and were not motivated by personal interest.
4. Defendant has fully cooperated with the State Bar's investigation and in reaching a resolution in these proceedings.
5. Members of the Guilford County Bar attest to Defendant's good character.

Based upon the Findings of Fact, Conclusions of Law, Additional Findings Regarding Discipline, and with the consent of the parties, the Hearing Panel makes the following

ADDITIONAL CONCLUSIONS REGARDING 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 Rule .0114(w) of the Discipline and Disability Rules of the State Bar.

2. The Hearing Panel concludes the following factors from Rule .0114(w)(1) warrant consideration of suspension of Defendant's license:

- (a) intent to commit acts where resulting harm is foreseeable;
- (b) negative impact of the defendant's actions on the administration of justice;
and
- (c) effect of defendant's conduct on third parties.

3. The Hearing Panel has carefully considered all of the factors enumerated in Rule .0114(w)(2) and concludes that none of the factors requiring consideration of disbarment are present in this case.

4. The Hearing Panel has carefully considered all of the factors enumerated in Rule .0114(w)(3) and determines that the following factors are applicable in this case:

- (a) Lack of prior discipline;
- (b) Absence of selfish motive;
- (c) Multiple offenses;
- (d) Cooperative attitude toward the proceedings;
- (e) Degree of experience in the practice of law; and
- (f) Good character or reputation.

5. The Hearing Panel has considered admonition, reprimand and censure as potential discipline but finds that any sanction less than suspension would fail to acknowledge the seriousness of the offenses committed by Defendant.

6. In light of the significant harm and potential harm resulting from Defendant's misconduct, the Hearing Panel concludes that a suspension of Defendant's license, stayed upon compliance with conditions, is the only discipline that:

- (a) will adequately protect the public;
- (b) acknowledges the seriousness of Defendant's offenses; and
- (c) sends a proper message to attorneys and the public regarding the conduct expected of members of the Bar of this State.

Based upon the foregoing Findings of Fact, Conclusions of Law, Additional Findings and Conclusions Regarding Discipline, and with the consent of the parties, the Hearing Panel enters the following

ORDER OF DISCIPLINE.

1. Defendant, Georgia S. Nixon is hereby suspended from the practice of law for one year, effective 30 days from service of this order upon Defendant.

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

- (a) Defendant shall keep the North Carolina State Bar membership department advised of her current physical home and business addresses, telephone numbers, and email address, and shall notify the membership department within 10 days of any change to her contact information;
- (b) Defendant shall accept all certified mail from the North Carolina State Bar and respond to all letters of notice and requests for information 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;
- (c) Defendant shall participate fully, timely, and in good faith in the State Bar's fee dispute resolution program when notified of any petitions for resolution of disputed fees;
- (d) Defendant shall timely comply with State Bar membership requirements and pay all fees and costs assessed by the State Bar and the Client Security Fund by the applicable deadline;
- (e) Defendant shall timely comply with her State Bar CLE requirements and shall pay all CLE fees and costs assessed by the applicable deadline;
- (g) Defendant shall not violate any federal or state laws, other than minor traffic violations;

(h) Defendant shall not violate any provision of the North Carolina Rules of Professional Conduct; and

(i) Defendant shall pay the costs of this proceeding within 30 days of service of the statement of costs upon her by the Secretary of the State Bar.

3. If the stay of the suspension is lifted at any time and the suspension of Defendant's law license is activated for any reason, before seeking reinstatement of her license to practice law, Defendant must show by clear, cogent and convincing evidence that she:

(a) Submitted her license and membership card to the Secretary of the State Bar within 30 days after the effective date of the order suspending her law license;

(b) Complied with all provisions of 27 N.C.A.C. Chapter 1, Subchapter B, Section .0124 of the State Bar Discipline & Disability Rules on a timely basis;

(c) Paid all outstanding membership fees, Client Security Fund assessments and costs assessed by the DHC or the State Bar and complied with all continuing legal education requirements imposed by the State Bar. At the time she petitions for reinstatement, Defendant must demonstrate that she is current in payment of all applicable membership dues, fees, costs, penalties accrued, Client Security Fund assessments, judicial district dues, and any other charges the State Bar is authorized to collect; and

(d) Complied with the conditions set forth in paragraphs 2(a) through 2(i) above during the period of active suspension.

4. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C.A.C. 1B § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout any period of stayed suspension.

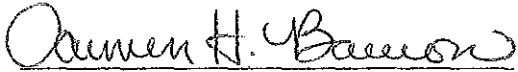
5. Defendant is taxed with the administrative fees and costs of this action as assessed by the Secretary, which shall be paid within 30 days of service of the notice of costs upon Defendant.

Signed by the Chair with the consent of the other Hearing Panel members, this the
18th day of November, 2016.

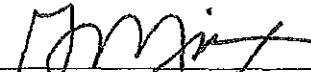


Joshua W. Willey, Jr., Chair
Disciplinary Hearing Panel

CONSENTED TO BY:



Carmen Hoyme Bannon
Attorney for Plaintiff



Georgia S. Nixon
Defendant



David B. Freedman
Attorney for Defendant