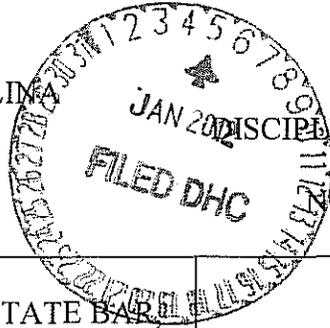


STATE OF NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
11 DHC 03

THE NORTH CAROLINA STATE BAR

Plaintiff

v.

ROBERT J. BURFORD, Attorney,

Defendant

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

THIS MATTER was heard on 13-14 October 2011 by a hearing panel of the Disciplinary Hearing Commission composed of Sharon B. Alexander, Chair, William M. Claytor, and Percy L. Taylor pursuant to 27 N.C.A.C. 1B § .0114 of the Rules and Regulations of the North Carolina State Bar. Carmen Hoyme Bannon represented Plaintiff, the North Carolina State Bar. Defendant, Robert J. Burford was represented by Amos G. Tyndall and Mani Leigh Dexter.

Based upon the pleadings, stipulations, and evidence presented 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 ("Plaintiff" or "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, Robert J. Burford ("Defendant" or "Burford"), was admitted to the North Carolina State Bar on 21 April 1980, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, 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. During all or part of the relevant periods referred to herein, Burford was engaged in the practice of law in the State of North Carolina and maintained a law office in Raleigh and/or Durham, North Carolina.

4. Defendant was properly served with process and received due notice of the hearing in this matter.

5. Burford represented thirteen plaintiffs in litigation against the pharmaceutical company Merck for damages caused by the drug Vioxx. (These plaintiffs are hereafter referred to as “Vioxx clients”).

6. Burford’s Vioxx clients entered into contingent fee agreements with Burford, which provided that Burford’s fee would be 40% of each client’s recovery.

7. The claims of Burford’s Vioxx clients were eventually made part of a mass tort action against Merck in federal court. (This litigation is hereafter referred to as “the Vioxx case”).

8. The federal court in the Vioxx case limited total attorneys’ fees to 32%, eight percent of which was escrowed for common benefit counsel fees. Accordingly, the fees of individual plaintiffs counsel (including Burford) were limited to 24%, regardless of the terms of the individual plaintiffs’ fee agreements,

9. Burford certified to the federal court that he understood and would abide by the court’s order limiting attorney fees.

10. When Burford received settlements for his Vioxx clients, he presented them with settlement disbursement summaries that showed how much of their recovery would go to: (a) common benefit fees and expenses; (b) Burford for attorney’s fees; (c) Burford for litigation costs and expenses; and (d) the client.

11. Burford provided his Vioxx clients with little or no explanation of what costs and expenses comprised the total amount shown on the disbursement summary.

12. Burford collected 24% of each Vioxx client’s settlement as his attorney fee.

13. The total amount to which Burford claimed entitlement from many of his Vioxx clients equaled or exceeded 40% of the clients’ settlement proceeds.

14. The amounts Burford charged the Vioxx clients for costs and expenses exceeded his actual out of pocket costs.

15. Burford paid a paralegal on a contract basis to assist him with the Vioxx clients’ cases. Burford paid the paralegal approximately \$3,800.00 per month to work for him.

16. Burford collectively charged his Vioxx clients at least \$292,000.00 for costs he attributed to the paralegal’s services.

17. Burford only paid the paralegal \$115,308.04 for her work on the Vioxx cases.

18. In support of the amounts shown on the disbursement summaries as payable to Burford for costs and expenses, Burford presented some Vioxx clients with invoices from the paralegal. The invoices reflected that the paralegal had billed Burford for her services at the rate of \$100.00 per hour.

19. Burford directed the paralegal to prepare invoices for the Vioxx clients reflecting a \$100.00 hourly rate.

20. Burford did not pay the paralegal on an hourly basis, nor did her monthly salary from Burford amount to \$100.00 per hour.

21. Burford consulted with an expert witness in connection with the Vioxx case. He paid the expert a total of \$3,500.00 for services benefitting all of the Vioxx clients.

22. Burford charged five of his Vioxx clients a total of \$4,500.00 for costs he attributed to expert witness fees. He did not apportion costs attributable to expert fees amongst all of the Vioxx clients.

23. Burford collectively charged his Vioxx clients at least \$62,460.00 for a cost he denominated a "class notice." What Burford denominated as a "class notice" included advertising through which Burford solicited potential clients in the Vioxx case.

Based on the record and the foregoing Findings of Fact, the hearing panel makes the following:

CONCLUSIONS OF LAW

1. All parties are properly before the hearing panel and this tribunal has jurisdiction over Defendant, Robert J. Burford, and the subject matter of this proceeding.

2. The advertising through which Burford solicited potential clients in the Vioxx case was not an expense incurred for the benefit of the Vioxx clients and therefore should not have been included in the costs and expenses assessed to the Vioxx clients.

3. Burford was not entitled to collect from his Vioxx clients amounts in excess of his 24% fee plus actual costs and expenses incurred for the benefit of the clients.

4. Burford provided misleading information about litigation costs and expenses to his Vioxx clients in an effort to obtain money to which he was not entitled.

5. Burford artificially inflated the amount he collected from the Vioxx clients for "costs and expenses" in order to circumvent the court's order capping individual attorney's fees at 24%.

6. 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 Burford violated the Rules of Professional Conduct in effect at the time of the conduct as follows:

- (a) By asserting entitlement to client funds in excess of his 24% fee plus his actual costs and expenses and by failing to apportion expenses proportionately amongst his Vioxx clients, Burford charged clearly excessive amounts for expenses in violation of Rule 1.5(a);

- (b) By providing his Vioxx clients with little or no explanation of the costs and expenses he charged to them, Burford failed to explain the basis of expenses for which the clients would be responsible in violation of Rule 1.5(b);
- (c) By directing his paralegal to prepare invoices that falsely stated that she charged \$100.00 per hour, Burford ordered a non-lawyer assistant to engage in conduct that would violate the Rules of Professional Conduct if engaged in by a lawyer in violation of Rule 5.3(c);
- (d) By presenting to his clients the paralegal invoices that falsely reflected a \$100 hourly rate, Burford engaged in conduct involving misrepresentation in violation of Rule 8.4(c);
- (e) By labeling costs associated with his advertising as costs related to “class notice,” Burford engaged in misrepresentation in violation of Rule 8.4(c); and
- (f) By inflating the amount he charged the Vioxx clients for costs and expenses in order to circumvent the court’s 24% cap on individual attorney’s fees, Burford knowingly disobeyed an obligation to a tribunal in violation of Rule 3.4(c) and intentionally prejudiced his clients during the representation in violation of Rule 8.4(g).

Based upon the foregoing Findings of Fact and Conclusions of Law, and the additional evidence regarding discipline 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 of fact in paragraphs 1 through 27 above are reincorporated as if fully set forth herein.
2. Burford presented uncontroverted evidence of good character and reputation in the form of testimony from a number of professional colleagues who have known Burford for many years. These witnesses indicated that any act of dishonesty by Burford would be an aberration from his usual course of conduct.
3. Burford has been licensed to practice law in North Carolina for more than thirty years and has no prior disciplinary offenses.
4. Burford’s Vioxx clients were inexperienced with the legal system and many lacked understanding of the process and terminology. Most of the Vioxx clients did not question the basis for the costs assessed by Burford because they relied upon him to protect their interests.
5. Some of Burford’s clients indicated that due to their experience with Mr. Burford, they will be less trusting of attorneys in the future.

6. Burford was notified of the State Bar's grievance investigation regarding his assessment of costs to the Vioxx clients in December 2009. Burford continued to charge clients inflated amounts for litigation costs in connection with the Vioxx settlements he received after receiving notice of the grievance.

7. Burford acted for his own benefit and to the detriment of his clients when he decided to charge the clients a clearly excessive amount for litigation costs. However, when it became clear that there was a dispute regarding his entitlement to the amounts charged for costs, Burford retained the disputed funds in his trust account rather than disbursing the funds to himself. As a result, Burford only actually collected the amount assessed for costs and expenses from one of the Vioxx clients.

8. Burford was forthcoming in his testimony before the hearing panel and expressed remorse for his misconduct.

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 considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w) of the Discipline and Disciplinary Rules of the North Carolina State Bar and concludes that the following factors are present in this case:

- (a) The intent of the defendant to commit acts where the harm or potential harm was foreseeable;
- (b) Circumstances reflecting the defendant's lack of trustworthiness in this instance, although the evidence indicates this was an aberration from the defendant's usual course of conduct;
- (c) Elevation of the defendant's own interests above the interests of his clients;
- (d) Negative impact of defendant's actions on clients' perception of the profession;
- (e) Acts of misrepresentation;
- (f) Absence of prior disciplinary offenses;
- (g) Selfish motive;
- (h) Timely good faith efforts to rectify the consequences of his misconduct;
- (i) A pattern of misconduct and multiple offenses related to the Vioxx cases;

- (j) Full and free disclosure to the hearing panel and cooperative attitude toward the proceedings;
- (k) Remorse;
- (l) Proof of good character and reputation;
- (m) Vulnerability of the victims;
- (n) Experience in the practice of law;
- (o) As an additional factor pertinent to the consideration of the discipline to be imposed, the panel found that the course of conduct that violated the Rules continued even after the defendant received notice of the State Bar's grievance investigation.

2. The hearing panel has considered admonition, reprimand, and censure as potential discipline but finds that admonition, reprimand, or censure would not be sufficient discipline because of the gravity of the harm to the profession and the potential harm to Defendant's clients in the present case. Furthermore, the panel finds that any sanction less than suspension would fail to acknowledge the seriousness of the offenses committed by Defendant, would not adequately protect the public, and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State.

3. A significant factor in determining the appropriate discipline in this case was the fact that Defendant maintained in his trust account almost all of the amounts he assessed to the Vioxx clients for costs and expenses. The fact that Defendant maintained these funds in trust was an act of good faith that significantly ameliorated the resulting harm to the clients. The facts of this case would have warranted considerably more serious discipline if the funds had not been safeguarded and therefore were not available for refund to the clients.

4. In light of all the relevant facts and circumstances, the hearing panel finds and concludes that the public will be adequately protected by suspension of Defendant's license, stayed for a period of time with conditions imposed upon Defendant designed to ensure protection of the public and continued compliance with the Rules of Professional Conduct.

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

ORDER OF DISCIPLINE

1. Defendant's license to practice law in the State of North Carolina is hereby suspended for two years.

2. The period of suspension is stayed for five years upon Defendant's compliance with the following conditions:

- (a) Within 90 days from the entry of this order, Defendant shall disburse from his trust account all remaining settlement proceeds he received in connection with the Vioxx case. The disbursements must comply with the following parameters:
- i. Defendant has already disbursed to himself the 24% contingent fee to which he was entitled for each Vioxx client's case. In addition to those fees, he is entitled to reimbursement for the actual out of pocket costs set forth in paragraphs (ii) and (iii).
 - ii. Defendant is entitled to reimbursement of \$110.00 from each client for filing fees;
 - iii. Defendant is entitled to reimbursement for the following actual expenses he incurred for the common benefit of the Vioxx clients: (a) \$17,697.00 in copying/scanning costs; (b) \$3,500.00 in expert witness fees; and (c) \$115,308.04 for paralegal services.
 - iv. The common benefit expenses described in paragraph (iii) shall be allocated among the Vioxx clients pro rata based upon the relative amounts of their settlements.
 - v. All funds related to the Vioxx clients remaining in the trust account after deduction of the actual expenses in paragraphs (ii) and (iii) shall be refunded to the Vioxx clients. The amounts refunded shall be calculated using the pro rata allocation of common benefit costs described in paragraph (iv).
 - vi. Prior to disbursing the remaining Vioxx settlement proceeds from his trust account, Defendant shall confer with the Office of Counsel and obtain the State Bar's consent to the proposed disbursement amounts.
- (b) If Defendant represents any client in a mass tort action during the period of the stay, he must associate co-counsel with experience in mass tort litigation;
- (c) Defendant shall complete six (6) hours of accredited continuing legal education in the area of trust account management by 31 December 2013. These six hours are in addition to the standard continuing legal education requirements contained in 27 N.C.A.C. 1D § .1518;
- (d) Defendant shall pay all Membership dues and Client Security Fund assessments and comply with all Continuing Legal Education requirements on a timely basis;
- (e) 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. Defendant shall also accept all certified mail from the North Carolina State Bar and respond to all letters of notice and requests for information from the North Carolina State Bar by the deadlines stated in the

communication or within fifteen (15) days of receipt of such communication, whichever is later;

- (f) 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; and
- (g) Defendant shall pay all costs of this proceeding as assessed by the Secretary within 30 days of service of the statement of costs on him.

3. If Defendant fails to comply with any one or more of the conditions stated in Paragraph 2 above, then the stay of the suspension of his law license may be lifted as provided in 27 N.C.A.C. 1B § .0114(x) of the North Carolina State Bar Discipline and Disability Rules. If the stay granted herein is lifted or the suspension of Defendant's license is activated for any reason, before a subsequent stay of the suspension can be entered Defendant must show by clear, cogent, and convincing evidence that he has complied with each of the conditions referenced in Paragraph 2.

4. The administrative fees and costs of this action, including deposition costs, are taxed to Defendant. Defendant must pay the costs of this action within 30 days of service upon him of the statement of costs by the Secretary.

5. The Disciplinary Hearing Commission will retain jurisdiction of this matter pursuant to 27 N.C.A.C. 1B § .0114(x) of the North Carolina State Bar Discipline and Disability Rules throughout the period of the stayed suspension.

Signed by the Chair with the consent of the other hearing panel members, this the 05 day of January, 2012.



Sharon B. Alexander, Chair
Disciplinary Hearing Panel