

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
13 DHC 33

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

SUE E. MAKO, Attorney,

Defendant

ORDER OF DISCIPLINE

This matter was heard on 12 June 2014 by a hearing panel of the Disciplinary Hearing Commission composed of Walter E. Brock, Jr., Chair, and members Donald C. Prentiss and Bradley Lail. Carmen Hoyme Bannon represented Plaintiff, the North Carolina State Bar. Neither Defendant, Sue E. Mako, nor any counsel of record appeared.

On Plaintiff's motion, judgment by default was granted against Defendant at the conclusion of the hearing. Based upon the pleadings and admissions pursuant to 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(f) and Rule 8(d) of the Rules of Civil Procedure, the hearing panel hereby finds 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 General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar (Chapter 1 of Title 27 of the North Carolina Administrative Code).

2. Defendant, Sue E. Mako, was admitted to the North Carolina State Bar in August 1988 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. Defendant was properly served with process and received due notice of the hearing in this matter.

4. During the relevant period referred to herein, Mako was actively engaged in the practice of law in Wilmington, New Hanover County, North Carolina.

5. In the course of her law practice, Mako received funds in trust for the benefit of her clients and/or third parties. Mako deposited and maintained entrusted funds in an attorney trust account at RBC Bank.

6. Mako was the managing attorney for her firm, Mako & Associates, P.A., and was responsible for office policy and management. Mako was responsible for maintenance of the firm trust account.

7. Mako did not maintain an accurate general ledger or complete accurate individual client ledgers, and did not perform quarterly reconciliations of her trust account as required by the Rules of Professional Conduct.

8. Between 20 December 2010 and 4 July 2011, the IRS issued at least three notices to Mako & Associates regarding delinquencies in payment of federal income tax withholding. During that same period, the North Carolina Employment Security Commission issued a notice of intent to levy upon the assets of the firm for non-payment of unemployment insurance taxes.

9. In late June 2011, Mako's firm was contacted via email by an individual identifying himself as Oliver Burkeman. Burkeman asked for help in collecting \$350,000.00 purportedly owed to him by a former employer as part of a worker's compensation settlement.

10. Via email, Mako's firm entered into a fee agreement with Burkeman. The agreement provided that Mako's firm would represent Burkeman in the collection effort for a fee of 20% of the amount collected.

11. No one at the firm had any prior knowledge of "Oliver Burkeman," and no one at the firm met the purported client in person.

12. On 11 July 2011, Mako's firm received what purported to be a cashier's check from Burkeman's former employer for \$175,000.00 ("the first counterfeit check"). The check was deposited into the firm's trust account.

13. Notwithstanding the firm's general policy of holding funds in trust for ten days before disbursing, on 12 July 2011 Mako directed the firm's bookkeeper to disburse \$35,000.00 of the Burkeman funds to the firm's operating account and to wire the remaining \$140,000.00 to an overseas account as directed by Burkeman. At that time, the first counterfeit check for \$175,000.00 had not been irrevocably credited to Mako's trust account.

14. The \$35,000.00 disbursed to the operating account after the first counterfeit check was deposited was used to pay various firm expenses. Expenses paid immediately after the 12 July 2011 receipt of the Burkeman "fee" included payroll and a \$28,000.00 payment to the U.S. Treasury for employee withholding taxes.

15. On 14 July 2011, Mako's firm received what purported to be a second cashier's check from Burkeman's former employer for \$175,000.00 ("the second counterfeit check"). The check was deposited into the firm's trust account.

16. Again notwithstanding the firm's policy of holding funds in trust for ten days before disbursing, on 15 July 2011 Mako disbursed \$35,000.00 to the firm's operating account and wired the remaining \$140,000.00 to an overseas account as directed by Burkeman. At that time, the second counterfeit check for \$175,000.00 had not been irrevocably credited to Mako's trust account.

17. The \$35,000.00 Mako disbursed to the operating account after depositing the second counterfeit check was used to fund a \$35,000.00 payment to Mako from the operating account.

18. On 15 July 2011, RBC Bank notified Mako that the first counterfeit check was being returned unpaid. On 18 July 2011, RBC Bank notified Mako that the second counterfeit check was being returned unpaid.

19. The first \$140,000.00 wire to Burkeman did not go through, so a total of \$210,000.00 (one \$140,000.00 wire and two \$35,000.00 disbursements) was disbursed from Mako's trust account in premature reliance on provisional credit for the counterfeit checks. (Mako's disbursements against the counterfeit checks are referred to hereafter as "the Burkeman transactions").

20. Because the counterfeit checks were dishonored, the \$210,000.00 wired overseas and disbursed to Mako's operating account in connection with the Burkeman transactions were funds that belonged to the firm's legitimate clients.

21. Mako knew within a week after she received the first counterfeit check that the \$70,000.00 transferred from her trust account to her operating account in connection with the Burkeman transactions represented legitimate clients' entrusted funds, not earned fees to which the firm was entitled.

22. Although Mako knew almost immediately that she had received \$70,000.00 of her clients' entrusted funds to which she was not entitled, she did not promptly put the money back in the trust account.

23. Approximately two weeks after the counterfeit checks were dishonored, Mako replenished \$35,000.00 by a deposit into the trust account from a company called Lightpath, which was owned by Mako's daughter and husband. This represented only half of the total amount Mako had withdrawn from the trust account for the benefit of herself and/or her firm in connection with the Burkeman transactions.

24. As of 29 July 2011, there was a \$175,000.00 deficit in Mako's trust account. \$35,000.00 of that deficit was attributable to Mako's use of entrusted funds for the benefit of herself and/or the firm without authorization from the beneficial owners of those funds (i.e., the firm's legitimate clients). The remaining \$140,000.00 of that deficit was attributable to Mako's use of entrusted funds for the benefit of the individual who

identified himself as "Burkeman" without authorization from the beneficial owners of the funds.

25. After the counterfeit checks were dishonored, Mako continued to deposit clients' entrusted funds into the trust account even though she knew there was insufficient money in the account to cover all of the client balances she should have been holding in trust.

26. By continuing to use the trust account in which there was a sizeable deficit, Mako used client money she received after the Burkeman transactions to fund disbursements for clients whose money was lost in the Burkeman transactions.

27. Mako did not notify clients with balances in the trust account about the deficit in the account, the fact that their money was not safeguarded, or the possibility that their funds might not be available upon demand.

28. Mako made no additional deposits to offset the \$175,000.00 deficit in her trust account until April 2012, after she received notice of the State Bar's grievance investigation related to the Burkeman transactions.

29. In April 2012, Mako replenished approximately \$27,000.00 of the entrusted funds lost in the Burkeman transactions. This deposit did not cover the entire \$35,000.00 of entrusted funds that had been converted to the use and benefit of Mako and/or the firm.

30. In October 2012, Mako made an additional deposit of approximately \$8,000.00 to partially offset the deficit in her trust account arising out of the Burkeman transactions.

31. Mako never replenished the remaining \$140,000.00 of entrusted funds that was wired overseas, consistently claiming that she didn't have sufficient personal funds to cover the shortfall in her trust account.

32. In 2011, total payments to Mako from the firm's operating account exceeded \$330,000.00, approximately \$67,000.00 of which was received after the counterfeit checks were dishonored.

33. Also during 2011, Mako made substantial payments from the operating account to pay credit card bills, and the firm paid Mako's husband and daughter more than \$30,000.00.

34. In response to a subsequent grievance inquiry from the State Bar about the Burkeman transactions, Mako claimed that she had been "unaware of the events surrounding the transaction" and asserted that the firm's bookkeeper had, unbeknownst to Mako, made the decision to disburse the Burkeman funds immediately rather than complying with the firm's custom and practice of holding funds in trust for ten days.

35. Mako's statements to the State Bar described in paragraph 34, above, were false and misleading.

36. After the Burkeman transactions, Mako spent months at a time in Costa Rica, where she was not generating income that could be used to replenish the client funds that were lost.

37. In the first six months of 2012, Mako received more than \$126,000.00 from the firm's operating account, either via disbursements directly to Mako or through payments for Mako's personal expenses from the operating account. Most of these funds were provided to Mako in the form of international wire transfers to a bank in Costa Rica.

38. In May 2013, Mako closed her law office and returned to Costa Rica, leaving behind a trust account that did not contain enough money to cover all the funds that she should have been holding for the benefit of her clients.

39. From 2011 through 2013, Mako & Associates had employees who provided services directly related to and for the benefit of Mako's law practice.

40. As the managing attorney of Mako & Associates, Mako had authority over the funds in bank accounts maintained by the firm and made decisions concerning how and when those funds would be spent.

41. Mako was a "responsible person" within the meaning of Title 26 of the United States Code, in that she had the power to see that the tax obligations of Mako & Associates were paid.

42. When Mako & Associates paid its employees, it was required to withhold funds from the employees' paychecks to pay federal and state income taxes.

43. From the time the funds were withheld from employees' paychecks until they were paid to state and federal tax authorities, Mako & Associates and Mako were obligated to hold the funds in trust for the benefit of the IRS and the North Carolina Department of Revenue ("NC DOR").

44. Funds withheld from employee paychecks were entrusted funds that Mako was required to hold in trust as a fiduciary. Mako had a fiduciary duty to deliver all withheld funds to the IRS and NC DOR.

45. For the entirety of 2012 and for the first two quarters of 2013, funds withheld by Mako & Associates from employee paychecks were not delivered to the IRS as required by law and were instead utilized for the benefit of Mako & Associates and/or for the benefit of Mako.

46. Mako's failure to pay over to the IRS funds withheld from employee paychecks was willful.

47. Mako's conduct as described in paragraphs 39 through 46 above was in violation of 26 U.S.C. § 7202.

48. During the last quarter of 2011, all of 2012, and the first two quarters of 2013, funds withheld by Mako & Associates from employee paychecks were not delivered to NC DOR as required by law and were instead utilized for the benefit of Mako & Associates and/or for the benefit of Mako.

49. Mako's failure to pay over to the NC DOR funds withheld from employee paychecks was willful.

50. Mako's conduct as described in paragraphs 48 and 49 above was in violation of N.C. Gen. Stat. § 105-236(a)(8).

Based on the foregoing Findings of Fact deemed admitted pursuant to Rule 8(d) of the Rules of Civil Procedure and established by default judgment, the Hearing Panel enters the following

CONCLUSIONS OF LAW

1. All the parties are properly before the hearing panel and the panel has jurisdiction over Defendant, Sue E. Mako, and the subject matter.

2. 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) in that Mako violated the Rules of Professional Conduct in effect at the time of her actions as follows:

- (a) By failing to maintain an accurate general ledger, failing to maintain complete and accurate individual client ledgers, and failing to perform quarterly reconciliations of her trust account, Mako violated Rules 1.15-3(b) and (d);
- (b) By wiring out large sums of money from her trust account in reliance upon provisional credit and contrary to her standard procedure, and failing to immediately rectify the resulting shortage in the account, Mako failed to safeguard entrusted funds in violation of Rule 1.15-2(a) and failed to act with reasonable diligence to protect her clients' interests in violation of Rule 1.3;
- (c) By continuing to deposit client funds into the trust account in which she knew there was a shortfall, Mako failed to safeguard entrusted funds in violation of Rule 1.15-2(a), used entrusted funds for the benefit of someone other than the beneficial owner of the funds in violation of Rule 1.15-2(j), and failed to act with reasonable diligence to protect her clients' interests in violation of Rule 1.3;
- (d) By using \$35,000.00 of entrusted funds for her own benefit or the benefit of her law firm and failing to return those funds to the trust account when she learned that she was not entitled to them, Mako used entrusted funds for personal benefit without authorization from the beneficial owner of the funds in violation of Rule 1.15-2(j), and engaged in criminal conduct

reflecting adversely on her honesty, trustworthiness, or fitness as a lawyer in violation of Rule 8.4(b);

- (e) By failing to notify clients whose entrusted funds were compromised by the Burkeman transactions, Mako failed to keep her clients reasonably informed and failed to explain a matter to the extent reasonably necessary to permit clients to make informed decisions about the representation in violation of Rule 1.4(a) and (b);
- (f) By making false and misleading statements in response to the State Bar's grievance inquiry, Mako knowingly made a false statement of material fact in connection with a disciplinary matter in violation of Rule 8.1(a) and engaged in conduct involving deceit and misrepresentation in violation of Rule 8.4(c);
- (g) By willfully failing to pay over to the IRS and NC DOR funds withheld from the paychecks of Mako & Associates employees, Mako committed criminal acts reflecting adversely on her honesty, trustworthiness and fitness as a lawyer in violation of Rule 8.4(b); and
- (h) By using funds held in trust for the IRS and NC DOR for the benefit of herself and/or her law firm, Mako committed a criminal act—embezzlement—reflecting adversely on her honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b).

Based upon the foregoing Findings of Fact and Conclusions of Law, and the additional evidence and argument presented at the hearing, the hearing panel hereby finds by clear, cogent, and convincing evidence the following additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. The findings in paragraphs 1 through 50 above are reincorporated as if fully set forth herein.
2. Defendant has no prior professional discipline.
3. Knowingly and intentionally disbursing against funds that have only been provisionally credited to a trust account creates a foreseeable risk of significant harm to the clients and third parties whose money is in the trust account.
4. Mako knowingly and intentionally benefitted from entrusted funds to which she was not entitled by failing to fully replenish funds disbursed to her in connection with the Burkeman transactions.
5. Mako did not take steps to mitigate or rectify the harm to her clients and third parties that resulted from her misconduct.

6. Mako's decision to leave the country and reduce her law practice following the Burkeman transactions, rather than trying diligently to earn fees that could be used to offset the lost client funds, reflects an indifference to making restitution. This indifference is also illustrated by Mako's decision to continue to draw substantial income from the firm, even after she was primarily living in Costa Rica and therefore was minimally contributing to the firm's profits.

7. Mako intentionally failed to pay state and federal payroll withholding taxes and unemployment insurance taxes over an extended period, in violation of law and in breach of her fiduciary obligations. This caused actual and potential harm to Mako's employees and the public.

8. When lawyers violate the law in their business and personal affairs, it brings disrepute upon the legal profession and undermines public confidence in lawyers.

9. Defendant's course of conduct over an extended period of time was characterized by prioritizing her own pecuniary interests over her clients' interests and her obligation to comply with the law.

10. Defendant's mishandling and misappropriation of entrusted funds created a foreseeable risk that some other entity, such as an insurance carrier or the North Carolina State Bar's Client Security Fund, would bear the financial consequences of her misconduct.

11. Mako's former clients who were deprived of their funds due to Mako's misconduct have applied to the State Bar's Client Security Fund for reimbursement.

12. Clients are entitled to attorneys they can trust. A lawyer's conversion of entrusted funds is an egregious breach of fiduciary duty, reflecting the lawyer's lack of trustworthiness and integrity. By engaging in multiple instances of misconduct—including acts of dishonesty—over a substantial period of time, Mako has shown herself to be untrustworthy.

13. Self-regulation of the legal profession depends upon the cooperation and participation of lawyers in the self-regulatory process. When a lawyer submits false information in the disciplinary process, it undermines the system of self-regulation.

14. The hearing panel has carefully considered all of the different forms of discipline available to it in considering the appropriate discipline to impose in this case.

Based upon the foregoing Findings of Fact, Conclusions of Law, and additional Findings of Fact Regarding Discipline, and upon consideration of the factors set forth in 27 N.C. Admin. Code Chapter 1, Subchapter B, § .0114(w), the hearing panel hereby enters the following additional

CONCLUSIONS OF LAW REGARDING DISCIPLINE

1. The hearing panel has carefully considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w) of the Rules and Regulations of the North Carolina State Bar. The hearing panel finds evidence of the following factors:

- a. From Rule .0114(w)(1) and Rule .0114(w)(2):
 - i. intent of the defendant to cause the resulting harm or potential harm;
 - ii. intent of the defendant to commit acts where the harm or potential harm is foreseeable;
 - iii. circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;
 - iv. elevation of the defendant's own interest above that of the client;
 - v. negative impact of defendant's actions on client's or public's perception of the profession;
 - vi. effect of defendant's conduct on third parties;
 - vii. acts of dishonesty, misrepresentation, deceit, or fabrication; and
 - viii. misappropriation or conversion of assets of any kind to which the defendant is not entitled, whether from a client or any other source.
- b. From Rule .0114(w)(3):
 - i. dishonest or selfish motive;
 - ii. indifference to making restitution;
 - iii. a pattern of misconduct;
 - iv. multiple offenses;
 - v. submission of false statements during the disciplinary process; and
 - vi. substantial experience in the practice of law.

2. The hearing panel has considered lesser alternatives and finds that suspension of Mako's license or a public censure, reprimand, or admonition would not be sufficient discipline because of the gravity of the actual and potential harm to clients, third parties, and the legal profession caused by Mako's conduct, and the threat of significant potential harm Mako poses to the public.

3. The hearing panel considered all lesser sanctions and finds that discipline short of disbarment would not adequately protect the public for the following reasons:

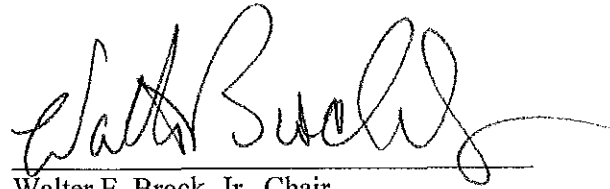
- a. Mako committed misconduct involving deceit and misappropriation of entrusted funds, which are among the most serious offenses an attorney can commit. Such offenses demonstrate that the offending attorney is not trustworthy. Clients are entitled to have trustworthy attorneys.
- b. Mako engaged in criminal acts reflecting adversely on her honesty, trustworthiness or fitness as a lawyer, and engaged in abuses of trust by using funds entrusted to her for personal benefit.
- c. Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of the offenses Mako committed and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar of this State.

Based upon the foregoing Findings of Fact, Conclusions of Law, and additional Findings of Fact and Conclusions of Law Regarding Discipline, the hearing panel hereby enters the following

ORDER OF DISCIPLINE

1. Defendant, Sue E. Mako, is hereby DISBARRED from the practice of law.
2. Defendant shall surrender her 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 the costs of this proceeding as assessed by the Secretary of the North Carolina State Bar. Defendant must pay the costs within 30 days of service upon her of the statement of costs by the Secretary.
4. Defendant shall comply with all provisions of 27 NCAC 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
17th day of July, 2014.

A handwritten signature in black ink, appearing to read "Walter Brock, Jr.", written in a cursive style. The signature is positioned above a horizontal line.

Walter E. Brock, Jr., Chair
Disciplinary Hearing Panel