

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
12 DHC 13

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

DAN L. MERRELL, Attorney,

Defendant.

ORDER OF DISCIPLINE

THIS MATTER was heard March 20-22 and July 11-12, 2013 before a hearing panel of the Disciplinary Hearing Commission composed of Sharon Alexander, Chair, Harriett Smalls and Patti Head. Plaintiff, the North Carolina State Bar, was represented by Carmen H. Bannon and G. Patrick Murphy. Defendant appeared at the hearing and was represented by Phillip Hayes. Based on the Complaint, Answer, stipulations, exhibits and evidence admitted during 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, Dan L. Merrell ("Merrell"), was admitted to the North Carolina State Bar in 1979 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, Merrell was engaged in the practice of law in the State of North Carolina and maintained a law office in Kitty Hawk, Dare County, North Carolina.
4. Merrell was properly served with process and received due notice of the hearing in this matter.
5. Michael K. Lam ("Lam") is a long-time associate of Merrell's.

6. In late 2005, Lam solicited Thomas and James Gordon ("the Gordons"), residents of the State of Maryland, to participate in an investment project to buy and develop certain land in Tyrrell County, North Carolina ("the Tyrrell County land").

7. Lam did not have the funds to finance the project (initially called Blue Water Cove) which would involve the development of a residential community on the Alligator River in the Albemarle Sound with 105 half-acre lots, a marina with 132 boat slips, and recreational facilities.

8. With the assistance of John Bollech ("Bollech"), Lam put together a package of information including a "term sheet" for Blue Water Cove which contained, among other information, a description of the project with overall cost and profit projections, and specifically stated that the cost of acquiring the land for the project was \$1.5 million. The package, including the term sheet, was presented to the Gordons.

9. Lam advised the Gordons that he needed to quickly move ahead with the project because Lam had purchase contracts with the farmers who owned the Tyrrell County land and some of the contracts were either already expired or about to expire.

10. On December 20, 2005, Lam and Bollech met with Merrell at Merrell's office to discuss the Blue Water Cove project. Lam provided Merrell information about the project including that he wanted to form an LLC for the project and that the Gordons had committed to fund \$2,450,000 toward the project with \$1,500,000 designated for purchasing the land.

11. The Gordons were represented in the project by Steven Nemeroff ("Nemeroff") who practices law in Bethesda, Maryland. Between late December 2005 and February 12, 2006, Merrell communicated with Nemeroff and lawyers for Bollech in the drafting of a memorandum of understanding amongst the individuals and entities who would have an ownership interest in the project.

12. On December 29, 2005, Merrell filed articles of organization to form a limited liability company named Deepwater Development Company, LLC ("Deepwater"). Lam was the sole member of Deepwater.

13. On January 13, 2006, Lam, the Gordons, John Bollech, Bernard Brooks and Bill Reidy all executed a memorandum of understanding related to the development of the project. The memorandum of understanding contained provisions prohibiting self-dealing by Lam or any other member to the agreement. The agreement contemplated that a company would be formed to carry on the business of the project. The Gordons would loan \$1.5 million to that company to acquire the land.

14. On January 18, 2006, Merrell drafted articles of organization to form a limited liability company named Development Company of Columbia, LLC ("DCC"). The articles established Lam as the organizer and registered agent. Lam's home address was used for the registered office of DCC. The articles were filed with the North Carolina Secretary of State's Office on January 23, 2006.

15. DCC was created to carry on the business of purchasing and developing the Tyrrell County property.

16. On January 18, 2006, Thomas and James Gordon each wired \$750,000 (total \$1.5 million) to Merrell's general trust account maintained at the Bank of Currituck. The \$1.5 million was recorded in Merrell's trust account ledger under the name of Lam even though the \$1.5 million belonged to the Gordons and was delivered to Merrell to purchase the Tyrrell County land for the project. The Gordons expected Merrell to hold their funds in trust to be disbursed to pay for DCC's purchase of the land at closing.

17. On January 19, 2006, Merrell wrote a note to an associate in Merrell's law office, Bill Stott, advising Stott that Merrell knew Lam intended to buy a parcel of the Tyrrell County land for \$360,000 and turn around and sell it to DCC for \$650,000. Merrell further advised Stott he knew Lam also wanted to buy two (2) parcels from other owners of the Tyrrell County land using investor money but only convey one (1) parcel to DCC with Lam and Bollech keeping 80+ acres free and clear. Merrell advised Stott he saw the potential for criminal and civil liability in both instances and directed Stott to draft a letter to Lam and a disclosure letter.

18. On or about January 23, 2006, Merrell sent a letter to Lam noting that Merrell understood Lam was considering a transaction or series of transactions involving the acquisition of real estate to be developed and sold by Lam or an entity in which Lam and an investment group would be members, shareholders or partners. Merrell advised Lam that if the transactions Lam was planning took place, they could constitute fraud and violate state and federal law. Merrell instructed Lam that Merrell would not participate in further discussions about Lam's contemplated transactions unless full and complete disclosure was made to Lam's investors and/or potential partners and 100% of them acquiesce and gave their full support to the proposed arrangements. Merrell advised Lam his office would prepare disclosure documents for execution after Merrell verified that full disclosure had been made to all parties.

19. Despite the language of Merrell's letter of January 23, 2006, Merrell did not draft a disclosure letter. Lam told Merrell he (Lam) had made full disclosure to all interested parties, including the Gordons, of the fact that Lam planned to or had acquired the real estate for less than the \$1.5 million price at which it was being sold to DCC. Merrell believed Lam.

20. Merrell did not insist on any written documentation of Lam's purported disclosure to all interested parties, including the Gordons, of the fact that Lam planned to or had acquired the real estate for less than it was being sold to DCC. Lam refused to have Merrell prepare or obtain written documentation of the disclosure.

21. In December 2005 Merrell had notice of the terms of the contracts for Lam's acquisition of the Tyrrell County land from the original landowners. As of the end of December 2005, Merrell knew the content of the term sheet which Lam provided to the Gordons stating that the cost of acquisition of the Tyrrell County land would be \$1.5 million.

22. Lam did not make full disclosure to the Gordons that he (Lam) was going to buy the Tyrrell County land through Deepwater and sell it to DCC at a considerable profit to Lam and Deepwater.

23. On January 24, 2006, without the Gordons' knowledge or permission, Merrell transferred their \$1.5 million to a certificate of deposit account ("CD") at Bank of America.

24. The CD was opened in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC," not in the name of the Gordons or as trustee for the Gordons, who were the owners of the funds.

25. The address given for the account was Lam's address, not the Gordons' or Merrell's.

26. Merrell did not ensure that information pertaining to the CD account would be sent to him, and did not ensure that the address on the account reflected Merrell's address.

27. Merrell used DCC and the tax identification number of DCC on account documents to open the CD account even though DCC did not have any ownership interest in the \$1.5 million. Merrell did not ensure that there was a signature card which limited signatory authority on the account to him. Merrell knew that withdrawals were made from the CD account without any requirement that Merrell sign anything.

28. Between January 13, 2006, when the memorandum of understanding was executed, and March 1, 2006, Merrell represented Lam in the purchase, through Deepwater, of the Tyrrell County land from the owners of the parcels, and in negotiation of the terms and conditions of the operating agreement for DCC.

29. The operating agreement of DCC was signed by the members of DCC on or about March 1, 2006. By its terms, the operating agreement was effective February 1, 2006. The operating agreement provided that:

- a. Lam was manager of DCC and, through Deepwater, also a member of DCC.
- b. The term "Property" under the agreement was defined as four separate parcels or interests as follows: one tract owned by Bernard Sykes; a second tract owned by the Estate of Harry L. Davis; a part interest in a third tract, referred to as Ludford Landing, owned by Bobby Pinner and others; and, an easement in an existing canal on property adjoining the Tyrrell County land later referred to as the Taylor tract.
- c. Lam, as manager of DCC, was prohibited from self-dealing.

30. Funds were withdrawn from the Bank of America CD account referenced in paragraph 23 above without the Gordons' knowledge, permission, or approval on January 27, 2006, February 14, 2006, and March 1, 2006. The March 1, 2006 withdrawal closed out the account.

31. These withdrawals were for Lam's benefit, including covering Lam's costs to acquire the Tyrrell County land that he later resold at a higher price to DCC.

32. Merrell was not aware of funds being wrongfully withdrawn from the CD without his authorization until sometime in September 2006.

33. On February 3, 2006, Merrell was closing attorney for Lam in Lam's purchase, through Deepwater, of the Sykes tract for \$360,000.

34. On February 9, 2006, Merrell was closing attorney for Lam in Lam's purchase, through Deepwater, of a tract of land adjacent to the Tyrrell County land known as the Taylor tract for \$267,500.

35. On February 14, 2006, Merrell was closing attorney for Lam in Lam's purchase, through Deepwater, of the Pinner interest in the Ludford Landing tract of the Tyrrell County land for \$16,666.

36. On February 15, 2006, Merrell was closing attorney for Lam in Lam's purchase, through Deepwater, of the Cahoon interest in the Ludford Landing tract of the Tyrrell County land for \$50,000.

37. Also on February 15, 2006, Merrell was closing attorney for Lam in Lam's purchase, through Deepwater, of the Estate of Harry L. Davis tract of the Tyrrell County land for \$300,000.

38. On February 16, 2006, Merrell wrote the Gordons' attorney, Nemeroff, on behalf of Lam to confirm that the Gordons had agreed to provide an additional \$295,000 for DCC to purchase a license and easement for use of the existing canal on the Taylor tract. Merrell knew that the \$295,000 price of the license and easement was more than Deepwater had paid for the entire 86-acre Taylor tract.

39. As closing attorney for the series of transaction in February 2006, Merrell knew that Lam, through his company Deepwater, purchased the Tyrrell County land for a total of \$726,666 from the individuals who owned the properties.

40. On March 2, 2006, Merrell was the closing attorney for the transaction in which DCC bought the Tyrrell County land and an interest in the Taylor tract for \$1,745,000.00 from Deepwater.

41. Merrell represented DCC in the March 2, 2006 purchase transaction.

42. Merrell represented Lam in the March 2, 2006 purchase transaction.

43. Merrell represented Deepwater in the March 2, 2006 purchase transaction.

44. DCC's purchase on March 2, 2006 resulted in a profit of about \$1,000,000 going to Lam/Deepwater at the expense of the other members of DCC, including the Gordons.

45. Merrell represented DCC at this closing despite knowing of the self-dealing by Lam at the expense of the other members of DCC.

46. The manner in which Merrell set up the CD account at Bank of America with the transfer of the Gordons' \$1.5 million and Merrell's representation of both parties at the closing on March 2, 2006 was an aberration from the normal conduct of his practice and not in keeping with the ordinary course of his business.

47. Merrell was aware that the members of DCC, including Lam, signed a memorandum on January 13, 2006 and a DCC operating agreement on March 1, 2006 that included express terms prohibiting self-dealing.

48. Merrell did not provide the Gordons a written accounting of the receipts and disbursements of the \$1.5 million upon the complete disbursement of the funds, nor did he account for the interest earned on the \$1.5 million while in the Bank of America CD account.

49. The Rules of Professional Conduct do not allow a lawyer to represent both a purchaser and a seller in a commercial real estate transaction unless both parties give informed consent, confirmed in writing, to the potential conflict of interest inherent therein.

50. Even if such dual representation were allowed, the facts of the March 2, 2006 transaction created a conflict of interest that went beyond the potential conflict inherent in an ordinary real estate transaction, and one attorney could not have diligently and competently represented both buyer and seller.

51. A lawyer must determine whether there is any obstacle to the loyal representation of both parties in circumstances where a lawyer undertakes to represent both parties in a transaction. By February 15, 2006, Merrell was on notice of information that he had learned through his representation of Lam that would have been important and vital information to all the principals or members of DCC on March 2, 2006. Merrell was not at liberty to disclose that information to all the principals or members of DCC due to his representation of Lam and Deepwater.

52. As a result of the actions of Merrell and the self-dealing of Lam and Deepwater noted above, the Gordons suffered a monetary loss in excess of one million dollars, and DCC was injured, among other ways, by paying a higher price for the Tyrrell County land than could have been obtained by buying directly from the land owners.

Based on the foregoing findings of fact, the Hearing Panel makes the following conclusions of law:

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 did not establish by clear, cogent, and convincing evidence that Merrell's conduct was in violation of Rule 1.15-2(b) or Rule 8.4(a) and 8.4(c).

3. 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 Defendant violated the Rules of Professional Conduct in effect at the time of his actions as follows:

- a. By moving the Gordons' funds from defendant's trust account to a certificate of deposit account at Bank of America in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC" with Lam's mailing address on the account, using DCC's tax identification number, failing to ensure access to the account was limited to himself, and failing to provide an accounting, along with other factors noted above, Merrell failed to safeguard and hold in trust the Gordons' entrusted funds in violation of Rule 1.15-2(a).
- b. By representing both Deepwater and DCC at the closing on March 2, 2006 when Defendant's representation of DCC was materially limited by his responsibilities to Deepwater and he had not obtained the written informed consent of the clients to the dual representation, Defendant engaged in a conflict of interest in violation of Rule 1.7(a)

Based upon the foregoing Findings of Fact and Conclusions of Law, and the additional evidence regarding discipline admitted at the hearing, the Hearing Panel also finds by clear, cogent, and convincing evidence the following:

FINDINGS OF FACT REGARDING DISCIPLINE

1. In December 2005 and early January 2006, Defendant knew that Lam was contemplating a transaction or series of transactions that potentially violated state and federal law. Defendant also knew of the self-dealing prohibitions in the memorandum of understanding and the operating agreement of DCC but proceeded to represent Deepwater and DCC in a transaction where a patent conflict of interest existed and harm or potential for harm to Lam, Deepwater, DCC and DCC's members was foreseeable.

2. Defendant's handling of the Gordons' \$1.5 million in violation of the rules for safekeeping of entrusted funds demonstrates Defendant's intent to commit acts which put entrusted funds at risk and where the harm or potential harm to the entrusted property was foreseeable.

3. The circumstances of Defendant's conflict of interest and handling of the Gordons' \$1.5 million contained in the findings of fact above demonstrate and reflect Defendant's lack of honesty, trustworthiness, and integrity.

4. The circumstances of Defendant's conflict of interest and handling of the Gordons' \$1.5 million resulted in subsequent civil litigation involving numerous parties, numerous depositions and had a negative impact on Defendant's client's and the public's perception of the legal profession.

5. The circumstances of Defendant's conflict of interest and handling of the Gordons' \$1.5 million contained in the findings of fact above had a negative effect on third parties to include the other members of DCC as the corrupted development project was a failure.

6. Defendant has refused to acknowledge the wrongfulness of his conduct.
7. Defendant enjoys a reputation for good character in his community.
8. Defendant has substantial experience in the practice of law: He was licensed to practice law in 1979 and has practiced law in various legal associations in Dare and adjacent counties since that time.

Based upon the Findings of Fact, Conclusions of Law and Findings of Fact 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. In addition, the Hearing Panel has considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(3) and determines the following factors are applicable in this matter:

- a. Defendant's refusal to acknowledge the wrongful nature of his conduct;
- b. The good character and reputation of defendant in his community; and
- c. Defendant has substantial experience in the practice of law.

2. The Hearing Panel has carefully considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1) and determines the following factors which warrant suspension of Defendant's license are applicable to this matter:

- a. The intent of the defendant to commit acts where the harm or potential harm is foreseeable;
- b. Circumstances reflecting the defendant's lack of honesty, trustworthiness or integrity;
- c. The negative impact of defendant's actions on his clients' or the public's perception of the legal profession; and
- d. The negative effect of defendant's conduct on third parties.

3. The Hearing Panel has also considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(2) and concludes no factors are present in this case that would warrant disbarment.

4. The Hearing Panel has considered written discipline but finds that an admonition, reprimand, or censure would not be sufficient discipline because of the risk of potential harm to clients and the public as demonstrated by the facts in the present case. Furthermore, the panel finds that any sanction less than a suspension would fail to acknowledge the seriousness of the offenses committed by Defendant and would send the wrong message to attorneys and the public

regarding the conduct expected of members of the Bar in this State. The Hearing Panel finds, however, that the public will be adequately protected by a stayed suspension.

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

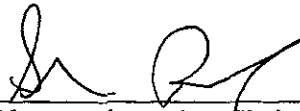
ORDER OF DISCIPLINE

The license to practice law in North Carolina of Defendant, Dan L. Merrell, is hereby suspended for two years, effective 30 days from service of this order upon him. The suspension is stayed for a period of two years, so long as Defendant complies with the following conditions:

- a. Defendant will respond to all letters of notice and requests for information from the N.C. State Bar by the deadline stated in the communication.
- b. Defendant will advise the Bar in writing of all address changes within 10 days of the change.
- c. Defendant will timely comply with his State Bar continuing legal education requirements and will pay all fees and costs assessed by the applicable deadline.
- d. Defendant will not violate the laws of any state or of the United States.
- e. Defendant will not violate any provision of the Rules of Professional Conduct.
- f. All costs and administrative fees of this action are taxed to Defendant. Defendant will pay the costs and administrative fees of this action within 12 months of service upon him by the Secretary of the statement of costs and administrative fees.
- g. The Defendant will permit the State Bar to conduct random audits of all accounts over which he has signatory authority and into which client or fiduciary funds have been deposited. The Defendant shall provide the State Bar with all documents requested by the State Bar within 5 business days and shall be solely responsible for the expense of complying with the random audit request. The State Bar shall not conduct more than 2 random audits in any 12 month period.
- h. The Defendant will not represent both sides in any real estate transaction during the two year stayed suspension.
- i. During each year of this stayed suspension, Defendant will take two (2) additional hours of CLE in the area of ethics. These two hours each year are in addition to the continuing legal education requirements set out in 27 N.C.A.C. 1D § .1518. Documentation of completion of the additional ethics CLE hours required by this order shall be provided to the Office of Counsel of the State Bar no later than 30 days from the date the additional CLE hours are completed.

- j. If Defendant fails to comply with any one or more of the conditions stated 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 is lifted and the suspension of Defendant's license is activated for any reason, before a subsequent stay of the suspension can be entered or before Defendant's reinstatement to the active practice of law in North Carolina Defendant must show by clear, cogent, and convincing evidence that he has complied with the terms of 27 N.C. Admin. Code 1B § .0124 of the State Bar Discipline & Disability Rules and that he has complied with any conditions for reinstatement included in any order lifting the stay of his suspension.
- k. 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 suspension.

Signed by the Chair with the consent of the other hearing panel members, this the 02
day of December, 2013.



Sharon Alexander, Chair
Disciplinary Hearing Panel