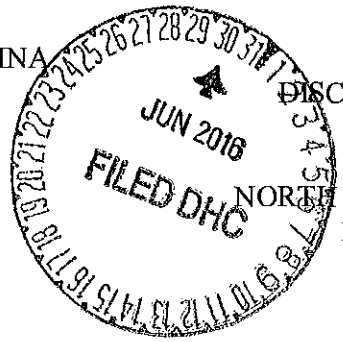
STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING
COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 52 A & B

THE NORTH CAROLINA STATE BAR, Plaintiff v. SEAN DAVID SOBOLESKI, and JANE DEARWESTER SOBOLESKI, Attorneys, Defendants	CONSENT ORDER

THIS MATTER was considered by a hearing panel of the Disciplinary Hearing Commission composed of Fred M. Morelock, Chair, David W. Long, and Tyler B. Morris. Plaintiff, the North Carolina State Bar, was represented by Margaret Cloutier. Defendant Sean David Soboleski was represented by Robert B. Long, Jr. Defendant Jane Dearwester Soboleski was represented by Dudley A. Witt and David B. Freedman. Defendants waive a formal hearing in this mater. The parties stipulate and agree to the findings of fact and conclusions of law recited in this order, and consent to the discipline imposed by this order. By consenting to the entry of this order, Defendants knowingly, freely, and voluntarily waive their rights to appeal this consent order or to challenge in any way the sufficiency of the findings and conclusions herein.

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 North Carolina General Statutes, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, Sean David Soboleski ("Soboleski" or "Defendant"), was admitted to the North Carolina State Bar on March 24, 2001, 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. Defendant, Jane Dearwester Soboleski, now Jane Dearwester, ("Dearwester" or "Defendant"), was admitted to the North Carolina State Bar on August 24, 2001, 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.

4. During some or all of the relevant periods referred to herein, Soboleski and Dearwester were engaged in the practice of law in the State of North Carolina and maintained a law office in Asheville, Buncombe County, North Carolina.

5. Defendants were properly served with the summons and complaint in this matter.

6. From July 1, 2012 through August 29, 2014, Defendants maintained three attorney trust accounts: Home Trust Bank trust account ending in no. 1115 (hereinafter "the general trust account"), Home Trust Bank trust account ending in no. 1412 (hereinafter " the real estate trust account"), and Mountain First Bank trust account ending in no. 3575 (hereinafter "the Mountain First trust account").

7. Defendants did not at least quarterly total the individual client balances and reconcile those and the general ledger balance for each trust account to the bank statement balance for each trust account as a whole.

8. Defendants did not always maintain accurate client ledgers and did not always record disbursements and deposits contemporaneously with the transactions.

9. Defendants did not record on checks the client balances against which the items were drawn.

10. Defendants did not indicate on the face of checks made payable to them the client balances from which the items were drawn.

11. Defendants made electronic transfers from the trust accounts that did not record the client balances from which the transfers were made.

12. Defendants employed a disorganized and at times haphazard manner of disbursing earned fees from clients' deposit for fees in Defendants' general trust account. Combined with the lack of contemporaneous recording of transactions on the client ledger cards, Defendants' methods of disbursing fees from the general trust account resulted in mismanagement of individual clients' entrusted funds on many occasions.

13. This mismanagement resulted in Defendants disbursing funds to themselves from the general trust account attributable as fees earned for specific clients in excess of the fees earned at that time on a number of occasions. For example:

(a) On February 18, 2013, Defendants disbursed $525.00 to themselves without recording the disbursement on the client ledger card. On March 15, 2013, Defendants disbursed $737.50 to themselves, which erroneously included the $525.00 already disbursed for the same activities.

(b) On February 18, 2013 Defendants disbursed to themselves $112.50. On February 19, 2013, Defendants disbursed $237.50 to themselves, which erroneously included the $112.50 already disbursed for the same activities.

(c) On or about February 21 and 27, 2013, Defendants recorded on an adhesive note legal services performed for client Edwards and disbursed the corresponding amount from Edwards' entrusted funds on that date; however, on an invoice sent to the client, Defendants recorded that the legal services had been performed on March 5, 2013, creating the appearance that they had collected fees before the fees had been earned.

14. This mismanagement also resulted in Defendants disbursing to themselves amounts that were less than the fees they had earned at that time on multiple occasions.

15. This mismanagement resulted in Defendants disbursing funds from the general trust account for the benefit of clients in excess of the amounts deposited into the account for those clients on a number of occasions. For example:

(a) For client Gay, Defendants disbursed to themselves $336.25 in payment of legal services on September 21, 2012. At the time of the disbursement, client Gay had a balance in the general trust account of $186.25. Defendants deposited $1,500.00 into the general trust account paid by Gay on October 4, 2012.

(b) For client Rice, Defendants disbursed to themselves $700.00 in payment of legal services on March 30, 2014. At the time of the disbursement, client Rice had a balance in the general trust account of $532.50.

16. At the time Defendants made these overdisbursements, Defendants were holding the trust account earned fees that had not yet been disbursed to Defendants; however, the overdisbursements exceeded the amount of earned fees. To the extent the undisbursed earned fees were insufficient to rectify the overdisbursements, Defendants failed to safeguard entrusted funds by using without authorization funds held in a fiduciary capacity for other clients to fund the deficiencies.

17. As of February 27, 2014, Defendants were obligated to hold in trust $260.00 on behalf of client Turnip for the payment of costs to the North Carolina Court

of Appeals. Due to the mismanagement of the trust accounts, on or about February 20, 2014, Defendants disbursed $810.00 to themselves in payment of attorney fees from the funds they held on behalf of Turnip. The $810.00 disbursement from the Turnip account for payment of attorney fees depleted all the funds that had been deposited on behalf of Turnip, including the funds Defendants were obligated to hold for payment of costs to the North Carolina Court of Appeals.

18. Despite attempts made by Defendants to rectify the problems in the general trust account both before and after the State Bar's Letter of Notice sent to Defendants, as of August 29, 2014, the balance in Defendants' general trust account was less than the amount of entrusted funds Defendants were required to maintain for the benefit of their clients due to Defendants' continued mismanagement of the trust account and trust account records.

Based on the foregoing Findings of Fact and with the consent of the parties, the Hearing Panel makes the following:

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the DHC has jurisdiction over Defendants and over the subject matter of this proceeding.

2. Defendants' 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 Defendants violated the Rules of Professional Conduct as follows:

(a) By failing at least quarterly to total the individual client ledger balances and reconcile those and the general ledger balances with the adjusted bank statement balances for each trust account as a whole, Defendants failed to perform quarterly reconciliations of the trust accounts in violation of Rule 1.15-3(d);

(b) By failing to maintain accurate client ledgers, by failing to record on checks the client balances against which the items were drawn, and by making electronic transfers that did not record the client balances on which the transfers were made, Defendants failed to maintain the minimum records required for general trust accounts in violation of Rule 1.15-3(b);

(c) By failing to identify on trust account checks payable to Defendants the client balances from which the funds were drawn, Defendants failed to indicate on an item payable to the lawyer the client balances from which the item was drawn in violation of Rule 1.15-2(h);

(d) By disbursing from the trust accounts more funds for clients than Defendants held in the trust accounts for the benefit of those clients,

Defendants failed to properly maintain entrusted funds in violation of Rule 1.15-2(a), allowed another to benefit from entrusted funds in violation of Rule 1.15-2(j), and failed to properly disburse entrusted funds in violation of Rule 1.15-2(m);

(e) By disbursing funds to themselves from the general trust account attributable as fees earned for providing legal services specific clients at a time when Defendants had not yet earned those fees, Defendants failed to properly maintain entrusted funds in violation of Rule 1.15-2(a), obtained personal benefit from entrusted funds in violation of Rule 1.15-2(j), and failed to properly disburse entrusted funds in violation of Rule 1.15-2(m); and

(f) By failing to hold $260.00 in trust on behalf of client Turnip and by failing to maintain in the general trust account all funds Defendants were obligated to hold for the benefit of each client who should have had funds in the accounts, Defendants failed to properly maintain entrusted funds in violation of Rule 1.15-2(a), allowed another to benefit from entrusted funds in violation of Rule 1.15-2(j), and failed to properly disburse entrusted funds in violation of Rule 1.15-2(m).

Based upon the consent of the parties, the Hearing Panel also finds by clear, cogent and convincing evidence the following:

ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. Although Defendants' failure to properly monitor, track, and safeguard entrusted funds resulted in some funds being used for the benefit of someone other than the beneficial owner of the funds, there is no evidence that Defendants knowingly or intentionally misused entrusted client funds, there is no evidence that Defendants intended to harm their clients, and there is no evidence of any dishonest motive on the part of Defendants. The evidence shows the deficiencies resulted from Defendants' failure to maintain client ledgers properly, failure to accurately track earned fees and the disbursements of earned fees, and failure to properly reconcile their trust accounts quarterly. Defendants demonstrated extreme recklessness in the handling of the funds entrusted to them by their clients from which they could have foreseen that the safeguarding of those funds was at risk.

2. Defendants ultimately properly credited the full amount of each client's entrusted funds against legal fees incurred despite instances in which Defendants disbursed more funds for the benefit of specific clients than Defendants held for the benefit of those clients thereby using funds held for the benefit of other clients to fund those disbursements. Nevertheless, Defendants' conduct in over-disbursing entrusted funds from their trust account caused potential significant harm to their clients whose

entrusted funds were used for the benefit of someone other than the beneficial owner of the funds without their knowledge or consent.

3. Defendants did not always ensure that the amounts transferred from the trust account in payment of fees correlated to specific services performed on behalf of their clients, at times resulting in fees being transferred from the trust account before the fees were earned as described in the Findings of Fact. On at least one occasion, Defendants were aware that they had disbursed to themselves more funds than they had earned, yet they failed to take all of the steps necessary to prevent future instances. Although Defendants hired an office manager in late 2012 and implemented timekeeping software in an effort to better organize their accounting practices, their efforts were insufficient to fully rectify the problems and they failed to implement all of the necessary changes to ensure that entrusted funds were properly handled.

4. Despite instances in which Defendants transferred funds to themselves in payment of attorney fees before the fees were earned, the goals of the representations were not hindered in that there were no instances in which Defendants received more funds than were earned for the entirety of those clients' cases.

5. Keeping accurate client ledgers and conducting quarterly reconciliations are the lynchpins of proper trust account maintenance and protection of entrusted funds. Defendants' continued failure to properly reconcile their trust account and failure to maintain proper trust account records demonstrates a pattern of misconduct and demonstrates Defendants' intent to commit acts in which the potential harm is foreseeable.

6. Defendants' conduct placed entrusted funds at risk and had the potential to cause significant harm to the standing of the profession in the eyes of the public because it shows their disregard for their duties as attorneys. Such erosion of public confidence in attorneys tends to sully the reputation of, and fosters disrespect for, the profession as a whole. Confidence in the legal profession is a building block for public trust in the entire legal system.

7. Defendants fully cooperated with the State Bar throughout the disciplinary process, and were candid and forthright in their responses to the State Bar's inquiries.

8. Both Defendants have substantial experience in the practice of law, each having been licensed since 2001.

9. Defendants acknowledge the wrongful nature of their conduct and are genuinely remorseful for their misconduct.

10. Defendant Soboleski has prior professional discipline. In July 2015, Soboleski was reprimanded by the Grievance Committee for asserting a charging lien at the outset of representation when no judgment or settlement existed and for using a

client's entrusted funds for payment of legal fees for an unrelated matter without the client's permission.

11. Defendant Dearwester has no prior professional discipline.

12. Both Defendants enjoy a good professional reputation in their community.

13. The Hearing Panel has 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 foregoing Findings of Fact and Conclusions of Law and with the consent of the parties, the Hearing Panel also finds by clear, cogent and convincing evidence the following:

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has 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 concludes that the following factors are present:

(a) Intent of the Defendants to commit acts where the harm or potential harm is foreseeable; and

(b) Negative impact of Defendants' actions on the public's perception of the profession.

2. The Hearing Panel has considered all of the factors enumerated in 27 N.C. Admin. Code 1B § .0114(w)(2) of the Rules and Regulations of the North Carolina State Bar and concludes that no factors are present that warrant disbarment.

3. The Hearing Panel has considered all of the factors enumerated in 27 N.C. Admin. Code 1B § .0114(w)(3) of the Rules and Regulations of the North Carolina State Bar and concludes the following factors are applicable in this matter:

(a) Prior discipline in the form of a Reprimand issued in 2015 to Defendant Soboleski;

(b) Absence of a dishonest or selfish motive;

(c) Pattern of misconduct;

(d) Multiple offenses;

(e) Full and free disclosure to the Hearing Panel and cooperative attitude toward the proceedings;

(f) Remorse;

(g) Good character and reputation among their colleagues; and

(h) Degree of experience in the practice of law as both have practiced since 2001.

4. The Hearing Panel has considered lesser alternatives and finds that a public censure, reprimand, or admonition would not be sufficient discipline because of the gravity of the potential harm to Defendants' clients, and the potential significant harm Defendants' conduct caused to the public, the administration of justice, and the legal profession.

5. The Hearing Panel has considered all lesser sanctions and finds that discipline short of suspension would not adequately protect the public, the profession and 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 suspension as the appropriate discipline;

(b) Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendants 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; and

(c) Protection of the public requires that Defendants not be permitted to resume the practice of law unless and until they demonstrate that they understand their obligations as attorneys.

6. Defendants' conduct, if continued or tolerated by the Bar, poses significant potential harm to future clients and to the profession.

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

ORDER OF DISCIPLINE

1. The licenses of Defendants, Sean David Soboleski and Jane Dearwester, are hereby suspended for three years, effective thirty days from the date of service of this order upon them.

2. Defendants shall submit their licenses and membership cards to the Secretary of the North Carolina State Bar no later than thirty days following the effective date of this Order.

3. Defendants shall comply with the wind down provisions contained in Rule .0124 of the North Carolina State Bar Discipline and Disability Rules. As provided in Rule .0124(d), Defendants shall file an affidavit with the Secretary of the North Carolina State Bar within ten days of the effective date of this Order, certifying that they have complied with the wind down rule.

4. Defendants shall pay the costs and administrative fees of this proceeding as assessed by the Secretary, including the costs of all depositions and transcriptions of depositions taken in this case, within sixty days of service of the statement of costs and administrative fees upon them.

5. Defendants are presently enjoined from handling entrusted funds by the Wake County Superior Court. Within ninety days of this Order's effective date, Defendants must petition the Wake County Superior Court seeking permission to disburse all identified client funds existing in the trust accounts to the beneficial owner(s) of the funds pursuant to the order of the court. Defendants shall diligently pursue the petition and comply with any subsequent order of the Court.

6. Within thirty days of the effective date of this Order, Defendants shall provide the State Bar with addresses and telephone numbers at which clients seeking return of files can communicate with Defendants to obtain such files. Defendants shall promptly return all files to clients upon request.

7. After six months of active suspension, each Defendant may apply for a stay of the remaining period of their suspension upon filing a motion in the cause and demonstrating by clear, cogent and convincing evidence that, in addition to complying with the general provisions for reinstatement listed in 27 N.C. Admin. Code 1B §.0125(b), the applicant Defendant has complied with the following conditions:

(a) Defendant has kept the North Carolina State Bar Membership Department advised of his/her current business and home addresses and notified the Bar of any change in address within ten days of such change;

(b) Defendant has responded to all communications from the State Bar, including communications from the Attorney Client Assistance Program, within thirty days of Defendant's receipt of the communication 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 which was pending during the period of suspension;

(c) That Defendant has petitioned the Wake County Superior Court seeking permission to disburse all identified client funds existing in the trust accounts to the beneficial owner(s) of the funds pursuant to the order of the court, has diligently pursued the petition and has complied with any subsequent order of the Court.

(d) That at the time of his/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 him/her, and including all judicial district dues, fees and assessments;

(e) That at the time of his/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) That during the active suspension that preceded the petition for stay, Defendant has completed two hours of CLE in addition to the minimum CLE requirement; the additional two hours shall be regarding trust accounting and at least one of the two hours shall be a course taught by the Trust Account Compliance Counsel for the North Carolina State Bar;

(g) 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/her suspension;

(h) Defendant properly wound down his/her law practice and complied with the requirements of 27 N.C. Admin. Code 1B § .0124; and

(i) Defendant has paid the costs and fees of this proceeding as reflected on the statement of costs served upon Defendant by the Secretary of the State Bar within sixty days of service of that statement upon Defendant.

8. If either Defendant successfully petitions for a stay of his/her suspension, the applicable suspension of that Defendant's law license shall be stayed as long as that Defendant complies and continues to comply with the following conditions:

(a) Defendant is current in payment of all Membership dues, fees, assessments and costs, including all Client Security Fund assessments and other charges or surcharges that the State Bar is authorized to collect from Defendant, including all judicial district dues, fees and assessments;

(b) That there is no deficit in Defendant's completion of mandatory CLE hours, in reporting of such hours, or in payment of any fees associated with attendance at CLE programs;

(c) Within the first year of the stayed suspension, Defendant shall complete three hours of CLE in the area of trust account management approved by the Office of Counsel of the State Bar. At least one such session shall be the Trust Accounting Rules Continuing Legal Education Program taught by the Trust Account Compliance Counsel for the North Carolina State Bar. Defendant shall provide written proof of successful completion of the CLE courses to the State Bar within ten days of completing the courses. These three hours are in addition to the CLE requirements set out in 27 N.C. Admin. Code lD § .1518;

(d) During the stayed suspension, Defendant shall personally perform the three-way reconciliations of all bank accounts into which are deposited any funds which Defendnat is required to hold in trust for the benefit of any client or third party using the reconciliation method described in the State Bar Lawyer's Trust Account Handbook using the reconciliation form provided therein. Defendant shall provide the three-way reconciliation report and all appropriate supporting documentation to the Certified Public Accountant (CPA) as provided below within fifteen days of the end of each quarter;

(e) Defendant shall engage the services of a CPA to audit his/her trust account on a quarterly basis to ensure Defendant's compliance with the Rules of Professional Conduct relating to trust accounts.

i. The CPA must submit quarterly a written report to the Office of Counsel concerning whether Defendant's reconciliations and trust account records and activities comply with the Rules of Professional Conduct, including but not limited to report of any accounting irregularities and any deviation 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 thirty days after the end of each quarter (each January 30, April 30, July 30, and October 30 during the period of stay). It is Defendant's sole responsibility to ensure the CPA completes and submits the reports as required herein;

ii. If any of the CPA 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 CPA and to the Office of Counsel of the State Bar within fifteen days of the date of the CPA's report;

iii. All CPA evaluations, reports, and services referred to herein will be completed and submitted at Defendant's sole expense; and

iv. Failure of Defendant to ensure the CPA submits any report required by this Order shall be grounds to lift the stay and activate the suspension.

(f) 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/her suspension;

(g) Defendant shall keep the State Bar Membership Department advised of his/her current business address. Defendant shall notify the State Bar of any change of address within ten days of such change. His/her current business address must be a street address, not a post office box or drawer;

(h) Defendant shall respond to all communications from the State Bar, including communications from the Attorney Client Assistance Program, within thirty days of receipt of such communication or by the deadline stated in the communication, whichever is sooner;

(i) Defendant shall participate in good faith in the State Bar's fee dispute resolution process for any petition which is pending during any stay of the suspension.

9. If either Defendant fails to comply with any one or more of the conditions of the stay of suspension provided in paragraphs 8 (a) – (i) above, the stay of suspension may be lifted in accordance with 27 N.C. Admin. Code 1B § .0114(x).

10. If either Defendant successfully petitions for a stay of his/her suspension, that Defendant's obligations governing the stay under this Order end after the applicable period of the stay provided there are no motions or show cause proceedings pending alleging lack of compliance with the conditions of the stay of the suspension. Pursuant to § .0114(x) of the North Carolina Discipline and Disability Rules, the DHC retains jurisdiction until all conditions of the stay of the suspension have been met. If a motion or show cause proceeding alleging lack of compliance with the conditions for the stay of the suspension is pending when the period of the stay of the suspension would otherwise have terminated, the DHC retains the jurisdiction and ability to lift the stay of the suspension and activate the remaining portion of the suspension in whole or in part if it finds that any of the conditions of the stay have not been met. The stay of the suspension and Defendant's obligation to comply with the conditions for the stay will continue until resolution of any such pending motion or show cause proceeding.

11. If either Defendant does not seek a stay of the suspension of his/her law license or if some part of the suspension is stayed and thereafter revoked, that Defendant must comply with the conditions set out in paragraphs 7(a) – (h) above and the provisions of 27 N.C. Admin. Code 1B § .0125 before seeking reinstatement of his/her license to practice law, and must provide in the petition for reinstatement clear, cogent and convincing evidence showing compliance therewith.

12. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code 1B § .0114(x) throughout the period of the suspension, any stay thereof, and until all conditions set forth in paragraph 7 above are satisfied.

Signed by the Chair with the consent of the other hearing panel members, this the 30 day of June, 2016.

Fred M. Morelock, Chair
Disciplinary Hearing Panel

CONSENTED TO BY:

Margaret Cloutier, Deputy Counsel
Attorney for the North Carolina State Bar

Sean David Soboleski
Defendant

Sean David Soboleski
Defendant

Robert B. Long, Jr.
Attorney for Defendant Soboleski

Jane Dearwester
Defendant

Dudley A. Witt
Attorney for Defendant Dearwester