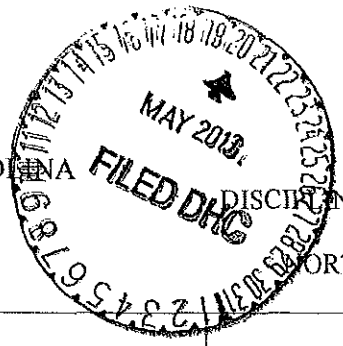

STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 11 DHC 31
THE NORTH CAROLINA STATE BAR, Plaintiff v. DAVID A. VESEL, Attorney, Defendant	ORDER OF DISCIPLINE

This matter was heard on 24 April 2013, before a hearing panel of the Disciplinary Hearing Commission composed of M. H. Hood Ellis, Chair, Walter E. Brock, Jr. and Karen B. Ray. Leanor Bailey Hodge and Margaret T. Cloutier represented Plaintiff, the North Carolina State Bar. Defendant, David A. Vesel, who (i) had notice of this hearing date and (ii) so advised Plaintiff's counsel that he had such notice by letter dated 18 April 2013 (Plaintiff's Exhibit No. 101), failed to appear for hearing as he stated was his intention in his April 18th letter to Plaintiff's counsel (Plaintiff's Exhibit No. 101).

Based upon the evidence presented at the hearing, the Hearing Panel makes by clear, cogent and convincing evidence the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar (hereafter "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, David A. Vesel (hereafter "Defendant" or "Vesel"), was admitted to the North Carolina State Bar on 11 November 1994 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. During the relevant period referred to herein, Vesel was actively engaged in the practice of law and maintained a law office in Creedmoor, Granville County, North Carolina.

4. Vesel's law practice included litigation and real estate matters.

5. On or about 15 April 2005, Vesel employed Cynthia Driscoll ("Driscoll") as an independent contract paralegal for his law practice.

6. From May 2005 through June 2008, Driscoll worked with Vesel to conduct real estate closings.

7. For each real estate transaction Vesel closed, Vesel collected a legal fee that he split with Driscoll. Initially, Driscoll received 31% of the legal fee. Later, Driscoll's percentage of the legal fee increased to 32%.

8. Vesel had 3 trust accounts. Wachovia Bank trust account ending in no. 0908 ("Wachovia Account No. 1"), Wachovia Bank trust account ending in no. 4520 ("Wachovia Account No. 2") and Wachovia Bank trust account no. ending in no. 3026 ("Wachovia Account No. 3").

9. Vesel conducted real estate closings using each of his three trust accounts.

10. Vesel gave Driscoll signature authority for two of his three trust accounts: Wachovia Account No. 2 and Wachovia Account No. 3.

11. Using her signature authority, Driscoll made disbursements from Wachovia Account No. 2 and Wachovia Account No. 3, including disbursements to herself for her share of Defendant's legal fee.

12. On several of the disbursements she made to herself from Wachovia Account No. 2 and Wachovia Account No. 3 Driscoll failed to identify the client on whose account these disbursements were purportedly made.

13. On several occasions, Driscoll disbursed to herself from Wachovia Account No. 2 more funds than she was entitled to receive as her share of the legal fee. Driscoll was not entitled to these funds she disbursed to herself and they were not used for the benefit of any client who had funds in the trust account.

14. Driscoll embezzled entrusted client funds from Wachovia Account No. 2.

15. Vesel failed to reconcile Wachovia Account No. 1 from January 2005 through July 2008.

16. Vesel failed to reconcile Wachovia Account No. 2 from December 2006 through July 2008.

17. Vesel failed to reconcile Wachovia Account No. 3 from April 2006 through June 2008.

18. Vesel's failure to reconcile was a contributing factor to his failure to detect Driscoll's embezzlement of entrusted client funds.

19. Vesel did not provide adequate training to Driscoll while she was employed by him.

20. Vesel failed to adequately supervise Driscoll.

21. For several of the real estate closings Vesel conducted using Wachovia Account No. 2, Vesel did not disburse his portion of the legal fee at the time of closing by instrument identifying the client from whose account the fee was drawn.

22. Instead, Vesel made several lump sum disbursements to himself from Wachovia Account No. 2 without identifying from which client account these disbursements were made.

23. Of these unidentified disbursements, $17,343.05 was not Vesel's fee or any other funds that Vesel was entitled to receive. These funds were entrusted client funds.

24. Vesel embezzled $17,343.05 of entrusted client funds from Wachovia Account No. 2.

25. In June 2008, Vesel discovered that the title insurance premiums for several real estate transactions that were closed through Wachovia Account No. 2 had not been paid.

26. For each of the closing transactions listed below, Vesel failed to disburse payment for the title insurance premium until 26 June 2008:

a. T. A. closing on or about 31 August 2007;

b. G.B. closing on or about 24 December 2007;

c. G.D. closing on or about 21 December 2007;

d. R.G. closing conducted on or about 14 December 2007;

e. R.G. closing conducted on or about 21 December 2007;

f. J.H. closing conducted on or about 28 September 2007;

g. A.J. closing conducted on or about 31 August 2007;

h. P.L. closing conducted on or about 17 September 2007;

i. S.M. closing conducted on or about 24 September 2007;

j. A.M. closing conducted on or about 28 August 2007;

k. D.N. closing conducted on or about 6 September 2007;

l. C.P. closing conducted on or about 28 September 2007;

m. J.S. closing conducted on or about 26 November 2007;

n. C.S. closing conducted on or about 3 October 2007;

o. G.T. closing conducted on or about 31 August 2007;

p. W.&C. closing conducted on or about 31 October 2007;

q. F.Y. closing conducted on or about 5 September 2007.

27. For several closing transactions Vesel conducted using Wachovia Account No. 2, Vesel disbursed from the trust account more funds on behalf of the client than he held for said client in Wachovia Account No. 2.

28. For other closing transactions Vesel conducted using Wachovia Account No. 2, Vesel failed to timely disburse or return to the client funds that remained in his trust account from said transactions.

29. Although Driscoll had access to Vesel's trust accounts and had signature authority for Wachovia Account No. 2 and Wachovia Account No. 3, only Vesel had the authority to wire funds from his trust accounts.

30. On several occasions, Vesel wired entrusted client funds from each of his trust accounts to make mortgage payments on Driscoll's behalf to U.S. Bank.

31. Vesel made the following payments to U.S. Bank on Driscoll's behalf:

a. $267.50 on or about 27 February 2006 from Wachovia Account No. 1;

b. $4,722.80 on or about 27 February 2006 from Wachovia Account No. 1;

c. $1,700 on or about 31 October 2006 from Wachovia Account No. 1;

d. $1,900 on or about 21 September 2007 from Wachovia Account No. 2;

e. $2,251 on or about 28 August 2007 from Wachovia Account No. 2;

f. $500 on or about 27 September 2007 from Wachovia Account No. 2;

g. $2,251.72 on or about 30 October 2007 from Wachovia Account No. 2;

h. $4,100 on or about 27 February 2007 from Wachovia Account No. 3;

i. $2,100 on or about 30 March 2007 from Wachovia Account No. 3.

32. Driscoll was not entitled to the funds that Vesel wired to U.S. Bank on her behalf.

33. On or about 29 August 2007, Countrywide Home Loan wired $42,347.10 into Wachovia Account No. 3 in furtherance of the J.W. real estate closing transaction.

34. Vesel transferred the funds he received for J.W. from Wachovia Account No. 3 to Wachovia Account No. 2, the only trust account from which he made any disbursements for J.W.

35. Countrywide Home Loan directed Vesel to use a portion of the J.W. closing proceeds to pay off other J.W. creditors.

36. To date, Vesel has failed to disburse from Wachovia Account No. 2 any funds to pay seven J.W. creditors as required by Countrywide Home Loan's closing instructions.

37. On or about 24 August 2008, Vesel deposited $342,000 into Wachovia Account No. 2 in furtherance of the Parrish real estate closing transaction.

38. Vesel made the following disbursements in furtherance of the Parrish closing:

a. On or about 30 April 2008, $5,162.17 to Mr. and Mrs. Parrish;

b. On or about 1 May 2008, $15,136.97 to Bank of America;

c. On or about 8 May 2008, two payments to State Employees Credit Union: (i) $6,264.52 and (ii) $66,460.80;

d. On or about 25 June 2008, $637.20 to Colonial Title.

39. On or about 26 April 2008, Vesel prepared in furtherance of the Parrish closing two checks made payable to his firm for a total of $268.00. These checks were never negotiated.

40. On or about 26 April 2008, Vesel prepared in furtherance of the Parrish closing a $68.00 check made payable to Granville County Register of Deeds. This check was never negotiated.

41. On or about 29 April 2008, Vesel prepared in furtherance of the Parrish closing a $248,002.34 check made payable to Citi Mortgage to payoff the first mortgage of the property that was the subject of the Parrish closing.

42. The check to Citi Mortgage remains outstanding and there are insufficient funds in Vesel's trust accounts to cover the check to Citi Mortgage.

43. Vesel failed to pay Citi Mortgage in accordance with the client's directive at the Parrish closing.

44. On or about 1 February 2006, Vesel made a $600 counter withdrawal from Wachovia Account No. 1.

45. Vesel made the following disbursements to himself from Wachovia Account No. 1 without identifying on the face of the item the client balance from which the payment was purportedly drawn:

a. On or about 15 November 2005 wire for $1,000;

b. On or about 6 December 2005 check no. 1319 for $6,000;

c. On or about 5 January 2006 check no. 1324 for $2,000;

d. On or about 13 January 2006 check no. 1325 for $1,500;

e. On or about 3 February 2006 wire for $4,000;

f. On or about 8 February 2006 wire for $1,000;

g. On or about 13 February 2006 wire for $1,000;

h. On or about 23 February 2006 wire for $1,000.

46. On or about 5 September 2005, Vesel wrote check no. 1310 drawn on Wachovia Account No. 1 and made payable to Cynthia Driscoll for $1,200 without identifying on the face of the item the client account on which this item was purportedly drawn.

47. At the time that Vesel made the unidentified disbursements to himself and Driscoll listed in paragraphs 45 and 46, he had collected his legal fee from each transaction for every client who had money deposited into the trust account. Vesel did not have any funds in Wachovia Account No. 1 that he was entitled to receive.

48. Vesel did not earn and was not otherwise entitled to the funds he disbursed to himself as described in paragraph 45 and to Driscoll as described in paragraph 46.

49. Driscoll did not earn and was not otherwise entitled to the money Vesel disbursed to her as described in paragraph 46.

50. Vesel embezzled the funds he disbursed to himself and Driscoll as described in paragraphs 45 and 46.

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

CONCLUSIONS OF LAW

1. The Hearing Panel has jurisdiction over Defendant and over the subject matter of this proceeding.

2. Defendant's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:

a. By failing to reconcile his trust accounts, Vesel failed to reconcile client balances with the current bank statement balance for the trust account as a whole in violation of Rule 1.15-3(d);

b. By splitting his legal fees with Driscoll, Vesel shared legal fees with a non-lawyer in violation of Rule 5.4(a);

c. By failing to promptly withdraw his legal fee from the trust account, Vesel failed to maintain entrusted property separate from the property of the lawyer in violation of Rule 1.15-2(a);

d. By disbursing to himself and to Driscoll funds from Wachovia Account No. 2 that were not funds to which Vesel was entitled and by using funds that he was required to hold in trust for the Parrish closing to make disbursements for the benefit of others, Vesel used entrusted property for the benefit of one other than the legal or beneficial owner of that property without authorization to do so in violation of Rule 1.15-2(j), committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

e. By failing to supervise Driscoll's disbursement of entrusted client funds from Wachovia Account No. 2, Vesel failed to make reasonable efforts to ensure that the non-lawyer's conduct was compatible with Vesel's professional obligations in violation of Rule 5.3;

f. By failing to timely disburse payment for title insurance premiums, Vesel failed to promptly pay to third persons as directed by the client entrusted property belonging to the client and to which the client is currently entitled in violation of Rule 1.15-2(m) and failed to act with reasonable diligence and promptness in representing clients in violation of Rule 1.3;

g. By disbursing from Wachovia Account No. 2 more funds for clients than that which he held on such clients' behalf, Vesel used entrusted property for the personal benefit of one other than the legal or beneficial owner without authorization to do so in violation of Rule 1.15-2(j);

h. By failing to fully and timely disburse or return to the client funds collected at closing and held in Wachovia Account No. 2, Vesel failed to promptly pay to the client or third persons as directed by the client entrusted property belonging to the client and to which the client is currently entitled in violation of Rule 1.15-2(m) and failed to act with reasonable diligence and promptness in representing clients in violation of Rule 1.3;

i. By using entrusted funds from Wachovia Account Nos. 1 and 2 to make payments to U.S. Bank for Driscoll's mortgage, Vesel used entrusted property for the personal benefit of one other than the legal or beneficial owner without authorization to do so in violation of Rule 1.15-2(j);

j. By failing to pay seven of J.W.'s creditors, the Granville County Register of Deeds and Citi Mortgage, Vesel failed to promptly pay to third persons as directed by the client entrusted property belonging to the client and to which the client is currently entitled in violation of Rule 1.15-2(m) and failed to act with reasonable diligence and promptness in representing clients in violation of Rule 1.3;

k. By failing to indicate on the wire transfer details and trust account checks listed in paragraphs 45 and 46 above the client balance on which these items were drawn, Vesel failed to indicate on the item the client balance on which the item was drawn in violation of Rule 1.15-2(h);

l. By making a counter withdrawal from Wachovia Account No. 1, Vesel drew an item on a trust account made payable to cash or bearer in violation of Rule 1.15-2(i);

m. By disbursing to himself and Driscoll from Wachovia Account No. 1 funds that were not legal fees or other funds to which Vesel or Driscoll was entitled, Vesel used entrusted property for the personal benefit of one other than the legal or beneficial owner without authorization to do so in violation of Rule 1.15-2(j), committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).

Based upon the foregoing Findings of Fact and Conclusions of Law and the evidence presented at the hearing, the Hearing Panel hereby makes by clear, cogent and convincing evidence the following:

ADDITIONAL FINDINGS OF FACT REGARDING DISCIPLINE

1. As a result of Defendant's misappropriation and failure to supervise, funds for payoff of the Parrish first mortgage were used for Defendant's personal benefit, for the benefit of Driscoll, and/or to reimburse other clients' accounts.

2. After Defendant failed to pay off the Parrish first mortgage at closing as required, the Parrish home was subject to two mortgages for approximately two years while the title insurance company litigated with Defendant over payment of the first mortgage with Citi-Mortgage.

3. Foreclosure proceedings were instituted against the Parrish home because Defendant failed to pay off their first mortgage at closing.

4. Defendant's failure to pay off the Parrish first mortgage with Citi-Mortgage for more than two years after closing resulted in adverse reports to the credit agencies. Consequently, the Parrishes's other creditors either increased their interest rate or sought full payment of the total outstanding credit balance. The Parrishes's credit rating has been severely damaged. The Parrishes's credit continues to be negatively impacted by Defendant's failure to timely pay off their mortgage with Citi-Mortgage.

5. When the Parrishes retained Defendant to conduct their refinance closing, they trusted that Defendant, as their lawyer, would protect their interests. Mrs. Parrish no longer trusts that lawyers will protect her interests - her opinion of the legal profession has been damaged by Defendant's misconduct.

Based on the foregoing Findings of Fact, Conclusions of Law and Additional Findings of Fact Regarding Discipline, the Hearing Panel enters the following:

CONCLUSIONS OF LAW REGARDING DISCIPLINE

1. The Hearing Panel has considered all of the factors contained in 27 N.C.A.C. 1B § .0114(w)(1), the Rules and Regulations of the State Bar, and concludes that the following factors that warrant suspension or disbarment are present:

a. intent of Defendant to commit acts where the harm or potential harm is foreseeable;

b. circumstances reflecting Defendant's lack of honesty, trustworthiness, or integrity;

c. elevation of Defendant's own interest above that of the client;

d. negative impact of Defendant's actions on client's perception of the profession;

e. impairment of client's ability to achieve the goals of the representation; and

f. acts of dishonesty, misrepresentation, deceit or fabrication.

2. The Hearing Panel has considered all of the factors contained in 27 N.C.A.C. 1B § .0114(w)(2), the Rules and Regulations of the State Bar, and concludes that the following factors that warrant disbarment are present:

a. acts of dishonesty, misrepresentation, deceit or fabrication; and

b. misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source.

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

a. dishonest or selfish motive;

b. pattern of misconduct;

c. refusal to acknowledge the wrongful nature of the conduct;

d. vulnerability of victim; and

e. 19 years of experience in the practice of law.

4. Defendant put his own personal interests ahead of his clients' interests.

5. By misappropriating entrusted client funds, Defendant has caused harm to the standing of the legal profession in that his conduct undermines the trust and confidence that the public has in lawyers and the legal system.

6. By failing to appear and participate in this hearing Defendant showed disregard for the lawyer self-regulation process, thereby causing harm to the standing of the legal profession.

7. Mr. and Mrs. Parrish were vulnerable in that they entrusted disbursement of their closing proceeds to Defendant by allowing the full amount of these proceeds to be deposited into Defendant's trust account, an account to which they had no access.

8. Defendant caused significant harm to Mr. and Mrs. Parrish by misappropriating their entrusted funds from Wachovia Account No. 2.

9. Defendant's misappropriation and failure to supervise caused significant harm to Mr. and Mrs. Parrish in that the funds for payoff of their first mortgage were used for Defendant's personal benefit and the benefit of Driscoll.

10. Mr. and Mrs. Parrish suffered significant harm as a result of Defendant's misconduct in that their home was subject to two mortgages for approximately two years while the title insurance company litigated with Defendant over payment of their first mortgage with Citi-Mortgage.

11. Mr. and Mrs. Parrish suffered significant harm as a result of Defendant's misconduct in that foreclosure proceedings were instituted against their home.

12. Mr. and Mrs. Parrish suffered significant harm as a result of Defendant's misconduct in that their creditworthiness was severely damaged.

13. Defendant caused significant harm to his clients by misappropriating their entrusted funds from Wachovia Account No. 1.

14. Defendant caused significant harm and potential significant harm to clients whose funds he was required to hold in his trust account but has failed to maintain in trust.

15. The Hearing Panel has considered all lesser sanctions including: suspension, censure, reprimand and admonition, and finds that discipline less than disbarment would not adequately protect the public from Defendant's future misconduct for the following reasons:

a. Defendant committed a criminal act on multiple occasions, specifically embezzlement, that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects;

b. entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to lawyers and the public regarding the conduct expected of members of the Bar of this State;

c. the protection of the public and the legal profession requires that Defendant not be permitted to return to the practice of law until he demonstrates the following by clear, cogent and convincing evidence: (i) that he has reformed, (ii) that he possesses the moral qualifications required for admission to practice law in North Carolina taking into account the misconduct that is the subject of this order, (iii) that he

understands the current Rules of Professional Conduct, including but not limited to those Rules relating to "Safekeeping Property" as set forth in Rule 1.15 et seq.; and (iv) that reinstatement will not be detrimental to the public or the integrity and standing of the legal profession. Disbarment is the only discipline that will require Defendant to make such a showing before returning to the practice of law.

Based upon the foregoing Findings of Fact, Conclusions of Law, Additional Findings of Fact Regarding Discipline and Conclusions of Law Regarding Discipline, the Hearing Panel hereby enters the following:

ORDER OF DISCIPLINE

1. Defendant, David A. Vesel, is hereby DISBARRED from the practice of law.

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

3. Defendant shall pay within 30 days of service of the statement of costs upon him by the Secretary of the State Bar the administrative fees and costs of this proceeding, including the following deposition costs:

a. $543.50 for Defendant's 27 March 2013 deposition;

b. $325.00 for videotape of Defendant's 27 March 2013 deposition;

c. $208 for the 14 August 2012 deposition of Elizabeth Kramer;

d. $275 for videotape of Elizabeth Kramer's 14 August 2012 deposition; and

e. $1,312 for Defendant's 19 June 2012 deposition.

4. Defendant shall comply with all provisions of 27 N.C.A.C. 1B § .0124 of the North Carolina State Bar Discipline & Disability Rules.

Signed by the Chair with the consent of the other Hearing Panel members, this the 20th day of May, 2013.

M.H. Hood Ellis, Chair
Disciplinary Hearing Panel