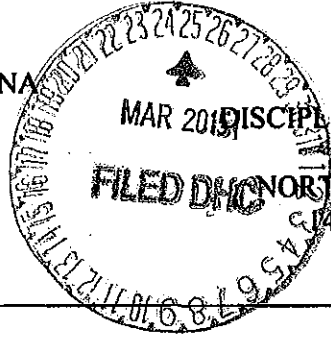


NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
BSR 2 and 11 DHC 15

IN THE MATTER OF)

Petition for Stay of)
GARY B. KIVETT, Attorney)

ORDER ALLOWING)
PETITION FOR STAY)

THIS MATTER coming before a Panel of the Disciplinary Hearing Commission for consideration of Petitioner Gary B. Kivett's Petition for Stay filed pursuant to the provisions of the Order of Discipline in this matter dated March 27, 2014 and 27 N.C. Admin. Code Chapter 1, Subchapter B, §.0125. The Petition for Stay was heard on March 13, 2015. Petitioner was present and represented by Attorney R. Daniel Boyce. The North Carolina State Bar was represented by Deputy Counsel Margaret Cloutier. The Panel consisted of Chair Fred M. Morelock, and members Renny W. Deese, and Karen B. Ray.

Based upon the record and the evidence presented the Panel finds by clear, cogent and convincing evidence the following:

FINDINGS OF FACT

1. In a consent Order of Discipline filed January 3, 2012, Kivett was suspended from the practice of law for four years effective thirty days from the date the order was served on Kivett.
2. The effective date of the Order was February 4, 2012.
3. The Order provides that Kivett may apply for a stay of any remaining period of suspension after serving one year of the active suspension and upon compliance with conditions stated in the Order. The Order provides that Kivett comply with the procedures set forth in 27 N.C. Admin. Code Chapter 1, Subchapter B, §.0125(b) in applying for the stay.
4. Kivett's Petition for Stay was filed on March 27, 2014.

5. The Office of Counsel for the North Carolina State Bar filed its Objections to Petition for Stay on April 10, 2014.

6. This hearing was held pursuant to the provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, §.0125(b)(7).

7. The Order requires that to be eligible for a stay of the remaining period of suspension Kivett must establish by clear, cogent and convincing evidence compliance with the following conditions:

- (a) That Kivett has submitted to comprehensive psychiatric or psychological evaluations, at Kivett's sole expense, by two separate psychiatrists or psychologists who specialize in treating sexual offenders in the professions and who have been approved in advance by the Office of Counsel of the North Carolina State Bar;
- (b) That each of the psychiatrists/psychologists have certified under oath, based on their independent comprehensive evaluations of Kivett, that in their professional opinion Kivett does not suffer from any condition creating a predisposition for inappropriate sexual behavior and that Kivett does not suffer from any mental, psychological, or emotional condition that significantly impairs his professional judgment, performance, or competence in the representation of female clients;
- (c) That Kivett has attached to his reinstatement petition the sworn statements from the two evaluating psychiatrists/psychologists along with releases or authorizations signed by Kivett instructing the evaluating psychiatrists/psychologists to discuss their evaluations of Kivett with, and to release any corresponding records to, a representative of the Office of Counsel;
- (d) That Kivett has kept the North Carolina State Bar Membership Department advised of his current business and home addresses and notified the Bar of any change in address within ten days of such change;
- (e) That Kivett has responded to all communications from the North Carolina State Bar within thirty days of receipt 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 received after the effective date of this Order;
- (f) That Kivett has not violated the Rules of Professional Conduct or the laws of the United States or any state or local government during his suspension;

(g) That Kivett has properly wound down his law practice and complied with the requirements of §.0124 of the North Carolina State Bar Discipline and Disability Rules; and

(h) That Kivett has otherwise complied with the requirements of 27 N.C. Admin. Code Chapter 1, Subchapter B, §.0125(b).

8. By the terms of the Order, the burden of proof is on Kivett to show by clear and convincing evidence that he complied with the provisions set forth in the Order.

9. Kivett submitted to comprehensive psychiatric or psychological evaluations, at Kivett's sole expense, by two separate psychiatrists or psychologists (Dr. Anthony Sciara and Roger Wallace, M.A.) who specialize in treating sexual offenders in the professions and who were approved in advance by the Office of Counsel for the North Carolina State Bar.

10. Kivett submitted with his petition a re-evaluation report from Anthony D. Sciara, Ph.D., ABPP, CLCP. Dr. Sciara testified at the hearing in this matter.

11. Dr. Sciara is of the opinion that Kivett does not suffer from any condition that would cause him to be predisposed to engage in inappropriate sexual behavior or that he suffers from any mental, psychological or emotional condition that would significantly impair his ability to represent female clients.

12. Kivett submitted with his petition a Summary of Treatment Services and a verified statement from Roger Wallace, M.A. Kivett submitted into evidence at the hearing an affidavit signed by Mr. Wallace.

13. Kivett followed all the recommendations of Dr. Sciara and underwent the treatment recommended by Mr. Wallace.

14. Mr. Wallace is of the opinion that Kivett does not now suffer from any condition creating a predisposition for inappropriate sexual behavior and that Kivett does not suffer from any mental, psychological or emotional condition that significantly impairs his professional judgment, performance, or competence in the representation of female clients.

15. During the wind-down period, Kivett resolved the cases of five clients without first sending to them the required notification. Kivett's notification letter to his remaining clients was dated and sent one day before the effective date of his suspension. However, before resolving these cases Kivett contacted each client by telephone and provided them with the information required by Rule §.0124.

16. Kivett complied with sections (a) through (h) of paragraph 7 of the Order of Discipline.

17. Pursuant to the recommendation of Dr. Sciara, Kivett obtained an attorney mentor. Attorney Shelley Blum has served as a mentor to Kivett since approximately July, 2013 through the present.

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

CONCLUSIONS OF LAW

1. All parties are properly before the Disciplinary Hearing Commission and the Disciplinary Hearing Commission has jurisdiction over Petitioner, Gary B. Kivett, and the subject matter of this proceeding.

2. Kivett has shown by clear, cogent and convincing evidence that he has met the conditions for a stay set forth in paragraph 6(a) – (f) and (h) of the Order of Discipline.

3. Although Kivett did not properly wind down his practice pursuant to Rule .0124 in that Kivett did not promptly notify all of his clients of his suspension in writing as required by Rule .0124 as required by paragraph 6(g) of the Order of Discipline, his failure to do so was a technical deficiency and not of a nature to prevent the imposition of a stay of the suspension.

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

ORDER

1. Kivett's Petition for Stay filed March 27, 2014 is allowed.

2. Kivett is taxed with the costs and administrative fees which he shall pay within thirty days of service of the statement of costs on him.

3. The remaining term of the four-year suspension is hereby stayed as long as Kivett complies, and continues to comply during the period of the stay, with the following conditions:

- (a) Kivett shall pay all administrative fees and costs of this proceeding as assessed by the Secretary within thirty days after service of the statement of costs on him;
- (b) Kivett shall not violate any state or federal laws or any provisions of the Rules of Professional Conduct during the period of the stayed suspension;
- (c) Kivett shall accept all certified mail sent to him by the State Bar and respond to all State Bar requests for information as required by Rule

8.1(b) of the Rules of Professional Conduct by the earlier of the deadline stated in the communication or within thirty days of receipt;

- (d) Kivett shall timely comply with all State Bar membership and Continuing Legal Education requirements; and**
- (e) Kivett shall keep the North Carolina State Bar membership department advised of his current home and business street (not P.O. Box) addresses and telephone numbers.**

4. If Kivett fails to comply with any one or more of the conditions set out in this Order, then the stay of the suspension of his law license may be lifted and the suspension activated as provided in § .0114(x) of the North Carolina State Bar Discipline and Disability Rules.

5. Unless Kivett's obligations under this Order are modified by further order of the DHC, Kivett's obligations under this Order end on February 4, 2016 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 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 Kivett's obligation to comply with the conditions for the stay will continue until resolution of any such pending motion or show cause proceeding

6. If the stay of the suspension is lifted and the suspension is activated for any reason, the DHC may enter an order imposing such conditions as it deems necessary for the reinstatement of Kivett's license at the end of the suspension. Furthermore, Kivett must have complied with each of the following conditions before he will be eligible for reinstatement:

- (a) Submitted his license and membership card to the Secretary of the North Carolina State Bar no later than thirty days from the effective date of the order activating his suspension;**
- (b) Complied with all provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0124 of the North Carolina State Bar Discipline and Disability Rules on a timely basis;**
- (c) Paid any outstanding disciplinary administrative fees and costs;**
- (d) Have accepted all certified mail sent to him by the State Bar and responded to all State Bar requests for information as required by Rule**

8.1(b) of the Rules of Professional Conduct by the earlier of the deadline stated in the communication or within thirty days of receipt;

- (e) Within fifteen days of the effective date of the order activating the suspension Kivett shall have provided the State Bar with an address and telephone number at which clients seeking return of files could communicate with Kivett and obtain such files, and Kivett shall have promptly returned all files to clients upon request; and
- (f) Complied with the provisions of 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0125 of the North Carolina State Bar Discipline and Disability Rules.

7. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of the stayed suspension.

Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Panel, this 25th day of March, 2015.



FRED M. MORELOCK, CHAIR
HEARING PANEL