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WAKE COUNTY

NORTH CAROLINA

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR
97 DHC 32

FILED DHC FEB 1998

THE NORTH CAROLINA STATE BAR, Plaintiff v. THEAOSEUS T. CLAYTON, JR, ATTORNEY Defendant	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE

This matter was heard on the 9th day of January, 1998, before a hearing committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair; Fred H. Moody, Jr and B. Stephen Huntley. The defendant, Theaoseus T. Clayton, Jr, was represented by Fred J. Williams. The plaintiff was represented by Clayton W. Davidson, III. Based upon the pleadings and the evidence introduced at the hearing, the hearing committee hereby enters the following:

FINDINGS OF FACT

1. The Plaintiff, the North Carolina State Bar (the "Plaintiff") is a body duly organized under the laws of the State of North Carolina and is the proper body to bring this proceeding under the authority granted to it in Chapter 84 of the General Statutes of North Carolina and the rules and regulations of the State Bar promulgated pursuant thereto (the "State Bar Rules and Regulations").

2. The Defendant, Theaoseus T. Clayton, Jr, (the "Defendant") was admitted to the State Bar in or about February 1987 and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina subject to the State Bar Rules and Regulations and the Rules of Professional Conduct of North Carolina.

3. During all or a part of the relevant periods referred to herein, Defendant was engaging in the practice of law in the State of North Carolina and maintained a law office in Raleigh, North Carolina.

00265

4. The Defendant was properly served with process and the hearing was held with due notice to all parties.

5. On or about February 25, 1992, Roy J. Hinton ("Hinton") was injured in an automobile accident while working for the town of Garner. Hinton hired the Defendant to represent him in that matter. Defendant brought a personal injury claim on behalf of Hinton.

6. In connection with his law practice Defendant maintained a Trust Account at BB&T, account number 5112559908 (the "BB&T Trust Account").

7. In connection with his law practice the Defendant maintained an operating account at BB&T, account number 5110589931 (the "Operating Account").

8. On or about May 25, 1994, the Defendant received a settlement in the amount of $265,000 on behalf of Hinton which was deposited in the same day into the BB&T Trust Account.

9. On the same day the Defendant prepared a settlement statement which was signed by Hinton and Defendant, and which indicated that the following payments were to be made:

Hinton	$136,058.67
Attorney's fees	$88,333.33
Town of Garner	$40,000.00

10. In accordance with the settlement statement, on May 25, 1994 the Defendant disbursed BB&T Trust Account check number 1267 in the amount of $88,333.33 to The Clayton Law Firm as a fee, and BB&T Trust Account check Number 1271 in the amount of $136,058.67 to Hinton.

11. In addition to the payments listed above, on May 25, 1994, the Defendant issued to The Clayton Law Firm BB&T Trust Account check number 1268 in the amount of $13,333.33 (the "Hinton Additional Fee Check") which he contended was a 1/3 fee payable by the Town of Garner for his efforts in obtaining the funds to satisfy the Worker's Compensation lien.

12. The Defendant maintained a ledger card on behalf of the Roy J. Hinton which correctly stated that The Hinton Additional Fee check was issued on May 25, 1994.

13. The fee of $88,333.33 authorized by the settlement statement was 1/3 of the total amount of the recovery from the Third Party. Neither Hinton, the Town of

Garner, GAB Business Services, Inc., nor the Industrial Commission had agreed to or authorized the Defendant to take any additional fee.

14. On or about June 15, 1994, The North Carolina Industrial Commission issued an order that $40,000 of the third party funds be distributed to the Town of Garner in satisfaction of a worker's compensation subrogation lien.

15. On or about June 17, 1994, the Defendant issued a check in the amount of $39,999.00 from the BB&T Trust Account to the GAB Business Services, Inc., the Worker's Compensation Carrier for the Town of Garner.

16. The Defendant did not replace the $13,333.33 taken as the Hinton Additional Fee Check until May 22, 1995.

17. The Defendant used the funds of other clients without their knowledge or permission when he paid and/or retained the additional fee of $13,333.33.

18. On or about October 4, 1991, Donald Brooks ("Brooks") was injured in an automobile accident. In or about March 1995, Brooks retained the Defendant to handle the matter.

19. On or about March 7, 1995, Defendant notified New York Central Mutual Fire Insurance Company that Brooks would accept the policy limits of $25,000.00 to settle the personal injury action.

20. On or about March 17, 1995, Defendant wrote a BB&T Trust Account check No. 1596, in the amount of $8,333.33 as his fee for handling the Brooks matter (the "Brooks Early Fee Check").

21. Defendant personally signed check number 1596. At the time that Defendant caused this check to be issued, no funds had been deposited into the BB&T Trust Account on behalf of Brooks.

22. At the time that Defendant wrote check number 1596, Defendant knew that no funds had been deposited into the BB&T Trust Account on behalf of Brooks.

23. The funds of other clients were used to cover the Brooks Early Fee Check without the knowledge or permission of the other clients, and the Defendant benefited from the issuance of the Brooks Early Fee Check.

24. On or about April 27, 1995, Defendant received a check in the amount of $25,000 from New York Central Mutual Fire Insurance Company which represented the settlement funds in the Brooks matter.

25. On or about April 28, 1995, Defendant withdrew a second check from the BB&T Trust Account, check no. 1613, in the amount of $8,333.34 which was designated as a fee in the Brooks matter (the "Second Brooks Fee Check").

26. At the time of the issuance of the Second Brooks Fee Check, there were insufficient funds deposited into the BB&T Trust Account on behalf of Brooks to cover both the Brooks Early Fee Check and the Second Brooks Fee Check, therefore, Respondent used the funds of other clients in issuing the Second Brooks Fee Check without the knowledge and permission of the other clients.

27. On May 22, 1995, Defendant transferred the sum of $8,333.33 into his BB&T Trust Account from his Operating Account in order to reimburse the BB&T Trust Account for the excess fees taken in the Brooks matter.

28. On or about June 24, 1993, Vivianne Brann ("Brann") retained the Defendant to represent her in a case arising out of an automobile accident.

29. On or about April 29, 1994, the Defendant received the sum of $25,000 in settlement of Brann's claim (the "Brann Settlement Funds").

30. On or about May 2, 1994, the Defendant deposited the entire $25,000 of the Brann Settlement Funds into his Operating Account, and not into his Trust Account.

31. On or about May 25, 1994, the Defendant issued to Brann a check from his Operating Account in the amount of $16,637.22, which was Brann's portion of the settlement proceeds.

32. From May 3, 1994 until May 24, 1994, the balance in the Operating Account was below $16,637.22, the balance necessary to maintain the Brann Settlement Funds.

33. The Defendant used the Brann Settlement Funds for his own benefit. The Defendant was not entitled to the full amount of the Brann Settlement Funds and Brann did not authorize Defendant to place the money in his Operating Account, or to otherwise use the funds for his own benefit.

34. The Defendant did not maintain a ledger card showing funds received on behalf of Brann.

35. On or about February 28, 1994, the Defendant obtained a check in the amount of $10,000.00 for the settlement of a lawsuit on behalf of Defendant's client, Nannie Branch (the "Branch Settlement Funds").

36. The Branch Settlement Funds were client funds held in a fiduciary capacity which are required by the Rules of Professional Responsibility to have been deposited into a Trust Account.

37. An employee of Defendant, acting on behalf of Defendant, but without Defendant's knowledge, mistakenly deposited the Branch Settlement funds into his Operating Account rather than into the Trust Account.

38. The Defendant maintained a ledger card (the "Branch Ledger Card") indicating that the fee was received on February 28, 1994.

39. The Branch Ledger Card incorrectly indicates that the funds were deposited into the BB&T Trust Account on February 28, 1994. The Branch Ledger cards further indicate that the following disbursements were made:

Attorney's Fees	$3,333.33
Clayton Law Firm Expenses	$65.00
Nannie Branch Final Settlement	$6,601.67

40. On February 28, 1994, the Defendant issued BB&T Trust Account Check Number check number 1144 in the amount of $6,601 to Nannie Branch.

41. No checks were issued from the BB&T Trust Account for Attorney's fees or Clayton Law Firm Expenses.

42. There were no funds deposited into the BB&T Trust Account on behalf of Branch. Defendant used funds of other clients without their knowledge or consent to cover the check written to Nannie Branch.

43. The Branch Ledger Card contains an additional entry stating: "Note: Settlement Check Deposited to Corporate Account in error. Adjustment to correct error made on 5-24-94."

44. A deposit was made to the BB&T Trust Account from the Operating Account on May 25, 1994 in the amount of $22,565.22, which was designated as an "adjustment" to the Trust Account, a portion of which was deposited to replace the amounts taken from the trust account on behalf of Nannie Branch.

45. From 1987 until July, 1993, the Defendant was a partner in a law firm of Clayton and Clayton ("Clayton and Clayton"). The only two partners in the firm were Defendant and Theaoseus Clayton, Sr.

00269

46. Clayton and Clayton had offices in Warrenton, North Carolina and Raleigh, North Carolina. Theaoseus Clayton Sr. practiced primarily in Warrenton, and the Defendant established and operated the Raleigh office.

47. The Defendant was inexperienced in the management of a law practice.

48. While practicing with Clayton and Clayton the Defendant maintained a Trust Account at First Citizens Bank, account number 56-140-1145 (the "Clayton and Clayton Trust Account"). The Defendant and an employee of Clayton and Clayton, Twania Bumpers Stancil ("Stancil"), had signatory authority over the Clayton and Clayton Trust Account. Stancil worked in the Raleigh office of Clayton and Clayton and Defendant had direct supervisory responsibility over Stancil.

49. Stancil had primary responsibility for the day to day maintenance of the books and records of the Clayton and Clayton Trust Account. Prior to undertaking those responsibilities for management of the Trust Account, the Defendant required Stancil to undergo training by Patsy Hargrove, the office administrator in Warrenton for the Clayton Law Firm who was experienced in the maintenance of trust account records.

50. From about November 1992 through February 1994, the Defendant represented Jesse Odom ("Odom") in an attempt to negotiate a reduction and payoff of Odom's obligations to the State of New Jersey for student loans.

51. On or about June 22, 1993, Odom paid to the Defendant the sum of $15,800.00 to use in the reduction of liability for student loans. The check was deposited into the Clayton and Clayton Trust Account.

52. Beginning in April, 1993, Stancil began misappropriating funds from the Clayton and Clayton Trust Account.

53. By August 31, 1993, the balance in the Clayton and Clayton Trust Account had dropped below the $15,800.00 necessary to maintain the funds of Odom.

54. On or about July, 1993, the Defendant left the partnership of Clayton and Clayton and opened a new law firm, The Clayton Law Firm. The Defendant opened the Operating Account and the BB&T Trust Account at that time.

55. Stancil was employed as Office Manager of The Clayton Law Firm at that time and given signatory authority over the BB&T Trust Account and the Operating account.

56. On or about October 19, 1993, Stancil transferred from the Operating Account to the BB&T Trust Account the sum of $16,000.00 which was deposited into the BB&T Trust Account. There was no indication as to the client on whose behalf the deposit was made.

57. Between August 31, 1993, and October 19, 1993, the balance in the Operating Account fell below the $15,800 necessary to maintain the funds of Odom.

58. Odom did not give Defendant or Stancil permission to borrow or use his funds for any purpose, and had no knowledge of the misappropriation by Stancil.

59. Odom made two subsequent payments of $2,000.00 and $3,443.82 which were deposited into the BB&T Trust Account. The total of the $16,000 adjustment and the two checks deposited by Odom is $21,443.82.

60. On or about February 25, 1994, the Defendant paid to the New Jersey Higher Education Assistance Authority on behalf of Odom the sum of $21,443.82 in order to settle the matter in full.

61. Defendant maintained a copy of a ledger card on behalf of Odom. The only entries on the ledger card contained a single deposit and a corresponding disbursement in the amount of $21,443.82.

62. Beginning in November, 1993, and continuing until February 1994, Stancil began writing checks to herself from the BB&T Trust Account (the "Stancil Checks"). There were insufficient funds in the BB&T Trust Account deposited on behalf of Stancil or the Defendant to cover the Stancil Checks. The amounts misappropriated by Stancil from the BB&T Trust Account exceed $15,000.00.

63. Funds of other clients were contained in the BB&T Trust Account, and were used to cover the Stancil Checks without the permission or authorization of the clients.

64. The Defendant failed to exercise sufficient supervision of Stancil's handling of the Clayton and Clayton Trust Account and the BB&T Trust Account to ensure compliance with the Rules of Professional Conduct.

65. The Defendant failed to reconcile or review the reconciliation of the Clayton and Clayton Trust Account and the BB&T Trust Account at least quarterly, which would have revealed the defalcations by Stancil.

66. The Defendant did not maintain sufficient records to meet the requirements of Rule 10.2 of the Rules of Professional Conduct, including but not limited to an accurate ledger card for each client who had funds in the trust account.

67. The Defendant wrote checks from his BB&T Trust Account to his law firm prior to the time that fees had been deposited on behalf of the client to whom the fee was attributed on thirteen different occasions.

68. The Defendant was using funds of other clients without their knowledge or permission in making early fee payments to himself or to the Clayton Law Firm for Defendant's benefit.

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

CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over the Defendant and the subject matter.

2. The 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) in that the Defendant violated the North Carolina Rules of Professional Conduct as follows:

a. With respect to the First Claim for Relief alleged in the Complaint in this matter, the hearing committee finds as follows:

(i) The Defendant stipulated and the committee finds that by failing to preserve funds in a fiduciary capacity, by failing to disburse funds in accordance with the Rules of Professional Conduct, and by commingling client funds with his own funds, the Defendant violated Rules 10.1 and 10.2.

(ii) The Defendant stipulated and the committee finds that in violation of Rule 10.2(c) the Defendant failed to maintain accurate records of funds received and disbursed from the Trust Account.

(iii) The Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(c) by using the funds of other clients without their knowledge or permission when he disbursed funds designated for the Hinton transaction without having sufficient funds deposited into his trust account to cover the disbursements and without replacing the fee in the amount of $13,333.33 which he had previously paid himself from the Hinton funds and to which he was not entitled.

(iv) With respect to the allegations in the First Claim for Relief in the Complaint in this matter, the Plaintiff failed to prove by clear cogent and convincing evidence that the Defendant had violated Rule 1.2(b) of the North Carolina Rules of Professional Conduct.

b. With respect to the Second Claim for Relief alleged in the Complaint in this matter, the hearing committee finds as follows:

(i) The Defendant has stipulated and the Hearing Committee finds that by failing to preserve funds in a fiduciary capacity, by failing to disburse funds in accordance with the Rules of Professional Conduct, and by commingling client funds with his own funds, the Defendant violated Rules 10.1 and 10.2.

(ii) By writing to himself a check in the amount of $8,333.33 from the Trust Account which was earmarked as a fee for Brooks when Brooks had no funds in the Trust Account, with the result that other client's funds were temporarily misappropriated for the Defendant's benefit, without the knowledge or consent of the clients, the Defendant committed a criminal act which reflects adversely on his honesty, trustworthiness or fitness as a lawyer 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. With respect to the Third Claim for Relief alleged in the Complaint in this matter, the hearing committee finds as follows:

(i) By failing to preserve funds in a fiduciary capacity, by failing to disburse funds in accordance with the Rules of Professional Conduct, and by commingling client funds with his own funds, the Defendant violated Rules 10.1 and 10.2 of the North Carolina Rules of Professional Conduct.

(ii) In violation of Rule 10.2(c) of the North Carolina Rules of Professional Conduct, the Defendant failed to maintain the minimum records of client funds received and disbursed.

(iii) By knowingly and willfully depositing client funds directly into his operating account and using the funds for his own benefit without the knowledge or permission of the client, the Defendant committed a criminal act which reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 1.2(b) and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c).

d. With respect to the Fourth Claim for Relief alleged in the Complaint in this matter, the hearing committee finds as follows:

00273

(i) The Defendant has stipulated and the hearing committee finds that by failing to preserve funds in a fiduciary capacity, by failing to disburse funds in accordance with the Rules of Professional Conduct, and by commingling client funds with his own funds, the Defendant violated Rules 10.1 and 10.2.

(ii) With respect to the Fourth Claim for Relief, the Plaintiff has failed to prove by clear cogent and convincing evidence that the Defendant violated Rule 1.2(b) or Rule 1.2(c).

e. With respect to the Fifth Claim for Relief alleged in the Complaint in this matter, the hearing committee finds as follows:

(i) The Defendant has stipulated and the hearing committee finds that in violation of Rule 10.2(d) the Defendant failed to reconcile the trust account balances of all clients at least quarterly.

(ii) The Defendant has stipulated and the hearing committee finds that in violation of Rule 10.2(c) the Defendant failed to maintain accurate records of funds received and disbursed from the Trust Account.

(iii) The Defendant failed to make reasonable efforts to ensure that the conduct of an employee, Tawania Bumpers Stancil, was compatible with the professional obligations of the lawyer in violation of Rule 3.3(a) and 3.3(b).

(iv) With respect to the Fifth Claim for Relief alleged in the Complaint, the Plaintiff has failed to proved by clear cogent and convincing evidence that the Defendant violated Rule 3.3(c), Rule 10.2(e), Rule 1.2(b), Rule 1.2(c) and Rule 1.2(d).

f. With respect to the Sixth Claim for Relief alleged in the Complaint in this matter, the hearing committee finds as follows:

(i) The Defendant has stipulated and the hearing committee finds that by failing to preserve funds in a fiduciary capacity and by failing to disburse funds in accordance with the Rules of Professional Conduct, the Defendant violated Rules 10.1 and 10.2 of the North Carolina Rules of Professional Conduct.

(ii) By writing to himself thirteen checks from the Trust Account which were earmarked as fees for clients when those clients had no funds in the Trust Account, with the result that other client's funds were temporarily misappropriated for the Defendant's benefit, without the knowledge or consent of the clients, the Defendant committed a criminal act which reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 1.2(b) and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 1.2(c).

00274

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the hearing committee hereby makes the additional:

FINDINGS OF FACT REGARDING DISCIPLINE

1. The Defendant's misconduct is aggravated by the following factors:

   a. The Defendant had a dishonest or selfish motive,
   b. The Defendant engaged in a pattern of misconduct, and
   c. The Defendant engaged in multiple violations of the Rules of Professional Conduct.

2. The Defendant's misconduct is mitigated by the following factors:

   a. The Defendant has no prior disciplinary record;
   b. The Defendant made full and free disclosure to the Disciplinary Hearing Commission and had a cooperative attitude toward the proceedings and the investigation in this matter;
   c. The Defendant produced evidence of good character and reputation;
   d. The Defendant is remorseful for his misconduct;
   e. The Defendant was a victim of the embezzlement of his operating and trust funds by an employee, which caused a financial crisis for the Defendant;
   f. None of the Defendant's clients suffered any financial harm as a result of his misconduct;
   g. The Defendant was inexperienced in the management of a law practice.

3. The aggravating factors outweigh the mitigating factors.

Based upon the foregoing aggravating and mitigating factors and the arguments of the parties, the hearing committee hereby enters the following

ORDER OF DISCIPLINE

1. The Defendant, Theaoseus T. Clayton, Jr., is hereby disbarred from the practice of law beginning 30 days from service of this order upon the defendant.

00275

2. The Defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon the Defendant.

3. The Defendant shall pay the costs of this proceeding as assessed by the Secretary within thirty days following the service of this order on the Defendant, which costs shall include the costs of taking the depositions of Tawania Stancil and the Defendant.

4. The Defendant shall comply with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the N.C. State Bar Discipline & Disability Rules.

Signed by the chair with the consent of the other hearing committee members, this the 9 day of Feb. 1998.

Richard T. Gammon
Hearing Committee Chair

00276