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NORTH CAROLINA  
WAKE COUNTY

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BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
86 DHC 3

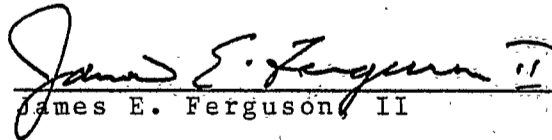
THE NORTH CAROLINA STATE BAR, )  
Plaintiff )  
vs. )  
DAVID J. SMITH, )  
Defendant )

ORDER OF DISCIPLINE

This matter coming on to be heard and being heard on August 29, 1986 before a hearing committee composed of James E. Ferguson, II, Chairman, John Shaw, and Powell Majors; and based upon the FINDINGS OF FACT and CONCLUSIONS OF LAW entered by the hearing committee of even date herewith; and further based upon arguments presented in the second phase of the hearing, the hearing committee enters the following ORDER OF DISCIPLINE:

- 1). The Defendant, David J. Smith, is hereby DISBARRED from the practice of law in North Carolina.
- 2). The Defendant, David J. Smith, shall forthwith surrender his license and permanent membership card to the Secretary of the North Carolina State Bar.
- 3). The defendant, David J. Smith, shall comply with the provisions of §24 of Article IX of the Rules and Regulations of the North Carolina State Bar.
- 4). The defendant, David J. Smith, is hereby taxed with the costs of this action.

Signed by the undersigned Chairman with the full accord and consent of the other members of the hearing committee this the 29th day of August, 1986.

  
James E. Ferguson, II

NORTH CAROLINA  
WAKE COUNTY

REC. MAR 28 11:30 86

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THE NORTH CAROLINA STATE BAR, )  
Plaintiff )  
vs. )  
DAVID J. SMITH, )  
Defendant )

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FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This matter coming on to be heard and being heard on August 29, 1986 in the Council Chambers of the North Carolina State Bar Building before a hearing committee of the Disciplinary Hearing Commission composed of James E. Ferguson, II, Chairman, John Shaw, and Powell Majors; and

BASED UPON the Default of the defendant for his failure to file Answer in this action and the evidence offered at the hearing, the hearing committee finds the following by clear, cogent, and convincing evidence.

1. The 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. The defendant, David J. Smith, was admitted to the North Carolina State Bar on May 14, 1981 and is, and was at all times referred to herein, an Attorney at Law licensed to practice in North Carolina, subject to the rules, regulations, and North Carolina Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During all of the periods referred to herein, the defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Wilmington, New Hanover County, North Carolina.

4. The Complaint in this action was filed on May 15, 1986.

5. Summons and Notice was issued at 9:30 a.m. on May 15, 1986 by B. E. James, Secretary of the North Carolina State Bar.

6. This Summons was returned unserved by a deputy in the office of J. McQueen, Jr., Sheriff of New Hanover County indicating that "Subject is in Greensboro, North Carolina on Radius Circle."

7. Alias and Pluries Summons and Notice was issued at 10:00 a.m. on June 12, 1986 by B. E. James, Secretary to the North Carolina State Bar.

8. The Alias and Pluries Summons and Notice shows a return of service indicating that T. R. Leonard, a deputy in the office of Guilford County Sheriff served defendant personally on June 23, 1986 by leaving a copy with Mrs. E. L. Summers (grandmother) who resides at defendant's usual place of abode."

9. Under §14(5) of Article IX, the defendant was required to file an Answer with the Secretary within twenty (20) days after service of the Summons and Complaint.

10. The defendant has not filed an Answer or other pleading in this action.

As pertains to the First Claim for Relief set out in the Complaint, the hearing committee makes the following FINDINGS OF FACT:

11. In about October, 1985, defendant relocated his law practice from Greensboro, North Carolina to Wilmington, North Carolina where he practiced law in an office sharing arrangement or other association with Fred A. Rogers, III.

12. On November 6, 1985, defendant was made an authorized signatory on the trust account of Fred A. Rogers, III at United Carolina Bank (UCB) account number 042-233-1511.

13. Fred A. Rogers, III made no further deposits nor wrote any checks on the trust account after November 6, 1986 when he surrendered his license to New Hanover Superior Court due to disability.

14. On December 5, 1985, defendant conducted a real estate closing on behalf of William I. McClanahan, Sr. and his wife, Barbara McClanahan, in their purchase of property located at 813 Frances Marion Drive in Wilmington.

15. At this closing, defendant received funds totalling \$48,594.78 which he deposited into the above-referenced trust account in two deposits of \$10,954.28 and \$37,640.50.

16. On December 5, 1985, defendant wrote checks on the trust account as follows:

(a) #306 payable to the sellers	
in the amount of	\$25,091.32

- (b) #307 payable to the realtor as commission in the sum of \$2,700.00
- (c) #308 payable to the Register of Deeds for recording and revenue stamps in the sum of \$64.00
- (d) #309 payable to David J. Smith as attorney fee and deed preparation in the sum of \$370.00

17. On December 6, 1985, defendant wrote checks on the trust account as follows:

- (a) #310 to David J. Smith for "cost and sales fee" not reflected in the loan closing statement \$150.00
- (b) #311 to the Clerk of Superior Court in a matter unrelated to the closing and not reflected in the closing statement \$41.00
- (c) #312 for payment of the seller's first mortgage \$17,028.32
- (d) #313 to Cameron Brown for various closing costs \$1,297.64
- (e) #314 to the FHA for loan guarantee \$1,368.00

18. On December 9, 1985, defendant wrote check number 315 on the trust account to Cash and negotiated the check himself. This check was in the amount of \$1,400.00.

19. On December 13, 1985, defendant wrote check number 316 to Cash in the sum of \$200.00 and negotiated the check for cash.

20. On December 16, 1985, defendant wrote check number 317 to Cash in the sum of \$500.00 and negotiated the check for cash.

21. Defendant appropriated the proceeds of checks numbered 315, 316, and 317 to his own use.

22. The McClanahans did not authorize or direct defendant to use any of the funds entrusted to him other than for payments relating to the real estate closing as reflected in the closing statement.

23. Defendant never wrote checks from the trust account for the following items which were listed as items to be paid on the closing statement he prepared in the McClanahan closing:

- (a) Canady & Sons Exterminating \$85.00
- (b) Water damage repair: Collis Construction Co. \$30.00
- (c) Survey to Jack G. Stocks \$180.00
- (d) Title Insurance to First Title Insurance Co. \$90.00

24. David J. Smith made no further deposits into the trust account in the month of December, 1985.

25. As a result of defendant appropriating the \$1,400.00 represented by check number 315 to his own use, there were insufficient funds on deposit in the trust account when check number 314 written to the FHA in the sum of \$1,368.00 was presented to UCB for payment. UCB nevertheless paid check number 314.

26. UCB also paid checks numbered 316 and 317 referenced above even though the account had a negative balance when they were paid.

27. UCB also paid check number 350 in the amount of \$100.00 written by defendant on December 15, 1986 to a man named DeVries for a load of wood. This check was paid after the account had a negative balance.

28. As a result of UCB paying the checks written against insufficient funds, the trust account was \$1,738.27 overdrawn (not including December interest earned on the account of \$3.51).

29. Defendant knew that he was writing checks on the account for which there were not sufficient funds on deposit to pay the same upon presentation.

BASED UPON the foregoing FINDINGS OF FACT pertaining to the First Claim for Relief set out in the Complaint, the hearing committee makes the following CONCLUSIONS OF LAW:

Defendant's conduct as set out in paragraphs 11 through 29 above constitutes grounds for discipline pursuant to N.C.G.S. §84-28(b)(2) in that defendant violated the North Carolina Rules of Professional Conduct as follows:

- (a) By appropriating funds held in trust for William I. McClanahan, Sr. and his wife, Barbara McClanahan, to his own use, defendant committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 1.2(B); and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(C).
- (b) By writing checks on the trust account knowing that there were insufficient funds on deposit in

the account to pay the same upon presentation, defendant committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 1.2(B); and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(C).

- (c) By failing to keep funds received on behalf of the McClanahans maintained in his trust account, defendant violated Rules 10.1(A) and (C).
- (d) By failing to pay items listed in the closing statement as directed by the McClanahans, defendant failed to promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client to which the client was entitled in violation of Rule 10.2(E).

As pertains to the Second Claim for Relief set out in the Complaint, the hearing committee makes the following FINDINGS OF FACT:

30. After the allegations contained in the First Claim for Relief set out in the Complaint were brought to the attention of the North Carolina State Bar, the Chairman of the Grievance Committee issued a Letter of Notice to defendant pursuant to §12(3) of Article IX of the Rules and Regulations of the North Carolina State Bar.

31. The Letter of Notice was served upon defendant by certified mail, return receipt requested on March 17, 1986.

32. Defendant failed to respond to the Letter of Notice as directed by the Letter of Notice and as required by §12(3) of Article IX.

BASED UPON the foregoing FINDINGS OF FACT pertaining to the Second Claim for Relief set out in the Complaint, the hearing committee makes the following CONCLUSIONS OF LAW:

Defendant's conduct as set out in paragraphs 30 through 32 above constitutes grounds for discipline pursuant to N.C.G.S. §84(b)(3) in that defendant failed to answer a formal inquiry issued by or in the name of the North Carolina State Bar in a disciplinary matter.

Signed by the undersigned Chairman with the full accord and consent of the other members of the hearing committee this the 29<sup>th</sup> day of August, 1986.

  
James E. Ferguson, II