

STATE OF NORTH CAROLINA  
WAKE COUNTY

BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
11 DHC 3

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

ROBERT J. BURFORD, Attorney,

Defendant

ORDER LIFTING STAY &  
ACTIVATING SUSPENSION

Defendant, Robert J. Burford, was ordered to appear and show cause why the stay of the suspension imposed by the Order of Discipline entered in this case on 5 January 2012 should not be lifted and the suspension activated. This matter was heard on 20 September 2012 by a Hearing Panel of the Disciplinary Hearing Commission composed of Sharon B. Alexander, Chair, William M. Claytor, and Percy L. Taylor pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(z). The Plaintiff was represented by Carmen Hoyme Bannon. The Defendant represented himself. Based upon the documents of record in this file, the evidence presented at the hearing, and the existing record in this disciplinary case, the Hearing Panel hereby finds by the greater weight of the evidence the following:

#### FINDINGS OF FACT

1. On 5 January 2012, the DHC entered an Order of Discipline finding that Defendant, Robert J. Burford, violated the Rules of Professional Conduct in his representation of thirteen clients in litigation related to the drug Vioxx (these clients are collectively referred to as "the Vioxx clients"). The Order of Discipline (hereafter "the Order") was served on Defendant the same day it was entered.

2. The Order suspended Burford's license to practice law for two years and stayed the suspension for five years on condition that Burford comply with the requirements specified in the order.

3. The first condition of the stay set forth in the Order was that Burford was required, within ninety days after entry of the Order, to refund to the Vioxx clients funds that he had withheld from their settlements on the pretext that they were owed to Burford as reimbursement for litigation costs. (The Vioxx settlement proceeds which remained in Burford's trust account at the time the Order was entered, totaling approximately \$378,000.00, are referred to hereafter as "the Vioxx funds").

4. The Order provided that Burford was only entitled to reimbursement for the four types of costs specifically identified therein, and the remainder of the Vioxx funds (totaling approximately \$271,000.00) was to be refunded to the Vioxx clients.

5. An additional condition of the stay of Burford's suspension set forth in the Order was: "Defendant shall not violate any state or federal laws or any provisions of the Rules of Professional Conduct during the period of stayed suspension."

6. On 9 February 2012, when Burford's counsel and the State Bar had agreed upon the specific amounts to be disbursed to each Vioxx client and to Burford, Burford disbursed to himself \$106,990.04 of the Vioxx funds. He did not issue any refunds to the Vioxx clients at that time.

7. Burford did not issue any refunds to the Vioxx clients within 90 days of the entry of the Order of Discipline.

8. On 1 May 2012, Burford petitioned the Court of Appeals to stay the effectiveness of the Order pending appellate review of this case. On 14 May 2012, the Court of Appeals entered an order which provided that the Order would be stayed on the condition that Burford post a supersedeas bond "in an amount sufficient to protect the clients' funds held by defendant" within 20 days.

9. Burford did not post the supersedeas bond as required by the Court of Appeals, nor did he issue refunds to the Vioxx clients when the 20-day window for posting a bond elapsed.

10. On 15 June 2012, the Court of Appeals entered an order dissolving the stay.

11. When the stay was dissolved, Burford did not immediately issue refunds to the Vioxx clients.

12. On 25 June 2012, the State Bar initiated this show cause proceeding by filing a motion alleging that Burford had not complied with the condition of the stay requiring him to refund the Vioxx funds to the Vioxx clients.

13. On 26 June 2012, Burford mailed refund checks to the Vioxx clients. Each client's check was enclosed in a cover letter from Burford (hereafter "the cover letter"). Burford testified that at the time he mailed the checks and cover letters, he believed he still represented the Vioxx clients.

14. The cover letter informed each client that, "depending on the appellate court's rulings [regarding this DHC case] you may be required to refund all or part of the amount now being issued to you. To protect against this risk that you may have to make a future full or partial refund of the amount now being issued to you, you might want to consider holding this amount in savings (or some other safe place) until all appeals are finally resolved."

15. On 5 July 2012, Burford filed a response to the Motion for Order to Show Cause, contending that he complied with the refund-related condition of the stay by making the required payments to his clients.

16. As evidence that he had complied with the condition regarding refunds to the Vioxx clients, Burford offered as attachments copies of checks payable to the clients and postmarked envelopes addressed to the clients.

17. The attachments to Burford's response did not include the cover letters that had accompanied the checks. Burford's filed response made no reference to the cover letter, creating the impression that he had refunded the money without condition or qualification.

18. On 6 July 2012, the State Bar filed a reply to Burford's response, alleging that Burford's acts of (a) sending the cover letter, and (b) failing to disclose the cover letter to the DHC, constituted violations of the Rules of Professional Conduct. This filing requested that Burford be additionally required to show cause why his suspension should not be activated for violation of the Rules during the period of the stay.

#### 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. The State Bar abandoned its allegation that Burford violated Rule 3.1 by making statements in the cover letter that lacked basis in fact and/or law. The Bar did not meet its burden with respect to the allegation that the cover letter contained misrepresentations in violation of Rule 8.4(c).

3. By sending the cover letter that purported to give each Vioxx client legal advice about whether s/he might eventually have to return the enclosed money to Burford, and recommended to the client that s/he should preserve the money in a "safe place," Burford gave legal advice to a person whose interests were directly adverse to his own.

4. For purposes of the findings and conclusions herein, the Hearing Panel accepts as true the premise that the Vioxx clients were Burford's current clients at the time he sent the letter.

5. At the time he sent the cover letter, Burford's interest in keeping and/or recouping the Vioxx funds was directly adverse to the Vioxx clients' interest in receiving those funds. Burford could not reasonably have believed that he could render competent and diligent representation to the Vioxx clients under those circumstances. Moreover, Burford offered no evidence tending to show that the Vioxx clients gave informed consent to this inherent conflict of interest.

6. There are circumstances where failure to make a disclosure to the tribunal is the equivalent of an affirmative misrepresentation. For example, when the omission of a material fact tends to mislead the tribunal regarding a disputed issue.

7. The fact that Burford sent the cover letter with the refunds to the Vioxx clients was a material fact for purposes of determining whether Burford complied with the conditions of the Order of Discipline.

8. Defendant, Robert J. Burford, has failed to comply with the following conditions of the stay of his suspension contained in the Order of Discipline previously entered in this case:

- a. Burford failed to timely and unconditionally disburse the Vioxx funds to the Vioxx clients; and
- b. Burford violated the Rules of Professional Conduct during the period of stayed suspension in that:
  - i. Burford's ability to represent the Vioxx clients was materially limited by his personal interest in asserting entitlement to the Vioxx funds. By providing legal advice and opinions to the Vioxx clients despite this conflict of interest, Burford violated Rule 1.7(a); and
  - ii. By omitting any reference to the cover letter and by failing to include the cover letter among the attachments to the response he filed in the DHC, Burford misled this tribunal by implying that he had returned the Vioxx clients' money without condition or qualification, as contemplated by the Order. This omission of a material fact was equivalent to an affirmative misrepresentation to the tribunal in violation of Rule 3.3(a).

9. The condition in the Order of Discipline regarding disbursements to clients was intended to make the Vioxx clients whole and to provide prompt closure. By suggesting to the clients that they might be legally required to return the money to him, Burford undermined these central purposes of the Order.

10. Burford's failure to timely disburse the Vioxx funds caused actual significant harm to the Vioxx clients, in that they were deprived of their money for additional time.

11. Burford's cover letter caused at least potential significant harm to the Vioxx clients in the form of uncertainty and confusion about whether they might be legally obligated to give the money back.

12. By engaging in the misconduct underlying the Order of Discipline in this case, Burford elevated his own interests above the interests of his clients. Burford's conduct since the entry of the Order demonstrates that he continues to prioritize his own interests over his clients' interests.

Based upon the foregoing findings of fact and conclusions of law, the Hearing Panel enters the following:

#### ORDER

1. The stay of the two year suspension imposed in the Order of Discipline previously entered in this case is hereby lifted and the suspension is hereby activated.

This activation is effective and Defendant's license will be suspended 30 days from the date this order is served upon him.

2. Defendant shall surrender 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.

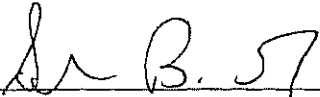
3. Defendant shall wind down his practice in compliance with all provisions of 27 NCAC 1B § .0124 of the North Carolina State Bar Discipline & Disability Rules.

4. At the conclusion of the two year active suspension of his license, Defendant may apply to be reinstated to the practice of law by filing a petition with the Secretary of the North Carolina State Bar. In order to seek reinstatement to active status, Defendant must provide in his application for reinstatement clear, cogent, and convincing evidence of the following:

- (a) Compliance with all provisions of 27 NCAC 1B § .0124 within 30 days after service of this order upon him;
- (b) Compliance with the general provisions for reinstatement listed in 27 N.C.A.C. 1B § .0125(b); and
- (c) Compliance with the conditions set forth in paragraph 2 on pages 7-8 of the Order of Discipline previously entered in this case.

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

This the 10 day of October 2012.

  
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Sharon B. Alexander, Chair  
Disciplinary Hearing Panel