

28139

NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
06 DHC 2

The North Carolina State Bar,)
Plaintiff,)
v.)
Bounthani Vongxay,)
Defendant.)

**FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER
OF DISCIPLINE BY CONSENT**

This matter came on to be heard and was heard before a Hearing Committee of the Disciplinary Hearing Commission composed of the Chair, Carlyn G. Poole, Tommy W. Jarrett, and R. Mitchel Tyler. The Plaintiff was represented by William N. Farrell, Deputy Counsel. Defendant was represented by Alan M. Schneider. Both parties stipulate and agree to the findings of fact and conclusions of law recited herein and to the order of discipline imposed. Based upon the consent of the parties, the Hearing Committee hereby enters the following.

Findings of Fact

1. The 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. The Defendant, Bounthani Vongxay (hereinafter "Vongxay"), was admitted to the North Carolina State Bar on 24 August 2001, 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 State of North Carolina State Bar and the laws of the State of North Carolina.

3. During all of the periods hereto, Vongxay was actively engaged in the private practice of law in Charlotte, North Carolina.

4. During all of the periods hereto, Vongxay maintained a personal injury trust account and a real estate trust account at Wachovia Bank.

5. On or about May 7, 2004, Vongxay conducted a real estate closing for Tim McAuley (hereinafter "McAuley"), the buyer/borrower, and Jeffrey Allan Griffin and Tammy R. Griffin (hereinafter "Griffins"), the sellers. The subject real estate is known as 1628 Dendy Lane, Pineville, North Carolina.

6. At the time of the closing there was a prior deed of trust on the property in the favor of Wilshire Credit Corporation. As part of the closing this deed of trust was to be paid off such that the new lender, Service First Mortgage, would have a first lien on the property.

7. As closing attorney, Vongxay had duties and responsibilities with respect to each of the parties to the transaction, including the buyer/borrower, sellers and lenders.

8. As part of this real estate closing, Vongxay prepared a HUD-1 settlement statement showing the receipt and disbursement of the funds received from the buyer/borrower and the lender, for the closing. By law, HUD-1 settlement statements are supposed to show an accurate accounting of the receipt and disbursement of funds at a real estate closing. Vongxay was identified as the settlement agent for the closing on the transaction for 1628

Dendy Lane, Pineville, North Carolina on the HUD-1. As settlement agent, Vongxay was responsible for collection of all funds required to be paid by or on behalf of the buyer/borrower and payment of all disbursements to or on behalf of the parties shown on the HUD form for the transaction.

9. Vongxay was required to deposit all funds received for this real estate closing into his trust account, and disburse the funds in accordance with the HUD-1 from his trust account.

10. The HUD settlement statement prepared by Vongxay was not a true and accurate account of the transaction and Vongxay did not cause the funds to be disbursed in accordance with the HUD-1 settlement, in that Vongxay listed \$2,284.00 disbursed to his law office for various charges when in fact this was not the case.

11. The HUD-1 settlement statement indicates a gross amount due from the borrower in the amount of \$79,543.74.

12. Vongxay's disbursement summary/balance sheet from his office shows total incoming funds of \$77,943.00 and total disbursements of \$80,502.60.

13. As part of the sellers' (Griffins) agreement with Wilshire Credit Corporation for a reduced loan pay-off, Wilshire Credit Corporation's instructions to Vongxay required that the Griffins receive no funds at closing and that any excess funds would be applied to what was owed to Wilshire.

14. Vongxay prepared a preliminary HUD-1 showing that the sellers (Griffins) were to receive \$1,500 - \$1,800.00 proceeds from the sale and notified the buyer that there were proceeds to the sellers.

15. After being told by the buyer (McAuley) that the sellers (Griffins) could not receive any proceeds, Vongxay prepared another HUD-1, showing that the sellers would not receive

any proceeds. Vongxay accomplished this by inflating fees, including his attorneys fees, shown on the HUD-1 and offsetting it with a "seller credit" to the buyer, thereby misrepresenting to Wilshire Credit Corporation that there were no additional proceeds which could be paid to them.

16. Vongxay submitted the HUD-1 to Service First Mortgage knowing that it was not true and accurate, including but not limited to the fact that he showed \$2,284.00 going to his office for various charges even though Vongxay did not receive these funds.

17. Vongxay opened his law practice in October 2001 and deposited \$2,000.00 to open a real estate trust account and deposited another \$2,000.00 to open a personal injury trust account.

18. During the period January 1, 2004 through September 30, 2004, Vongxay did not reconcile his real estate trust account or his personal injury trust account.

19. During the period from November 2003 through September 30, 2004, Vongxay failed to keep a ledger containing a record of the receipts and disbursements for his clients Ki Hong Nam (hereinafter "Nam") and Hee Suk Chon Seo (hereinafter "Seo") showing the current balance of funds held in the trust account for them. Seo and Nam had each paid Vongxay \$20,000 for their respective representation. These fees were deposited into Vongxay's personal injury trust account.

20. As a result of his failure to keep records of the receipts and disbursements for clients with funds in the personal injury trust account, Vongxay withdrew excess funds from the personal injury trust account.

21. During the period of January 1, 2004 through December 31, 2004, Vongxay made deposits into his personal injury trust account which did not identify the source of the funds and did not name the person to whom the funds belonged.

22. At the end of December 2004, there was a shortage of client funds in the personal injury trust account in the amount of \$3,898.52.

23. At the end of December 2004, there was a shortage of client funds in the real estate trust account in the amount of \$1,993.19.

24. Vongxay did not misappropriate client funds for his own use.

Based upon the foregoing Findings of Fact, the Hearing Committee hereby enters the following:

CONCLUSIONS OF LAW

- 1) All parties are properly before the Hearing Committee and the committee has jurisdiction over Bounthani Vongxay and the subject matter of this proceeding. By agreeing and consenting to their order of discipline, Vongxay has waived any and all defects in the service of the Summons and Complaint and in the Notice of Hearing.
- 2) Vongxay's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. General Statute §84-28(b)(2) in that the conduct violated the Revised Rules of Professional Conduct in effect at the time of the conduct as follows:
 - a) By preparing and signing the HUD-1 settlement statement that falsely misrepresented receipt of funds and/or falsely represented the disbursement of funds for the transaction, Vongxay engaged in conduct

involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

b) By inflating his Title Charges fees shown on the HUD-1 and offsetting this with a "seller credit" to the buyer to avoid any net proceeds, Vongxay misrepresented to the prior lender that there were no additional proceeds from the sale to be paid to it, thereby engaging in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);

c) By failing to maintain bank receipts or deposit slips listing the source of all funds deposited in the personal injury trust account and failing to name the client to whom the funds belong, Vongxay failed to maintain records in violation of Rule 1.15-3(a)(1);

d) By failing to maintain a ledger containing a record of receipts and disbursements for Nam and Seo and showing their current balances of funds held for them in the personal injury trust account, Vongxay failed to maintain a ledger in violation of Rule 1.15-3(a)(5);

e) By failing to reconcile his real estate and personal injury trust accounts quarterly, Vongxay failed to balance his individual client balances shown on the client ledger and reconcile them with the current bank balance for the trust account as a whole in violation of Rule 1.15-3(c);

f) By failing to maintain sufficient funds in his real estate trust account and his personal injury trust account at all times after receipt of the

clients' funds, by failing to protect the integrity of those funds, and by disbursing funds from his trust account on behalf of clients using funds received on behalf of other clients, Vongxay failed to properly maintain or disburse trust funds in violation of Rule 1.15-2(a), improperly disbursed trust funds on behalf of a client to the funds in violation of Rule 1.15-2(m), used entrusted property for the benefit of a party other than the legal or beneficial owner of the funds in violation of Rule 1.15-2(j).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing, Committee enters the following:

Findings Regarding Discipline

1. Vongxay's misconduct is aggravated by the following factors:
 - a. Multiple offenses.
 - b. Multiple violations of the Rules.
2. Vongxay's misconduct is mitigated by the following facts:
 - a. Absence of prior disciplinary record.
 - b. Cooperative attitude toward proceeding and acknowledgement of misconduct.
 - c. Inexperience in the practice of law.
3. Vongxay's conduct caused harm to Wilshire Credit Corporation and to the standing of the legal profession.
4. Vongxay's failure to reconcile his trust account posed a significant threat of harm to his clients and if repeated poses significant potential harm to future clients.

5. An Order of Discipline less than an active suspension would not sufficiently protect the public in this case because of the misrepresentations and the nature and extent of the trust account violations. Vongxay had fiduciary duties for those clients with funds in his trust account and an entry of any order imposing lesser discipline than suspension would fail to acknowledge the seriousness of the offenses he has committed and send the wrong message to the attorney and the public regarding the conduct expected of members of the Bar. The appropriate sanction in this case to protect the public, on the facts unique to this case, is suspension of Vongxay's license for a period of time.

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

Order of Discipline

1. Vongxay's license to practice law in the State of North Carolina is hereby suspended for three years, effective thirty days after service of this Order of Discipline on the Defendant.
2. Vongxay shall submit his license and membership card to the Secretary of the North Carolina State Bar no later than 30 days following service of this order upon Defendant.
3. Vongxay shall comply with the wind down provisions contained in 27 N.C. Admin Code Chapter 1, Subchapter B, § .0124(b), the North Carolina State Bar Discipline & Disability Rules. Vongxay shall file an affidavit with the Secretary of the North Carolina State Bar within 10 days of the effective date of this Order of Discipline certifying he has complied with the wind down rule.

4. After serving one year of the active suspension of his license, Vongxay may apply for a stay of the balance of the suspension upon filing a motion with the Disciplinary Hearing Commission in the matter at least thirty days before any proposed effective date of the stay and demonstrating the following by clear, cogent, and convincing evidence:

- a. That Vongxay has satisfactorily completed a law office trust account management course approved by the Office of Counsel of the North Carolina State Bar at his own expense and has paid the costs thereof.
- b. That Vongxay has satisfactorily cooperated with the Office of Counsel to identify and appropriately disburse the balance of the funds still in Defendant's trust account.
- c. That he has kept the North Carolina State Bar Membership Department advised of his current business and home address.
- d. That he has responded to all communications from the North Carolina State Bar within 30 days of receipt or by the deadline stated in the communication, whichever is sooner.
- e. That he has not violated the Revised Rules of Professional Conduct or the laws of the United States or any state during his suspension.
- f. That he properly wound down his law practice and complied with the terms of 27 N.C. Admin. Code Chapter 1 Subchapter B, §.0124 of the State Bar Discipline & Disability Rules.

- g. That he has paid all Membership dues and Client Security Fund assessments and complied with all Continuing Legal Education (CLE) requirements on a timely basis as if still in practice during the suspension.
 - h. That he paid the costs of this proceeding with 90 days of service of the statement of costs upon him
 - i. That if he proposes to practice as a solo practitioner if the stay is granted, he has contracted with a licensed a member of the North Carolina State Bar who is in good standing who practices law in county where he proposes to practice, and who has been approved by the North Carolina State Bar, to serve as his monitor and that the selected monitor has agreed to so serve and agreed to the requirements set forth in paragraph 5 of this Order. Vongxay will pay the cost if any, charged by the monitor for this supervision. If the monitor requires a fee to be paid in advance or a retainer to be paid at the inception of this monitoring relationship, Vongxay will have paid that prior to submitting his petition for a stay or for reinstatement.
5. If Vongxay successfully seeks a stay of the suspension of his law license, such stay will continue in force only as long as he complies with the following additional conditions:
- a. That he meets once a month with his monitoring attorney to whom he will report a status of all current trust accounts, cooperate with the mentor attorney and provide any information the mentor attorney deems reasonably necessary to ensure that Vongxay is handling all trust accounts appropriately and in

compliance with Revised Rules of Professional Conduct. Vongxay will be solely responsible for any cost of this arrangement.

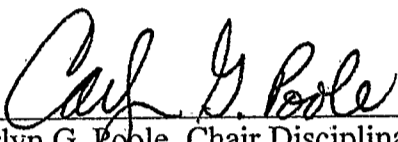
- b. That the monitoring attorney submits written quarterly reports to the Office of Counsel of the State Bar by the 10th of each month confirming that Vongxay is complying with Paragraph 5(a).
 - c. That Vongxay will provide written quarterly reconciliation of all trust accounts to which he has access to the Office of Counsel of the North Carolina State Bar within that (30) days of the last day of each calendar quarter. (i.e. reports are due no later than April 30, July 30, October 30 and January 30).
 - d. That Vongxay will permit the North Carolina State Bar to conduct random audits of his trust account, and any other business and personal bank accounts to which he has access necessary to complete such audits, during the period of the stay.
6. If an order staying any period of this suspension is entered and Vongxay fails to comply with any one or more of the conditions referenced in Paragraph 5, 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 and Disability Rules.
 7. If Vongxay does not seek a stay of the active portion of the suspension of his law license or if some part of the suspension is stayed and thereafter the stay is revoked, Vongxay must comply with the conditions set out in paragraphs 4(a) – (i) above before seeking reinstatement of his license to practice law.
 8. 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.

9. Vongxay will pay all costs of this proceeding permitted by law within ninety (90) days of service of notice of the amount of costs as assessed by the Secretary.

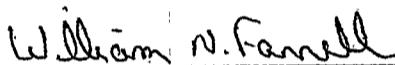
Signed by the undersigned Chair with full knowledge and consent of the other members of the Hearing Committee.

This is the 13 day of April, 2006.




Carlyn G. Poole, Chair Disciplinary
Hearing Committee

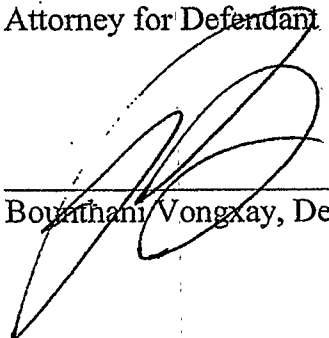
Consented To:



William N. Farrell, Deputy Counsel
Attorney for Plaintiff



Alan M. Schneider
Attorney for Defendant



Bounthani Vongxay, Defendant