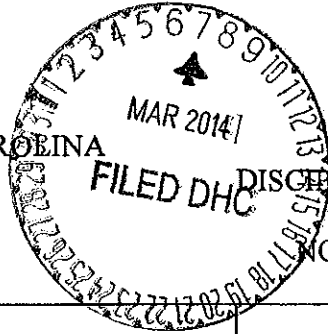


STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE

DISCIPLINARY HEARING COMMISSION

OF THE

NORTH CAROLINA STATE BAR

03 DHC 16

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

WILLIE D. GILBERT, II, Attorney,

Defendant

ORDER LIFTING STAY &
ACTIVATING SUSPENSION

Defendant, Willie D. Gilbert, II, was ordered to appear and show cause why the stay of the suspension imposed by the Order of Discipline entered in this case on April 7, 2010 should not be lifted and the suspension activated. This matter was heard on January 13, 2014 by a hearing panel of the Disciplinary Hearing Commission composed of Sharon B. Alexander, Chair, Beverly T. Beal, and Scott A. Sutton pursuant to 27 N.C.A.C. 1B §.0114(x). The Plaintiff was represented by Margaret T. Cloutier. The Defendant was represented by Eric C. Michaux. Based upon the record, the evidence presented at the hearing, and the existing record in this disciplinary case, the Hearing Panel hereby finds by the greater weight of the evidence the following:

FINDINGS OF FACT

1. On April 7, 2010, the DHC entered an Order of Discipline finding that Defendant, Willie D. Gilbert, II, violated the Rules of Professional Conduct by appropriating funds he held in a fiduciary capacity for his own use, and by failing to promptly pay a physician as directed by his client from funds retained specifically for that purpose. The Order of Discipline (hereafter "the Order") was served on Gilbert April 12, 2010.

2. The Order suspended Gilbert's license to practice law for five years and stayed the suspension for five years on condition that Gilbert comply with the requirements specified in the Order.

3. On October 3, 2013, the State Bar initiated this show cause proceeding by filing a motion alleging that Gilbert had failed to comply with certain conditions set forth in the Order.

4. The Order provided that Gilbert must not violate any of the Rules of Professional Conduct.

5. On September 16, 2010, Gilbert was issued a Censure by Judge Thomas H. Lock, Senior Resident Superior Court Judge for Judicial District 11-B, in the case of *Security Credit Corporation v. Michael Barefoot, et al.*, Johnston County File No. 08CVS 142. The court found by clear, cogent and convincing evidence that Gilbert violated the Rules of Professional Conduct.

6. Part of the basis for the Censure issued by Judge Lock involved statements made prior to April 7, 2010, which is the date of the Order in this matter. The panel determined that it would not consider whether or not any conduct occurring before April 7, 2010, constituted a violation of the Rules of Professional Conduct for purposes of this proceeding.

7. On July 12, 2010 Gilbert sent an email to the trial court coordinator for 11th judicial district requesting a continuance of a hearing scheduled for July 16, stating that he was in California and had a continuing need to be there until the end of July because he was "attending to numerous discovery and dispositive motion-related matters in a federal civil action."

8. Opposing counsel sent an email to Gilbert and the trial court coordinator on July 13, 2010 objecting to this continuance request. Later that same day Gilbert responded via email to the trial court coordinator and to opposing counsel stating that "I have already received continuances in two other matters due to the conflict created by the very same federal court obligations that have necessitated the continuance request that I am making now."

9. Gilbert further asserted that "... until July 1, 2010 I actually thought that I would be in a position to return to North Carolina for the July 16th hearing in the *Barefoot* matter. On July 1, 2010, however, 'all h_ll broke loose' in the Los Angeles litigation and I have since been working 18 to 20 hours per day attempting to overcome dire circumstances that were beyond my control to prevent, and that I had no reason to anticipate would interfere with my ability to attend the *Barefoot* hearing on July 16, 2010."

10. The statements were made by Gilbert after he had earlier in the same matter represented to the court that he had been required and was continuing to be required to prepare a multitude of legal documents for filing in matters that were pending in the federal Fourth Circuit, and also in the California federal district court.

11. Gilbert deliberately used the phrases "required to file," "court obligations," and "working" in his communications with Judge Lock. At no time had Gilbert appeared as counsel of record in any matter before the California federal courts. Gilbert's wife was the plaintiff in the pending matter out of the Central District of California, and she was represented by independent counsel. Gilbert's application to appear pro hac vice in that matter had been denied as of May 6, 2009.

12. The Order required Gilbert to comply with all membership requirements of the North Carolina State Bar by the applicable deadline.

13. Lawyer membership fees for 2013 were due on January 1, 2013 and lawyers had until June 30 to remit the fees to the State Bar. Gilbert did not pay his 2013 membership fees until October 11, 2013, after he was served with a notice to show cause for his failure to timely remit the fees.

14. The State Bar elected to present no evidence regarding Gilbert's non-compliance with 2012 CLE compliance as alleged in Paragraph 5(b) of the Motion for Order to Show Cause.

15. The Order required Gilbert to retain a certified public accountant (CPA) to provide semi-annual written reports to the Office of Counsel of the North Carolina State Bar confirming that Gilbert's handling of his trust account complied with the Rules of Professional Conduct. The reports were due within ten (1) days of the periods ending June 30th and December 31st of each year throughout the period of the stayed suspension.

16. Gilbert failed to file a CPA report, or affidavit in lieu thereof, as required by the Order of Discipline on a timely basis for January 2011, July 2011, January 2012, July 2012, January 2013 and July 2013.

17. Gilbert has been less than forthcoming with this tribunal in testifying that he did not understand when the CPA reports were due. Gilbert's own Exhibit 14, in which Gilbert informed a CPA that he had a January 10th deadline, contradicted Gilbert's testimony that he thought he had through the 30th to submit the reports.

18. Some of the delays in filing the reports were due to Gilbert's financial situation. However, Gilbert made no effort to contact the State Bar, to apply for a modification of the Order or to inform anyone as to the reason he was not timely filing the reports.

19. The Order required Gilbert to respond to all requests for information from the State Bar by the deadline stated in the communication or request.

20. The State Bar sent a letter to Gilbert's attorney concerning the content of an affidavit submitted by Gilbert. The letter instructed Gilbert to submit a corrected affidavit within fifteen days. Neither Gilbert nor his attorney responded to the September 23, 2010 letter.

21. There was no evidence that Gilbert ever had a copy of the letter or was aware of the deadline imposed by the State Bar.

22. The most egregious conduct in this matter occurred in 2010, that being the deceit in the statements made to the court in the *Barefoot* matter. The delay in bringing that conduct before this panel was not attributable to Gilbert.

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the Panel has jurisdiction over Gilbert and the subject matter of this proceeding.

2. The hearing in this matter was conducted pursuant to Rule .0114(x) of the North Carolina State Bar Discipline and Disability Rules. The standard applicable at this hearing is the greater weight of the evidence, as set out in Rule .0114(x).

3. Gilbert is collaterally estopped from challenging the superior court's findings of fact in *Security Credit Corporation v. Michael Barefoot, et al.*, Johnston County File No. 08 CVS 142, and this panel therefore adopts the superior court's findings of fact.

4. Based only on Gilbert's statements made after April 7, 2010 regarding post-trial matters in the *Barefoot* case, the panel finds Gilbert engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) of the Rules of Professional Conduct.

5. Defendant, Willie D. Gilbert II, has failed to comply with the following conditions of the stay of his suspension contained in the Order of Discipline entered in this case on April 7, 2010:

- a. Gilbert violated the Rules of Professional Conduct by making false or misleading statements to a tribunal, thereby engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);
- b. Gilbert failed to comply timely with all membership requirements of the North Carolina State Bar; and
- c. Gilbert failed to submit timely semi-annual CPA reports confirming that Gilbert's handling of his trust account complied with the Rules of Professional Conduct.

6. Gilbert's violations of the Rules of Professional Conduct, his failure to comply with membership requirements and the provisions of the Order regarding timely submission of CPA reports are substantial violations of the conditions of the stay of the suspension and warrant lifting the stay and activating a portion of his suspension.

Based upon the foregoing findings of fact and conclusions of law, the Hearing Panel enters the following:

ORDER

1. The stay of the suspension imposed in the Order of Discipline entered in this case is hereby lifted and three years of the five-year suspension is hereby activated. This activation is effective and Defendant's license will be suspended for three years beginning thirty days from the date this order is served upon him.


2. Defendant shall pay all administrative fees and costs of this proceeding as assessed by the Secretary within sixty days after service of the statement of costs on him;

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

4. Defendant shall wind down his practice in compliance with all provisions of 27 N.C.A.C. 1B § .0124 of the North Carolina State Bar Discipline & Disability Rules.

Signed by the undersigned Chair of the Disciplinary Hearing Panel with the consent of the other Hearing Panel members.

This the 07 day of March 2014.



Sharon B. Alexander, Chair
Disciplinary Hearing Panel