

STATE OF NORTH CAROLINA

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
11 DHC 6

WAKE COUNTY

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

STEVEN E. PHILO, Attorney,

Defendant

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

This matter was considered by a Hearing Panel of the Disciplinary Hearing Commission composed of Steven D. Michael, Chair, and members Fred Morelock and Dr. Charles L. Garrett, Jr., pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(h). Plaintiff was represented by Jennifer A. Porter. Defendant, Steven E. Philo ("Philo"), was represented Douglas J. Brocker. Both Plaintiff and Defendant stipulate and agree to the findings of fact and conclusions of law recited in this consent order and to the discipline imposed. Philo has freely and voluntarily stipulated to the foregoing findings of fact and consents to the conclusions of law and entry of the order of discipline. Philo freely and voluntarily waives any and all right to appeal the entry of this consent order of discipline.

Based upon the pleadings in this matter, the parties' stipulations of fact, and with the consent of the parties, the Hearing Panel hereby enters the following:

Findings of Fact

1. Plaintiff, the North Carolina 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 promulgated thereunder.
2. Defendant, Steven E. Philo ("Philo" or "Defendant"), was admitted to the North Carolina State Bar on September 1, 1974, and is, and was at all times referred to herein, 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. Philo was properly served with process, a hearing in this matter was set, and the matter came before the Hearing Panel with due notice to all parties.

4. During the relevant periods referred to herein, Philo was engaged in the practice of law in the State of North Carolina at a law office in Franklin, Macon County, North Carolina.

5. Philo served as closing attorney for several real estate transactions in which Ultima WNC Development, LLC ("Ultima") sold lots in the Wildflower subdivision in Franklin, North Carolina, hereinafter referred to as "the Wildflower transactions."

6. Philo represented the buyers in the Wildflower transactions.

7. In each Wildflower transaction, a lender loaned funds to the buyer for the buyer to purchase the Wildflower lot.

8. The lenders sought to protect their interests in these transactions through the instructions and requirements issued to Philo as closing attorney.

9. Philo represented each lender in the Wildflower transactions.

10. The terms of each Wildflower transaction were established by a purchase contract and several addenda to the purchase contract.

11. One of the addenda (hereinafter "the buyer escrow addendum") to the purchase contracts in the Wildflower transactions provided that the seller, Ultima, would deposit a designated amount of the purchase price into an escrow account (hereinafter "buyer escrow account") after the closing. The amount was typically about 10-15% of what was identified as the purchase price on the first page of the purchase contract. The funds in this account were for the buyer to use to pay the monthly mortgage payments on the loan being taken to purchase the property. The buyer escrow funds were not held or disbursed by Philo for any of the Wildflower transactions.

12. The funds (hereinafter referred to as "the buyer escrow") deposited into the buyer escrow account belonged to the buyer. The funds were to be used to make the buyer's monthly mortgage payments. If the buyer resold the property before the funds in the buyer escrow account were depleted, any remaining funds were to be disbursed to the buyer.

13. The placement of these funds by Ultima into an escrow account for the buyer was a contractual obligation in the transaction and was an integral part of the transaction.

14. Philo was aware of the buyer escrow addenda and the buyer escrow payments in the Wildflower transactions he closed.

15. The buyer escrow constituted at least one of the following:

- a. payment by the seller in the Wildflower transactions to the buyer;
- b. payment of the buyer's interest on his or her mortgage loan during the months for which payments were covered by the funds in the buyer escrow account;
- c. a concession to the buyer in the Wildflower transactions;
- d. a contribution by the seller in the Wildflower transactions;
- e. a return of funds to the buyer. This return of funds back to the buyer in the buyer escrow account was a credit to the buyer.

16. Philo should have shown this payment of funds into the buyer escrow account on the HUD-1 Settlement Statements he produced for these transactions, in order for the HUD-1 Settlement Statements to accurately reflect the full nature of the transactions and all receipts and disbursements in the transactions.

17. Philo failed to show Ultima's payment of funds into the buyer escrow account on the HUD-1 Settlement Statements in the Wildflower transactions.

18. Philo did not otherwise notify the lenders of the buyer escrow payments.

19. Several of the lenders who loaned funds to buyers in the Wildflower transactions issued closing instructions to Philo that had provisions that were violated by the buyer escrow.

20. Philo had an obligation to comply with each lender's closing instructions.

21. Philo had an obligation to close the transaction only if it complied with the lender's closing instructions.

22. Philo had an obligation to not close the transaction if it did not comply with the lender's closing instructions, absent notice to the lender of the non-compliance and approval from the lender to proceed.

23. Philo closed Wildflower transactions even though the terms violated certain lenders' closing instructions.

24. Philo did not notify those lenders that the terms of the transaction violated the lender's closing instructions or otherwise communicate with the lenders regarding the apparent conflict between the closing instructions and the buyer escrow addendum.

Based upon the consent of the parties and the foregoing stipulated Findings of Fact, the Hearing Panel enters the following:

Conclusions Of Law

1. All parties are properly before the Hearing Panel and the Panel has jurisdiction over Philo and the subject matter of this proceeding.
2. Philo's conduct, as set out in the stipulated Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:
 - a. By providing inaccurate HUD-1 Settlement Statements to lenders in the Wildflower transactions that failed to show the full nature of the transactions and all receipts and disbursements in the transactions,, Defendant failed to communicate to his clients all information necessary for them to make informed decisions regarding the representation in violation of Rule 1.4(b);
 - b. By failing to act in compliance with lenders' closing instructions, Defendant failed to diligently represent the lenders in violation of Rule 1.3; and
 - c. By failing to notify lenders that the transactions included a buyer escrow in conflict with a prohibition in the closing instructions, Defendant failed to reasonably consult with the client about the means by which the client's objectives are to be accomplished in violation of Rule 1.4(a)(2) and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of 1.4(b).

Upon the consent of the parties, the Hearing Panel also enters the following:

Findings Of Fact Regarding Discipline

1. Banks are not normally thought of as vulnerable entities. Nevertheless, banks rely upon the closing attorney to carry out the closing in an ethical, lawful, and proper manner. These institutions are particularly vulnerable to conduct of attorneys that circumvents or facilitates others in the circumvention of safeguards employed by lenders.
2. Accurate HUD-1 Settlement Statements are necessary for the system of finance in real estate to function. Lenders rely upon the HUD-1 Settlement Statements to accurately reflect the receipt and disbursement of funds in real estate closings.
3. Substantial credits for or payments to the buyer can potentially affect the lender's risk assessment of the buyer and/or the lender's evaluation of the value of the collateral.
4. Philo now appreciates how the buyer escrow could potentially have affected the lender's risk assessment of the buyer and/or the lender's evaluation of the value of the collateral and that it was information that should have been communicated to the lender. Philo now appreciates that he should have shown this payment of funds into the buyer escrow account on the HUD-1 Settlement Statements he produced for these transactions, in order for the HUD-1 Settlement Statements to accurately reflect the full nature of the transactions and all receipts and disbursements in the transactions. Philo failed to realize this potential effect at the time of the closings, however, and his failure to

show the escrow on the HUD-1 Settlement Statement was not done with any intent to misrepresent the transaction to the lender.

5. Lenders provided closing instructions, compliance with which were a prerequisite to the lenders making the loans to the borrowers. Failure to comply with the closing instructions circumvented the lenders' attempt to ensure the loans at issue were ones it was willing to make.

6. Philo now acknowledges that the buyer escrow could be perceived as in conflict with certain of the lenders' closing instructions. At the time, Philo assumed the lender had the buyer escrow addendum because it had the purchase contract and he did not attempt to clarify the conflicting language in the closing instructions. Philo did not ignore the closing instructions but, based on his assumption that the lender had the addendum, he erroneously misinterpreted them not to prohibit the buyer escrow arrangement. Philo is now aware that in most of the transactions the lenders had not received the buyer escrow addendum and was not aware of the buyer escrow arrangement. Philo now realizes his obligation as closing attorney to communicate with the lender when an apparent conflict arises between the terms of the transaction and the closing instructions.

7. Attorneys cannot assume a lender has received all pertinent information from other sources. At least two of the lenders who were initially aware of the buyer escrow arrangement were no longer favorably viewing this arrangement and might not have proceeded with the transactions at issue if they had been notified of the existence of the buyer escrow by Philo on an accurate HUD-1 Settlement Statement.

8. Philo did not engage in the conduct described in the Findings of Fact above with any dishonest or selfish motive.

9. Philo has served the Bar and legal community, including acting as the Chair of the North Carolina State Bar Lawyer's Assistance Program Board from 1997 - 1998 and serving as a volunteer in the PALS program since at least 1992. While he was Chair, Philo was instrumental in expanding LAP to include the FRIENDS program. The FRIENDS program addresses lawyers' mental health issues, in addition to the traditional alcohol and substance abuse issues addressed by PALS.

10. Philo has established a reputation for good character in his community.

11. Philo has the following prior discipline: Reprimand, August 6, 2007, for assisting a company doing business as The Closing Place in the unauthorized practice of law.

12. 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.

Based on the Findings of Fact and Conclusions of Law above and the additional Findings of Fact Regarding Discipline, the Hearing Panel makes the following:

Conclusions With Respect To 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)(1) of the Rules and Regulations of the North Carolina State Bar and concludes the following factors warrant suspension of Defendant's license:

- a) Defendant's actions potentially had a negative impact on the client's or public's perception of the legal profession; and
- b) Defendant's actions impaired his clients' ability to achieve the goals of the representation.

2. The Hearing Panel has 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.

3. 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 concludes the following factors are applicable in this matter:

- a) Absence of a dishonest or selfish motive;
- b) Defendant engaged in multiple offenses;
- c) Defendant engaged in a pattern of misconduct;
- d) Defendant's full and free disclosure to the Hearing Panel and cooperative attitude toward the proceedings;
- e) Defendant's remorse;
- f) Defendant has practiced law for 38 years;
- g) Defendant's good character and reputation; and
- h) The vulnerability of Defendant's clients.

4. Defendant's conduct, if continued or tolerated by the Bar, poses significant potential harm to future clients.

5. The Hearing Panel has considered issuing an admonition, reprimand or censure but concludes that such discipline would not be sufficient discipline because of

the gravity of the potential harm to the clients. The Panel further concludes that such discipline would fail to acknowledge the seriousness of the offenses committed by Defendant and send the wrong message to attorneys regarding the conduct expected of members of the Bar in this State.

6. This Hearing Panel has considered lesser alternatives and concludes that a stayed suspension is necessary to ensure Philo complies with necessary conditions to avoid significant harm or the potential for significant harm to clients.

7. For these reasons, this Hearing Panel finds that an order imposing discipline short of a stayed suspension of Philo's law license would not be appropriate.

8. If the Hearing Panel had found Philo to have committed the misconduct in this case knowingly and intentionally, then it would have imposed much more serious discipline. The harm and potential harm that results from inaccurate HUD-1 Settlement Statements, as experienced by lenders, secondary market purchasers, real estate professionals, and the public, cannot be overemphasized. It is important that the public and that other lawyers in North Carolina understand that such conduct will not be tolerated.

Based upon the foregoing Findings of Fact and Conclusions of Law and the Findings of Fact and Conclusions regarding discipline, and based upon the consent of the parties, the Hearing Panel enters the following:

Order Of Discipline

1. Defendant, Steven E. Philo, is hereby suspended from the practice of law for three years, effective 30 days from service of this order upon Philo.

2. The three-year suspension is stayed for a period of three years as long as Philo complies, and continues to comply during the period of the stay, with the following conditions:

- a. Annually submits a certification of the areas of law in which he practiced for the preceding 12 months. Said certifications are due no later than December 31 of each year of the stay;
- b. Each year of the stay, completes 12 hours of continuing legal education in addition to the hours required under 27 N.C. Admin. Code Chapter 1, Subchapter D, Section .1518. These 12 hours shall consist of substantive education courses in the areas of law in which Philo is then currently practicing. If Philo is engaged in the practice of real property law, as defined in 27 N.C. Admin. Code Chapter 1, Subchapter D, Section .2102, then 6 of these 12 hours must include instruction in recognizing mortgage fraud or other fraud occurring in residential real property transactions. These additional 12 hours must be completed within the applicable time period for completing the continuing legal education hours required under 27 N.C. Admin. Code

Chapter 1, Subchapter D, Section .1518 each year of the stay and must be reported on the annual CLE report forms;

- c. Timely submits his annual CLE report form to the CLE department of the North Carolina State Bar each year of the stay and contemporaneously sends a copy of the CLE report form to the Office of Counsel of the State Bar to document compliance with the above conditions of the stay. "Timely" means by the date specified by the CLE department as the date by which members must submit their annual report forms to avoid assessment of a \$75.00 late filing penalty. Philo must ensure the Office of Counsel receives a copy of his annual CLE report form no later than 15 days after it is due to the CLE department of the State Bar each year;
- d. Pays all Membership dues and Client Security Fund assessments and complies with all Continuing Legal Education requirements on a timely basis;
- e. Keeps his address of record with the North Carolina State Bar current, accepts all certified mail from the North Carolina State Bar, and responds to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the communication;
- f. Does not violate any of the Rules of Professional Conduct in effect during the period of the stay;
- g. Does not violate any laws of the State of North Carolina or of the United States during the period of the stay; and
- h. Pays all costs and administrative fees of this proceeding as assessed by the Secretary within thirty (30) days after service of the notice of costs and fees on him.

3. If the stay of the suspension is lifted and the suspension is activated for any reason, the following conditions are placed upon Philo's reinstatement to active status. With any petition Philo files for reinstatement to active practice, Philo must demonstrate by clear, cogent, and convincing evidence that he complied with each of the following conditions:

- a. Submitted his license and membership card to the Secretary of the North Carolina State Bar no later than 30 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 N.C. State Bar Discipline & Disability Rules on a timely basis;
- c. Within the 12 months immediately preceding his application for reinstatement, completed 12 hours of continuing legal education in real

property law as defined in 27 N.C. Admin. Code Chapter 1, Subchapter D, Section .2102. 6 of these 12 hours must include instruction in recognizing mortgage fraud or other fraud occurring in residential real property transactions;


- d. Not have violated any of the Rules of Professional Conduct;
- e. Not have violated any laws of the State of North Carolina or of the United States;
- f. Paid all costs of this proceeding as assessed by the Secretary within thirty (30) days of service of the notice of costs upon him;

4. Any order of the Administrative Committee of the North Carolina State Bar placing Philo in inactive status for any reason shall toll the running of the suspension, the period of the stay of the suspension, and Philo's obligation to comply with the terms of the stay of the suspension under this order. Upon Philo's reinstatement to active status by the Administrative Committee, the tolling of the running of the suspension and the stay of the suspension under this order shall be lifted, at which time Philo's obligation to comply with the conditions of the stay of the suspension in this order will resume.

5. 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.

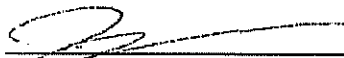
Signed by the undersigned Hearing Panel chair with the consent of the other Hearing Panel members.


This the 12th day of July 2012.

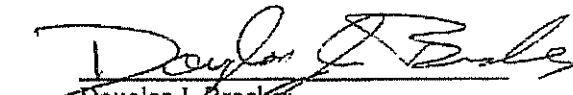

Steven D. Michael, Chair
Disciplinary Hearing Panel

Consent Order of Discipline concerning Steven E. Philo, 11 DHC 6

Agreed and consented to by:


Jennifer A. Porter
Attorney for Plaintiff


Steven E. Philo
Defendant


Douglas J. Brooker
Attorney for Defendant