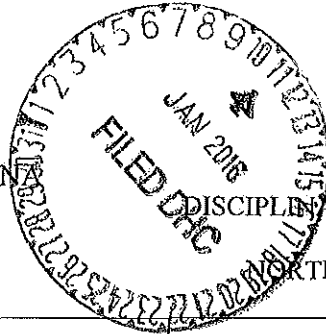


STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
15 DHC 12

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

DAN L. MERRELL, Attorney,

Defendant

ORDER OF DISCIPLINE

THIS MATTER was heard December 16-17, 2015 before a hearing panel of the Disciplinary Hearing Commission composed of Renny W. Deese, Chair, Walter E. Brock, Jr. and Bradley Lail. Plaintiff, the North Carolina State Bar, was represented by G. Patrick Murphy. Defendant appeared at the hearing and was represented by Phillip Hayes. Based on the Complaint, Answer, stipulations, admissions, exhibits, evidence admitted during the hearing, and with the consent of the Defendant, 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, Dan L. Merrell ("Defendant" or "Merrell"), was admitted to the North Carolina State Bar in 1979 and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the Rules and Regulations of the North Carolina State Bar and the Rules of Professional Conduct.

3. During all or part of the relevant periods referred to herein, Defendant was engaged in the practice of law in the State of North Carolina and maintained a law office in Kitty Hawk, Dare County, North Carolina.

4. From April 2010 through January 25, 2012, Defendant was the attorney for the Town of Kill Devil Hills ("KDH").

5. On or about April 6, 2010, Defendant met with KDH Town Manager Debora Diaz ("Diaz"), KDH Assistant Town Manager Shawn Murphy ("Murphy"), KDH Police Department ("KDHPD") Chief Gary Britt ("Chief Britt"), and KDHPD Assistant Chief Dana Harris ("Harris") to discuss an incident that took place on April 4, 2010 involving Superior Court Judge Jerry Tillett's son and KDHPD officers.

6. On April 15, 2010, Defendant and KDH Town Officials Diaz, Chief Britt, Harris and KDH Mayor Raymond Sturza met with Judge Tillett in Judge Tillett's judicial chambers. Defendant arranged the meeting at Judge Tillett's request.

7. During the April 15, 2010 meeting, in response to statements made by Judge Tillett, Chief Britt stated that he was not going to be intimidated by Judge Tillett, that he and KDHPD officers were going to continue to do the right thing, and that the law applied to everyone.

8. During the Spring and Summer of 2011, Defendant learned Judge Tillett had received complaints from former and current KDHPD officers making allegations about Chief Britt's administration and management of KDHPD.

9. Judge Tillett told Defendant that he would be giving the complaints of the former and current KDHPD officers to District Attorney Frank Parrish ("Parrish") for investigation.

10. On September 19, 2011, Judge Tillett issued an order *sua sponte* directing that copies of personnel files of designated KDH employees, including those of Chief Britt and Murphy, had to be delivered to his office.

11. There was no petition or legal action pending before Judge Tillett when Judge Tillett signed the September 19, 2011 order.

12. Diaz, the Town Manager, was not notified of any proceedings related to the September 19, 2011 order prior the Judge Tillett entering the order.

13. Defendant delivered the September 19, 2011 order to KDH Town officials on September 20, 2011.

14. Though Murphy questioned Defendant about Judge Tillett's authority to enter the order, Defendant advised Murphy and KDH officials that the Town of KDH had no choice but to comply with Judge Tillett's September 19, 2011 order.

15. Defendant billed the Town of KDH \$1,275.00 for the hours he spent supervising the Town of KDH's compliance with Judge Tillett's September 19, 2010 order.

16. On or about September 22, 2011, Parrish sent Defendant a copy of an unsigned petition to remove Chief Britt.

17. On or about September 22, 2011, Defendant met with Diaz and Murphy and advised them that Chief Britt should be suspended pending the outcome of the petition to remove Chief Britt.

18. On or about September 23, 2011, Chief Britt was placed on paid non-disciplinary suspension.

19. In or about October 2011, the North Carolina League of Municipalities assisted the Town of KDH to arrange for an administrative review to be conducted of the performance and leadership of Chief Britt and its impact on the operations of KDHPD.

20. Parrish told Defendant he wanted to wait on the completion of the administrative review before moving forward with the petition to remove Chief Britt.

21. The administrative review was completed in December 2011.

22. On or about December 22, 2011, Murphy sent town officials and Defendant an email notifying them that Chief Britt was being reinstated to active duty on December 22, 2011.

23. Murphy attached to his December 22, 2011 email a document captioned "Police Issues For Implimentation (sic) By The Police Chief As Of January 2012" (issues for implementation).

24. On or about December 30, 2011, Defendant sent a copy of Murphy's December 22, 2011 email to Judge Tillett along with the issues for implementation.

25. On January 19, 2012, Superior Court Judge Milton F. Fitch, Jr. entered an order styled "In the Matter of Complaints Against Officials of Kill Devil Hills Police Department." The order was assigned Dare County file number 12-R-8.

26. The January 19, 2012 order rescinded provisions of the issues for implementation, which Judge Fitch referred to in the order as "new policies", and provided that "any Kill Devil Hills Department employee may present any complaint, grievance or appeal involving the Police Department or conduct, disciplinary action or employment to the Senior Resident Superior Court Judge" at Judge Tillett's office address, or as otherwise provided by law.

27. Parrish never filed a petition to remove Chief Britt.

28. On January 25, 2012, Defendant was replaced as attorney for the Town of KDH.

29. On or about January 23, 2012, the Town of KDH filed an amended Petition for Writ of Supersedeas ("PWS") in the North Carolina Court of Appeals ("COA") seeking to vacate Judge Fitch's order in 12-R-8. The PWS was assigned COA number P12-72 ("COA P12-72"). The Town of KDH was represented in the appeal of

Judge Fitch's order by Dan Hartzog and members of Hartzog's firm, Cranfill, Sumner & Hartzog.

30. Murphy provided an affidavit in support of the Town of KDH's amended PWS.

31. On or about January 31, 2012, Attorney Dennis Rose ("Rose") filed a Motion to Intervene on behalf of several applicants in COA P12-72. The individuals seeking to intervene in COA P12-72 were individuals who had filed complaints concerning Chief Britt with Judge Tillett.

32. On or about January 31, 2012, while no longer attorney for the Town of KDH, Defendant executed and provided an affidavit with attached exhibits to Rose. Defendant's January 31, 2012 affidavit authenticated Murphy's email sent to various KDH Town officials notifying them that Chief Britt was being reinstated to active duty on December 22, 2011, the document captioned "Police Issues For Implimentation (sic) By The Police Chief As Of January 2012" which Murphy attached to the email, and a December 29, 2011 email of Murphy.

33. At the time Defendant provided his January 31, 2012 affidavit with attached exhibits, Defendant knew his affidavit would be used to authenticate Murphy's December 22 and December 29, 2011 emails and the issues for implementation to support Rose's Motion to Intervene in COA P12-72.

34. Defendant did not request or obtain the informed consent of the Town of KDH to disclose confidential information in his January 31, 2012 affidavit and attached exhibits before submitting the January 31, 2012 affidavit and attached exhibits to Rose.

35. The Town of KDH did not give Defendant permission to use confidential information obtained from his representation of the Town of KDH in his January 31, 2012 affidavit and attached exhibits to the disadvantage of his former client.

36. Defendant's January 31, 2012 affidavit and attached exhibits revealed confidential information that Defendant acquired during his professional relationship with the Town of KDH.

37. Confidential information revealed by Defendant's January 31, 2012 affidavit and attached exhibits includes:

- a) information about the process of re-instating Chief Britt; and
- b) details about the issues for implementation.

38. On February 13, 2012, the COA denied Rose's Motion to Intervene in COA P12-72.

39. On February 13, 2012, the COA granted the Town of KDH's amended PWS in COA P12-72 to review Judge Fitch's order.

40. On July 11, 2012, Defendant executed and submitted a second affidavit to Rose.

41. Defendant's July 11, 2012 affidavit disclosed confidential information acquired by Defendant during his professional relationship serving as attorney for the Town of KDH.

42. At the time Defendant submitted his July 11, 2012 affidavit to Rose, Rose was representing the plaintiffs in *Ennis v. Town of Kill Devil Hills*, 12-CVS-74 (Dare County). The plaintiffs in the civil action were the same individuals that had filed complaints concerning Chief Britt with Judge Tillett and attempted to intervene in COA12-72.

43. At the time Defendant submitted his July 11, 2012 affidavit, Defendant knew the affidavit could be used by Rose in litigation he was prosecuting against the Town of KDH in *Ennis v. Town of Kill Devil Hills*, 12-CVS-74 (Dare County).

44. Defendant did not request or obtain the informed consent of the Town of KDH to reveal or use confidential information in his July 11, 2012 affidavit before submitting the July 11, 2012 affidavit to Rose.

45. The Town of KDH did not give consent to Defendant to use or reveal confidential information obtained from his representation of the Town of KDH in his July 11, 2012 affidavit to the disadvantage of his former client.

46. Confidential information revealed by Defendant's July 11, 2012 affidavit includes the following:

- a) personnel information related to complaints about Chief Britt's alleged mismanagement and improper administration of the KDHPD (§ 7);
- b) Defendant's advice to town officials that Chief Britt should be suspended pending the outcome of the petition to remove Chief Britt (§§ 8 and 9);
- c) Murphy's inquiry about whether Murphy should retain legal counsel (§ 10);
- d) communications with the attorney hired by the NC League of Municipalities to represent the Town of KDH related to the administrative review of the KDHPD (§ 11);
- e) information Defendant received on behalf of his client from Parrish related to Parrish's intention to wait for the results of the administrative review (§12);
- f) the fact that Town of KDH officials did not consult with Defendant prior to contacting the NC League of Municipalities about conducting an administrative review of the Town of KDHPD (§ 13);

- g) that Defendant was not consulted by anyone with the Town of KDH prior to Chief Britt's return to active duty (§17);
- h) that Defendant was not made aware of the "new policies" prior to receiving a copy from Murphy attached to a December 22, 2011 email (§18);
- i) information about the April 15, 2010 meeting in Judge Tillett's chambers in an effort to contradict statements in Murphy's affidavit filed in support of COA P12-72 (§§ 21-30); and
- j) Defendant's opinion that Town of KDH officials were improperly maintaining unofficial personnel files and copies of personnel files in the custody of the police department administration (§ 33).

47. On or about October 16, 2012, the N.C. Court of Appeals issued an opinion in *In The Matter of Complaints Against Officials of Kill Devil Hills Police Department*, COA 12-398, and vacated Judge Fitch's January 19, 2012 order.

48. On November 19, 2012, Defendant submitted an affidavit in support of a Petition for Rehearing/Motion to Withdraw Opinion which Judge Tillett filed in *In The Matter of Complaints Against Officials of Kill Devil Hills Police Department*, COA 12-398.

49. Defendant's November 19, 2012 affidavit disclosed confidential information acquired by Defendant during his professional relationship serving as attorney for the Town of KDH.

50. At the time Defendant executed and submitted his November 19, 2012 affidavit, Defendant knew Judge Tillett was asking the COA for a rehearing in COA 12-398 or, in the alternative, that the COA withdraw its opinion which had ruled in favor of the Town of KDH and vacated Judge Fitch's order.

51. Defendant did not request or obtain the informed consent of the Town of KDH to reveal or use confidential information in his November 19, 2012 affidavit before submitting the November 19, 2012 affidavit.

52. The Town of KDH did not give Defendant permission to reveal or use confidential information obtained during his representation of the Town of KDH in his November 19, 2012 affidavit to the disadvantage of his former client.

53. Confidential information revealed by Defendant's November 19, 2012 affidavit includes the following:

- a) events during the April 15, 2010 meeting in Judge Tillett's chambers to support the petition for rehearing and to contradict statements in Murphy's affidavit filed in support of the Town of KDH's PWS (§§ 2-10);

- b) information Defendant obtained about alleged complaints against Chief Britt received during the time he served as Town attorney (§11);
- c) that paragraph 7 of Murphy's affidavit was "not factually correct" in an attempt to establish that Murphy had provided incorrect information in support of the Town of KDH's PWS (§12);
- d) Defendant's legal reasoning for actions taken by Defendant that impacted the Town of KDH (§§ 13, 14 and 16);
- e) communications with the Town Clerk (§ 15);
- f) communications Defendant had with town officials (§§ 17-19);
- g) Defendant's advice to town officials that Chief Britt should be suspended pending the outcome of the petition to remove Chief Britt (§ 21);
- h) communications with the attorney hired by the NC League of Municipalities related to the administrative review (§ 22);
- i) that town officials did not consult with Defendant prior to contacting the NC League of Municipalities (§ 24);
- j) that Defendant was not consulted by anyone with the Town of KDH prior to Chief Britt's return to active duty (§28);
- k) that Defendant was not consulted on the "new policies" prior to receiving a copy from Murphy attached to a December 22, 2011 email (§29); and
- l) that Defendant was not contacted about the Town of KDH's PWS to vacate Judge Fitch's order, and indicating the Town's PWS was not based on the "true facts of these matters" (§ 30).

CONCLUSIONS OF LAW

1. All parties are properly before the Hearing Panel and the panel has jurisdiction over Defendant and the subject matter of this proceeding.
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) as follows:
 - a. By executing and submitting his January 31, 2012 affidavit to Rose, Defendant revealed confidential information acquired through his professional relationship with the Town of KDH without the informed consent of the Town of KDH in violation of Rule 1.6, revealed confidential information relating to his representation of the Town of KDH in violation of Rule 1.9(c)(2), and used confidential information

relating to his representation of the Town of KDH to the disadvantage of his former client in violation of Rule 1.9(c)(1);

- b. By executing and submitting his July 11, 2012 affidavit to Rose, Defendant revealed confidential information acquired through his professional relationship with the Town of KDH without the informed consent of the Town of KDH in violation of Rule 1.6, revealed confidential information relating to his representation of the Town of KDH in violation of Rule 1.9(c)(2), and used confidential information relating to his representation of the Town of KDH to the disadvantage of his former client in violation of Rule 1.9(c)(1); and
- c. By executing and submitting his November 19, 2012 affidavit to be used in Judge Tillett's Petition for Rehearing/Motion to Withdraw Opinion, Defendant revealed confidential information acquired through his professional relationship with the Town of KDH without the informed consent of the Town of KDH in violation of Rule 1.6, revealed confidential information relating to his representation of the Town of KDH in violation of Rule 1.9(c)(2), and used confidential information relating to his representation of the Town of KDH to the disadvantage of his former client in violation of Rule 1.9(c)(1).

ADDITIONAL FINDINGS OF FACT REGARDING DISCIPLINE

1. Defendant was licensed to practice law in the State of North Carolina in 1979 and has substantial experience in the practice of law.
2. Defendant has refused to acknowledge the wrongfulness of his conduct.
3. Defendant revealed and used confidential information of his former client in three separate affidavits over an eleven- month period.
4. Defendant's July 11 and November 19, 2012 affidavits reveal detailed confidential information including conversations he had with Town of KDH officials on legal matters, legal advice and opinions he provided his former client and communications he had with third parties related to legal issues and/or potential legal issues involving his former client.
5. Defendant's July 11 and November 19, 2012 affidavits reveal confidential information acquired through his professional relationship with the Town of KDH over a twenty-month period of time
6. Defendant provided the three affidavits for use in litigation against his former client in three separate proceeding, the last of which sought to have the Court of Appeal grant extraordinary relief in the form of granting a rehearing in *In The Matter of Complaints Against Officials of Kill Devil Hills Police Department*, COA 12-398 or, in the alternative, withdrawing the opinion.

7. Defendant's affidavit that was filed in the Court of Appeals to support Judge Tillett's petition for rehearing and/or alternative motion to withdraw its opinion was also used in support of Judge Tillett's Petition for Discretionary Review and Petition for Writ of *Certiorari* filed in the North Carolina Supreme Court in *In The Matter of Complaints Against Officials of Kill Devil Hills Police Department*, No. 531P12. These filings required attorneys representing the Town of KDH to expend additional resources to respond to these petitions and motion.

8. Defendant has prior discipline in the form of a two-year stayed suspension in *The North Carolina State Bar v. Dan L. Merrell*, 12 DHC 13.

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

CONCLUSIONS REGARDING DISCIPLINE

1. The Hearing Panel has carefully considered all of the different forms of discipline available to it. In addition, the Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(3) of the Rules and Regulations of the North Carolina State Bar and determines the following factors are applicable in this matter:

- a. Prior disciplinary offenses in this state;
- b. A pattern of misconduct;
- c. Defendant's refusal to acknowledge the wrongful nature of his conduct; and
- d. Defendant has substantial experience in the practice of law.

2. The Hearing Panel has carefully considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1) of the Rules and Regulations of the North Carolina State Bar and determines the following factors which warrant suspension of Defendant's license are applicable to this matter:

- a. The intent of the Defendant to commit acts where the harm or potential harm is foreseeable;
- b. The negative impact of Defendant's actions on his client's or the public's perception of the legal profession;
- c. Negative impact of the Defendant's actions on the administration of justice; and
- d. Impairment of his client's ability to achieve the goals of the representation.

3. The Hearing Panel has also considered all of the factors enumerated in 27

N.C.A.C. 1B § .0114(w)(2) of the Rules and Regulations of the North Carolina State Bar and concludes no factors are present in this instance that would warrant disbarment.

4. The Hearing Panel has considered written discipline but finds that an admonition, reprimand, or censure would not be sufficient discipline because of the harm and potential harm to the client and the public as demonstrated by the facts in the present case. Furthermore, the panel finds that any sanction less than a suspension would fail to acknowledge the seriousness of the offenses committed by Defendant and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State. The Hearing Panel finds, however, that the public will be adequately protected by a stayed suspension under the facts and circumstances of the present case.

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

ORDER OF DISCIPLINE

1. Defendant is hereby suspended from the practice of law in the State of North Carolina for four (4) years, effective 30 days from service of this order upon Defendant.

2. The four (4) year suspension is stayed for four (4) years as long as Defendant complies with the following conditions:

- a. Defendant shall accept all certified mail from the North Carolina State Bar and respond to all requests for information or communications from the North Carolina State Bar by the deadline stated in the communication;
- b. Defendant shall keep the North Carolina State Bar membership department advised of his current physical business address (not a Post Office box), telephone number, and email address and shall notify the Bar of any changes in address within ten (10) days of such change;
- c. Defendant will timely comply with State Bar continuing legal education ("CLE") requirements and will pay all fees and costs assessed by the applicable deadline;
- d. Defendant will not violate the laws of any state or the United States;
- e. Defendant will not violate any provision of the Rules of Professional Conduct;
- f. Defendant shall complete three (3) hours of CLE in the area of ethics each of the four years of the stayed suspension and shall provide written proof of the successful completion of those courses to the Office of Counsel

within 10 days of completing each course. These CLE requirements are in addition to the CLE requirements set out in 27 N.C.A.C. 1D § .1518;

- g. Defendant shall pay the administrative fees and costs of this disciplinary proceeding within one (1) year of service of the statement of fees and costs upon him by the Secretary of the State Bar; and
- h. Defendant shall not represent any public bodies during the term of the stayed suspension.

3. If Defendant fails to comply with any one or more of the conditions stated above, then the stay of the suspension of his law license may be lifted as provided in § .0114(x) of the North Carolina State Bar Discipline & Disability Rules, and the DHC may enter an order imposing such conditions as it deems proper for the reinstatement of Defendant's license at the end of the suspension.

4. Unless Defendant's obligations under this Order are modified by further order of the DHC, Defendant's obligations under this Order end four (4) years from the effective date of the Order provided there are no motions or show cause proceedings pending alleging lack of compliance with the conditions of the stay of the suspension and Defendant has provided an affidavit with supporting documentation to the Office of Counsel not less than 60 days prior to the expiration of this suspension demonstrating that he has complied with all of the conditions 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 jurisdiction and the ability to lift the stay of the suspension and activate the four (4) year 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 Defendant's obligation to comply with the conditions for the stay will continue until resolution of any such pending motion or show cause proceeding.

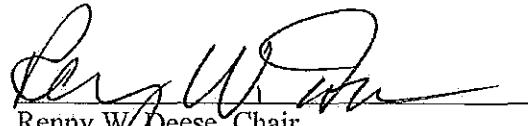
5. If the stay of the suspension is lifted and the suspension is activated for any reason, the DHC may enter an order imposing such conditions as it deems proper for the reinstatement of Defendant's license at the end of the suspension. Additionally, Defendant must establish the following by clear, cogent and convincing evidence prior to being reinstated to the practice of law after any period of active suspension:

- a. Defendant submitted his law license and membership card to the Secretary of the State Bar within thirty days of the date of the order lifting the stay and/or activating the suspension of his law license;
- b. Defendant complied with the provisions of 27 N.C.A.C. 1B § .0124 of the State Bar Discipline and Disability Rules following entry of the order lifting the stay and/or activating the suspension of his law license;

- c. Defendant timely paid all administrative fees and costs assessed against him in this proceeding as reflected on the statement of costs served upon him by the Secretary of the State Bar;
- d. That within 15 days of the effective date of the order activating the suspension Defendant provided the State Bar with an address and telephone number at which clients seeking return of files can communicate with Defendant and obtain such files;
- e. That Defendant promptly provided client files to all clients who made a request for return of their files;
- f. That Defendant has kept the State Bar Membership Department advised of his current business and home street addresses (not post office box or drawer addresses) and notified the State Bar of any change in address within ten days of such change;
- g. That Defendant has responded to all communications from the State Bar, including communications from the Attorney Client Assistance Program, within thirty days of receipt or by the deadline stated in the communication, whichever is sooner;
- h. That at the time of his petition for reinstatement, Defendant is current in payment of all membership dues, fees and costs, including all Client Security Fund assessments, and other charges or surcharges the State Bar is authorized to collect from him, including all judicial district dues and assessments;
- i. That at the time of his petition for reinstatement, there is no deficit in Defendant's completion of mandatory CLE hours in reporting of such hours or in payment of any fees associated with attendance at CLE programs;
- j. That at the time of his petition for reinstatement, Defendant has completed the additional 3 hours per year of CLE in the area of ethics as required in paragraph 2 (f) above;
- k. That Defendant has not represented any public bodies during the term of the stayed suspension ; and
- l. Defendant has not violated the Rules of Professional Conduct or the laws of the United States, or the laws of any state or local government during his suspension.

6. 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 until all conditions of the stay of the suspension are satisfied.

Signed by the Chair with the consent of the other Hearing Panel members, this the 11th day of January, 2016.


Renny W. Deese, Chair
Disciplinary Hearing Panel