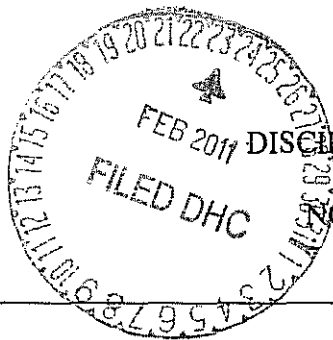


NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
10 DHC 17

The North Carolina State Bar,
Plaintiff,
v.
Phillip G. Rose,
Defendant.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
OF DISCIPLINE**

This matter came on to be heard and was heard on January 27 and 28, 2011 before a hearing panel of the Disciplinary Hearing Commission composed of Sharon B. Alexander, Chair; Robert F. Siler, and Joe Castro. William N. Farrell appeared on behalf of Plaintiff, the North Carolina State Bar. Douglas J. Brocker and Carolin Bakewell appeared on behalf of Defendant, Phillip G. Rose.

Based upon the pleadings, the stipulated facts and the evidence introduced at the hearing, 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, Phillip G. Rose ("Rose" or "Defendant"), was admitted to the North Carolina State Bar in August 1995, 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, Rose was engaged in the practice of law in the State of North Carolina and maintained a law office in Raleigh, Wake County, North Carolina.

4. On or about June 28, 2006, Rose was the closing attorney for a real estate transaction involving a property located at 237 Broadgait Brae, Cary, N.C. (hereinafter "Broadgait Brae transaction").

5. As the closing attorney, Rose represented the buyer/borrower, Lee C. Brisson, (hereinafter "buyer" or "borrower") and the lender, SunTrust Mortgage, Inc., (hereinafter "lender" or "SunTrust").

6. Rose prepared a HUD-1 Settlement Statement (hereinafter "HUD-1") for the transaction which showed receipt of cash at closing from the buyer and the disbursement of the sales proceeds to the seller, Maylene L. Jackson (hereinafter "seller").

7. The HUD-1 for the Broadgait Brae transaction represented the following:

- a. The contract sales price was \$291,500.00;
- b. SunTrust made a loan of \$233,200.00;
- c. The buyer brought \$59,652.31 to the closing; and
- d. A total of \$50,930.29 was disbursed to the seller in net sales proceeds.

8. The HUD-1 prepared by Rose was false in that the buyer brought no money to the closing, and Rose did not disburse \$50,930.29 to the seller.

9. The HUD-1 was also false in that the actual contract sales price was approximately \$50,000.00 less than the contract sales price reflected on the HUD-1.

10. Rose provided the HUD-1 to SunTrust.
11. Rose knew, at the time he prepared and provided the HUD-1 to SunTrust for the Broadgait Brae transaction, that the HUD-1 contained false information about the purchase price, the amount of net sales proceeds disbursed to the seller, and the amount of cash brought to the closing by the buyer/borrower.
12. Rose, as closing attorney, was responsible for ensuring the HUD-1 accurately recited the receipt and disbursement of funds in the transaction.
13. At the bottom of page 1 of the HUD-1 for the Broadgait Brae transaction is printed the following:

“To the best of my knowledge, the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received and have been or will be disbursed by the undersigned as part of the settlement of this transaction.”
14. The certification recited in paragraph 13 above was false.
15. Rose signed the certification as closing attorney just above the “warning” on the HUD-1, which states “It is a crime to knowingly make false statements to the United States on this or any similar form.”
16. Rose knew when he signed the HUD-1, including the certification recited in paragraph 13 above, that the certification was false.
17. SunTrust’s closing instructions required Rose to obtain a properly executed occupancy affidavit from the borrower/buyer.
18. The deed of trust securing the loan from SunTrust contained the following provision:

“Borrower shall occupy, establish, and use the property as Borrower’s principal residence within 60 days after the execution of this security instrument and shall continue to occupy the property as Borrower’s principal residence for at least one year after the date of occupancy,”

19. At the time Rose closed the Broadgait Brae transaction and recorded the deed of trust, Rose knew the borrower did not intend to occupy the premises and knew that the borrower intended to rent the property back to the seller.

20. Rose did not disclose to SunTrust the following material facts:

- a. that the borrower did not intend to occupy the property as his principal residence;
- b. that the borrower intended to lease the property back to the seller;
- c. that the purchase price of the property was approximately \$50,000.00 less than the contract sales price listed on the HUD-1;
- d. that the buyer/borrower did not bring \$59,652.31 to the closing; and
- e. that he did not disburse \$50,930.29 to the seller in net proceeds.

Based on the Foregoing Findings of Fact, 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, Phillip G. Rose, 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) and 84-28(b)(3) in that Defendant violated the Rules of Professional Conduct as follows:

- a. By knowingly preparing a HUD-1 Settlement Statement containing false information, by falsely certifying that the HUD-1 was an accurate statement of the receipts and disbursements, and by providing that false HUD-1 to the mortgage lender for the Broadgait Brae transaction, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), intentionally prejudiced his client, the lender, during the course of the professional relationship in violation of Rule 8.4(g), and committed criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b);
- b. By knowingly closing the loan for the Broadgait Brae transaction in violation of the lender's closing instructions, including instructions regarding occupancy of the property as the borrower's principal residence, and by closing the loan with knowledge that the borrower did not intend to occupy the property as his principal residence, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); and
- c. By concealing material information from the lender, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), intentionally prejudiced his client, the lender, during the course of the professional relationship in violation of Rule 8.4(g), and committed criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b).

- d. The State Bar did not establish by clear, cogent and convincing evidence that Defendant committed any violations with respect to its Second Claim for Relief and that Claim is dismissed with prejudice.

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments presented on the discipline to be imposed, the hearing panel hereby finds by clear, cogent and convincing evidence the following:

ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. Defendant's conduct, preparing a HUD-1 Settlement Statement containing false information, falsely certifying that the HUD-1 was an accurate statement of receipts and disbursements, and providing that false HUD-1 to his client, SunTrust, caused significant harm to SunTrust by impairing his client's ability to achieve the goals of the representation and by potentially subjecting his client to future economic loss.

2. Defendant's conduct caused significant harm to the profession. Defendant's intentional misrepresentations, regarding the true status of the Broadgait Brae transaction, have the potential to cause significant harm to the standing of the legal profession in the eyes of the public because such actions show disregard for his duties as an attorney. The erosion of public confidence in attorneys fosters disrespect for the profession as a whole and the legal system. Confidence in the legal profession is a requisite for public trust in the legal system.

3. Defendant betrayed the trust of a vulnerable client, SunTrust. Defendant was the one and only representative of SunTrust for the closing of the Broadgait Brae transaction. SunTrust relied on Defendant to protect its interest by requiring Defendant to follow closing instructions and requiring approval of the HUD-1 before approving disbursement of the loan proceeds.

4. Defendant never made any attempts to correct the misrepresentations he made to SunTrust concerning the Broadgait Brae transaction.

5. Defendant has previously been disciplined by the Grievance Committee consisting of a 2005 Admonition in grievance file 03G1120 and a 2005 Admonition in grievance file 04G0245.

Based upon the Findings of Fact, Conclusions of Law, and Additional Findings 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, including admonition, reprimand, censure, suspension, and disbarment, in considering the appropriate discipline to impose in this case. In addition, the hearing panel has carefully considered all of the factors enumerated in 27 N.C.A.C. 1B §.0114(w)(1) & (2) of the Rules and Regulations of the North Carolina State Bar and finds the following facts are applicable in the matter:

- a. intent of the Defendant to commit acts where the harm or potential harm was foreseeable;
- b. circumstances reflecting the Defendant's lack of honesty, trustworthiness, or integrity;
- c. negative impact of defendant's actions on client's or public's perception of the profession; and
- d. impairment of the client's ability to achieve the goals of the representation.

2. The hearing panel has also carefully considered all of the factors in 27 N.C.A.C. 1B §.0114(w)(3) of the Rules and Regulations of the North Carolina State Bar and finds the following factors applicable in the matter:

- a. prior disciplinary offenses;
- b. remoteness of prior offenses;
- c. dishonest or selfish motive;
- d. full and free disclosure to the hearing panel and cooperative attitude toward the proceeding;
- e. good character and reputation;
- f. vulnerability of victim;
- g. substantial degree of experience in the practice of law; and
- h. other factors the panel considered –
 - (i) quality, quantity and variety of character witnesses that testified to Defendant's high character and good reputation;
 - (ii) character and demeanor of Defendant during this proceeding; and
 - (iii) remoteness of prior offenses and remoteness of acts in this proceeding with no evidence of any intervening problems, despite the fact that Defendant engaged in a high volume practice that involved similar transactions, since the acts at issue.

3. The hearing panel has considered all other forms of discipline and concludes that any sanction less than suspension of Defendant's privilege to practice law would fail to acknowledge the seriousness of the offenses committed by Defendant, would not adequately

protect clients, the public and the profession, and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar.

4. But for the significant mitigating factors in this case, specifically that Defendant's conduct occurred almost five years prior to the issuance of discipline in this matter and that there is no evidence before the panel of similar misconduct in other real estate transactions; extensive evidence of Defendant's good character and reputation; Defendant's recognition of the wrongful nature of his misconduct from the beginning of this proceeding; and the panel's belief that Defendant's commitment to refrain from such conduct in the future is genuine, sincere and not likely to be repeated, the panel would consider disbarment or an active suspension of Defendant's license to practice law. However, given the circumstances of this case, the panel concludes that the public and the legal profession would be adequately protected by a suspension of Defendant's license to practice law which will be stayed upon conditions.

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

ORDER OF DISCIPLINE

1. Defendant, Phillip G. Rose, is hereby SUSPENDED from the practice of law for a period of one year beginning from the date of the service of this ORDER upon him. The period of suspension is hereby stayed for two years, with no active suspension of license, contingent upon Defendant's continued compliance with the following conditions:

- a. Defendant shall allow random audits of his trust account and his files relating to real estate closings by the State Bar at any time during the next two years;
- b. Defendant shall take an additional three hours of Continued Legal Education (CLE) to be completed within the period of stayed suspension. These three hours

are in addition to the normal CLE requirements and are to be approved in advance by the State Bar;

- c. Defendant shall not violate any state or federal laws or any provisions of the Rules of Professional Conduct during the period of the stayed suspension;
- d. Defendant shall respond to all State Bar requests for information by the earlier of the deadline stated in the communication or within thirty days, unless extended by the State Bar, as required by Rule 8.1(b) of the Rules of Professional Conduct;
- e. Defendant shall timely comply with all State Bar membership and Continuing Legal Education requirements; and
- f. Defendant 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.


2. This Order shall be effective on the date Defendant is served with this Order.

3. If Defendant fails to comply with any one or more of the provisions of Paragraph 1 above at any point during the period of time the stayed suspension is in effect, the stay of the suspension of his law license may be lifted or revoked as provided in §.0144(x) of the North Carolina State Bar Discipline and Disability Rules.

4. If the stay granted herein is lifted or revoked or the suspension of Defendant's license is activated for any reason, the DHC may enter an order providing for such conditions as it deems appropriate or necessary for reinstatement of Defendant's law license. Furthermore, if the stay is lifted or revoked, before seeking reinstatement of his license to practice law, Defendant must show by clear, cogent and convincing evidence that he has complied with each of the following conditions:

- a. Completed the three additional hours of CLE as required in Paragraph 1(b) above;
 - b. Submitted his license and membership card to the Secretary of the North Carolina State Bar within thirty days after the date of the revocation order suspending his law license;
 - c. Complied with all provisions of 27 N.C.A.C. 1B § .0124 of the State Bar Discipline and Disability Rules on a timely basis following the revocation order suspending his law license; and
 - d. Paid all due and owing membership fees, Client Security Fund assessments and costs assessed by the DHC or the State Bar and complied with all continuing legal education requirements imposed by the State Bar.
5. Defendant is taxed with the costs and administrative fees of this action as assessed by the Secretary which shall be paid within sixty days of service of the notice of costs upon the Defendant.

Signed by the Chair with the full knowledge and consent of the other members of the Hearing Panel, this the 23 day of February, 2011.


Sharon B. Alexander, Chair
Disciplinary Hearing Committee