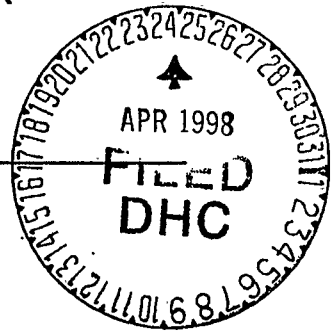


6522

WAKE COUNTY
NORTH CAROLINA

BEFORE THE DISCIPLINARY HEARING COMMISSION
OF THE NORTH CAROLINA STATE BAR
98 DHC 2



THE NORTH CAROLINA STATE BAR,)

Plaintiff)

v.)

DAVID H. BOWDEN, ATTORNEY)

Defendant)

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER OF DISCIPLINE

This matter was heard on the 3rd day of April, 1998, before a hearing committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair; Michael L. Bonfoey and A. James Early, III. The defendant, David H. Bowden, was represented by James B. Maxwell. The plaintiff was represented by Douglas J. Broucker and Larissa J. Erkman. 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, 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 & Regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, David H. Bowden (hereinafter "Bowden"), was admitted to the North Carolina State Bar on August 24, 1975, 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 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, Bowden was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Winston Salem, Forsyth County, North Carolina.

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

5. In 1988, Bowden formed a partnership with his wife, Teresa Bowden, and S. Mark Rabil (hereinafter "Rabil").

6. The Bowdens and Rabil initially operated under the partnership name, "Bowden and Rabil." Later, they changed the partnership to a professional association, "Bowden and Rabil, P.A." (hereinafter "the firm")

7. From the inception of the firm in 1988 through April 1996, Bowden was the managing partner of the firm and had primary responsibility for all financial operations of the firm, including ensuring that all bills were sent to clients, all accounts were properly paid by the firm and all income was properly distributed.

8. From the inception of the firm in 1988 through April 1996, Rabil trusted his partner, Bowden, to handle the financial operations the firm.

9. Rabil did not regularly review the books and records of the firm.

10. In March 1996, Rabil noticed numerous items that caused him to review the firm's general account ledgers, bank statements, and canceled checks. In reviewing these and other firm documents and financial records, Rabil eventually discovered that Bowden had appropriated substantial sums of money from the firm for his own personal use and enjoyment, without the knowledge and consent of Rabil.

11. Bowden had an American Express card under the firm's corporate account number (hereinafter "firm American Express card").

12. The firm American Express card was to be used for the firm's business purposes, and Bowden and Rabil never agreed that it could be used for anything other than business expenses.

13. During the years the firm existed Bowden charged to the firm American Express card numerous personal expenses, which he did not reimburse.

14. These personal charges included expenses for:

(a) a trip to Disney World on March 4 - 14, 1994, for Bowden's family;

- (b) a trip to Pawley's Island, South Carolina in June 1994, for Bowden's family;
- (c) a trip to Kiawah Island, South Carolina in August 1994, for Bowden's family;
- (d) a trip to Kiawah Island, South Carolina in October 1994, for Bowden's family;
- (e) a trip to Asheville, North Carolina in November 1994, for Bowden's family;
- (f) a trip to Richmond and Williamsburg, Virginia in December 1994, for Bowden's family;
- (g) a trip to Kiawah Island, South Carolina in April 1995, for Bowden's family;
- (h) a trip to Mexico on June 12-23, 1995, for Bowden's family;
- (i) a trip to Kiawah Island, South Carolina in October 1995, for Bowden's family;
- (j) a trip to Richmond and Williamsburg, Virginia in December 1995 for Bowden's family;
- (k) a trip to Greensboro, North Carolina in February 1996, for Bowden's family;
- (l) charges to retailers, such as J.C. Penny, Toys-R-Us, and the Nature Company; and
- (m) numerous personal meals.

15. Bowden made these personal charges to the firm American Express card up through March 1996, when Rabil discovered Bowden's personal charges.

16. To pay for his personal charges on the firm American Express card, Bowden signed and issued checks out of the firm's general operating account (hereinafter "operating account"). The funds in the operating account belonged to the firm.

17. Bowden appropriated at least \$20,000 of funds from the firm's operating account to pay his personal expenses on the firm American Express card.

18. Bowden took these firm funds to pay his personal expenses on the firm American Express card without Rabil's knowledge and consent and without permission or authorization to use firm funds for his personal expenses.

19. Bowden also had an American Express card for his personal use (hereinafter "personal American Express card"), which card was unrelated to his firm American Express card. Bowden signed and issued checks for at least \$10,000 from the firm operating account to make payments on his personal American Express card. The charges on Bowden's personal American Express card, for which Bowden made payments out of the firm's operating account, were his personal expenses. Bowden took funds from the firm's operating account to pay his personal expenses on his

personal American Express card without the knowledge and consent of Mark Rabil and without permission or authorization to use firm funds for his personal expenses.

20. Bowden also had a Master Card for his personal use. Bowden signed and issued a check from the firm operating account for \$2,000 on March 13, 1996 to make a payment on his personal Master Card. The charges on Bowden's Master Card, for which Bowden made the \$2,000 payment, were his personal expenses. Bowden took funds from the firm's operating account to pay his personal expenses on the Master Card without the knowledge and consent of Mark Rabil and without permission or authorization to use firm funds for his personal expenses.

21. Between January 1989 and March 1996, Bowden signed and issued checks from the firm's operating account to pay other third parties for other personal expenses. Bowden took funds from the firm's operating account to pay these other personal expenses. These personal expenses included:

- (a) charges for meals at the Piedmont Club;
- (b) charges for gasoline used for personal trips not related to firm business; and
- (c) charges on a phone line provided by Alltel at Bowden's home residence.

22. As managing partner, Bowden was responsible for transmitting the firm's financial information to and receiving financial information from the firm's certified public accountants, Gray Callison & Co., P.A. (hereafter "the firm's accountants"), including all necessary information for preparation of the firm's tax returns.

23. Bowden engaged Gray, Callison & Co., P.A. to prepare the firm's tax returns for the period 1991-1995.

24. The engagement letters between the law firm and its accountants for the tax years 1991-1995 expressly state that the firm's accountants were not responsible for auditing the accuracy of the books, records and other financial information provided to them by Bowden. Rather, the firm's accountants relied upon the accuracy of the information provided to them by Bowden to prepare the firm's tax returns.

25. For tax years 1991-95, Bowden provided the firm's accountants with the books and records of the firm for each of those years.

26. Included in the firm's books and records were check register entries representing checks issued by Bowden from the firm's general operating account in payment of Bowden's personal expenses, set forth in paragraphs 12-20 above.

27. Bowden represented, either implicitly or explicitly, to the firm's accountants that his personal expenses, set forth in paragraphs 12-20 above, were legitimate, business-related expenses of the firm.

28. The firm's accountants prepared tax returns in 1991-95 that claimed Bowden's personal charges as business expense deductions for the firm, based on the financial records Bowden prepared and provided to the firm's accountants.

29. Bowden's representations caused the firm to improperly claim his personal expenses as legitimate business deductions on the firm's tax returns for 1991-95, in violation of 26 C.F.R. § 274(a)(1)(A).

30. During each year from 1991-95, the firm's accountants asked Bowden about travel and entertainment expenses Bowden paid to American Express from the firm's general operating account. Bowden falsely represented to the firm's accountants that all such expenses were charged to and reimbursed by the firm's clients. The travel and entertainment expenses were not billed to or reimbursed by clients.

31. The firm's accountants specifically asked Bowden about reimbursement of these expenses on the firm's American Express account because the expenses would be treated differently under the federal tax code depending on whether or not the firm received reimbursement for the expenses.

32. Specifically, if the entertainment expenses were business-related and were reimbursed by clients, the entire amount of the entertainment expenses could be properly included as business expense deductions. If the firm was not reimbursed for the expenses, only a portion of the expenses could be properly included as business expense deductions.

33. Based on Bowden's misrepresentations that the firm was reimbursed for these expenses, the firm's accountants improperly claimed the entire amount, not just a portion, of these entertainment expenses on the firm's 1991-95 tax returns as business expense deductions, in violation of 26 C.F.R. § 274(n).

34. Bowden signed, under penalties of perjury, the firm's tax returns for 1991-95 containing these improperly claimed business deductions.

35. Bowden knew when he signed the firm's tax returns that they were not true and correct as to every material matter, in that the returns improperly claimed his personal charges as business related expense deductions for the firm and improperly claimed the entire amount of travel and entertainment expenses on the American Express account as business related expense deductions for the firm.

36. Bowden did not direct the firm's accountants to treat his personal expenses paid out of the firm's operating account, set forth in paragraphs 12-20 above, as a loan to Bowden by the firm or to otherwise show the expense amounts as an account receivable of the firm.

37. Bowden did not direct the firm's accountants to make any accounting adjustment for his personal expenses paid out of the firm's operating account, set forth in paragraphs 12-20 above, to report these payments to Bowden as miscellaneous income or to otherwise adjust his salary to reflect the amounts paid to Bowden for personal expenses, except for his personal usage of a vehicle paid for by the firm.

38. In April of 1996, Rabil discovered that Bowden had paid for his personal expenses by issuing checks from the firm's general operating account.

39. As a result, the firm's 1995 tax returns were amended to reduce the firm's business expense deductions and, consequently, the firm's income increased by \$22,899.

40. Bowden did not retain Gray, Callison & Co., P.A. to reconcile the law firm's trust account on a quarterly basis between June 1990 and April 1996.

41. Bowden represented to several clients, including Albert Burgess, that he would prepare their tax returns.

42. In 1994 Bowden received \$2,500 from Burgess. This \$2,500 included both money entrusted to Bowden for the payment of tax liabilities and money representing Bowden's fees for preparing Burgess' tax returns.

43. On May 11, 1994, Bowden deposited the entire \$2,500 amount from Burgess, including the money Burgess entrusted to Bowden for the payment of tax liabilities, into the firm's operating account.

44. Bowden then signed and issued checks out of the firm's operating account to the Internal Revenue Service, the North Carolina Department of Revenue, and Burgess. Bowden retained the remainder in the firm's operating account for his fee.

45. In 1995, Bowden received \$2,000 from Burgess. This \$2,000 included both money entrusted to Bowden for the payment of tax liabilities and money representing Bowden's fees for preparing Burgess' tax returns.

46. On April 11, 1995, Bowden deposited the entire \$2,000 amount from Burgess, including the money Burgess entrusted to Bowden for the payment of tax liabilities, into the firm's operating account.

47. Bowden then signed and issued checks out of the firm's operating account to the Internal Revenue Service, the North Carolina Department of Revenue, and Burgess. Bowden retained the remainder in the operating account for his fee.

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 David H. Bowden 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)(2) as follows:
 - a. Bowden committed criminal acts reflecting adversely on his fitness to practice law and engaged in conduct involving dishonesty, fraud, deceit and misrepresentations in violation of Rule 1.2(b) & (c), by misappropriating law firm funds to pay for his personal expenses.
 - b. Bowden committed criminal acts reflecting adversely on his fitness to practice law and engaged in conduct involving dishonesty, fraud, deceit and misrepresentations in violation of Rule 1.2(b) & (c) of the North Carolina Rules of Professional Conduct, by signing and submitting the firm's tax returns to the Internal Revenue Service knowing that the returns were not true and correct as to every material matter.
 - c. Bowden failed to hold and maintain funds received in a fiduciary capacity in a trust account separate from his or his law firm's funds in violation of Rules of Professional Conduct 10.1(a) & (c), by depositing, in the firm's operating account, funds Bowden received from his client Burgess, which funds consisted of money belonging to Burgess and money Bowden was supposed to pay to third parties on Burgess' behalf.

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. dishonesty or selfish motive;
 - b. a pattern of misconduct;
 - c. multiple offenses;

d. substantial experience in the practice of law;

e. abuse of a position of trust.

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

a. absence of a prior disciplinary record;

b. timely, good-faith efforts to make restitution or rectify consequences of misconduct;

c. full and free disclosure to the Hearing Committee or cooperative attitude toward the proceedings;

d. good character and good reputation;

e. delay in disciplinary proceedings through no fault of the Defendant's attorney;

f. interim rehabilitation, in that the Defendant has continued to practice law for approximately 23 months, the time between when the grievance in this case was filed and the hearing of this matter, and has had check-writing authority on both general office and trust accounts, and there has been no allegation or evidence presented that he has violated any of the Rules of Professional Conduct or the Revised Rules of Professional Conduct during that period of time;

g. remorse.

3. The panel finds that 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 is hereby disbarred from the practice of law beginning 30 days from service of this order upon the defendant.

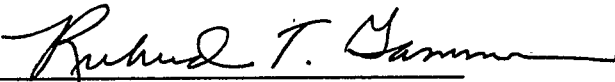
2. The defendant shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon the defendant.

3. The defendant shall pay the reasonable costs of this proceeding as assessed by the Secretary within 90 days within service of this order upon 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 24th day of April 1998.


Richard T. Gammon
Hearing Committee Chair