

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
JAY H. ZIMMERMAN**

VSB DOCKET NO.: 07-021-2047

ORDER

This matter came before the Virginia State Bar Disciplinary Board ("Board") on September 26, 2008, upon certification from the Second District Subcommittee. A duly convened panel of the Board consisting of William H. Monroe, Jr., First Vice Chair; Martha JP McQuade; Paul M. Black; Russell W. Updike and Jody D. Katz, lay member, heard the matter.

The Virginia State Bar was represented by Edward L. Davis, Bar Counsel. The Respondent was present and represented by Franklin A. Swartz. Jennifer L. Hairfield, court reporter with Chandler & Halasz, Post Office Box 9349, Richmond, Virginia 23227, (804) 730-1222, after having been duly sworn, recorded the proceedings.

All legal notices of the date, time and place of hearing were timely sent by the Clerk of the Disciplinary System in the manner prescribed by law.

The Chair polled the members of the Board as to whether any of them were conscious of any personal or financial interest or bias which would preclude them from fairly hearing this matter and serving on the panel, to which inquiry each member responded in the negative.

The Board admitted, without objection, VSB Exhibits 1-8. The Board dismissed, upon Motion of Bar Counsel, the alleged violations of Rules 1.1, 1.15(a)(1) & (2), and 8.4(b).

I. STIPULATED STATEMENT OF FACTS & RULE VIOLATIONS

At the commencement of the hearing, the Respondent, his counsel and Bar

Counsel, stipulated to the following facts and rule violations:

1. During all times relevant hereto, the Respondent, Jay H. Zimmerman, was an attorney licensed to practice law in the Commonwealth of Virginia.
2. On or about July 20, 2006, Frank Everett and his son, Billy Everett, submitted a \$200,000 purchase offer for a home located at 1432 Braden Crescent, Norfolk, Virginia, owned by James W. Browne and his two brothers, George W. Browne and Walter F. Browne.
3. The purchase offer indicated that closing should occur on or before August 20, 2006, at the office of the Respondent, Jay H. Zimmerman, counsel for the purchasers.
4. The Respondent had served as counsel for the purchasers in the past, having conducted approximately twenty-five real estate transactions for them.
5. The sellers also had individual counsel, Timothy K. Palmer.
6. The purchasers being unable to bring enough cash to the closing, the Respondent arranged a delay to October 23, 2006.
7. On October 23, 2006, the closing took place as scheduled with the Respondent serving as settlement agent. Mr. Palmer was not present for the closing.
8. When the sellers arrived, however, the Respondent advised them that the purchasers could not bring \$200,000 to the closing, but were offering to buy the property for \$186,000 instead.
9. The sellers rejected that offer, at which time the Respondent telephoned his client, purchaser Frank Everett, who offered \$188,000.
10. The sellers reluctantly accepted the offer of \$188,000 and the Respondent conducted the closing.
11. At the closing on October 23, 2006, the sellers endorsed the settlement statement and departed. After the sellers departed, the purchasers delivered the Respondent a certified check in the amount of \$183,000. The Respondent deposited that check into his real estate escrow account that afternoon, although it was after 2:00 p.m. Therefore, the deposit was not credited until the next day, October 24, 2006.

12. The afternoon of October 23, 2006, the sellers returned to the office of the Respondent who issued checks from his real estate trust account to each of the sellers, James, Walter and George Browne in the amounts of \$60,745.01, \$60,745.02 and \$60,745.01, respectively, representing their shares of the \$182,235.04 sales proceeds after deducting closing costs and a \$5,000 earnest money deposit. It was after 5:00 p.m. when the Respondent delivered the checks.
13. The purchasers, however, never returned to the Respondent's office to endorse the HUD-1, and the Respondent never endorsed it either.
14. The \$183,000 check from the purchasers represented the sales price of \$188,000 less the \$5,000 earnest money deposit.
15. The purchasers paid the Respondent some time thereafter (June or July 2007) their share of the remaining settlement costs.
16. Although he conducted the closing on October 23, 2006, and issued the sales proceeds to the sellers at that time, the Respondent did not record the deed.
17. Because he did not record the deed, the property remained titled in the name of the sellers, resulting in the City of Norfolk repeatedly dunning the sellers for unpaid real estate taxes on the property.
18. The Respondent would say that he recalls telling either the sellers or their attorney that he would not record the deed until a later date when the purchasers delivered the rest of the money, that he knew the purchasers and was not concerned that they would do so. The sellers, on the other hand, would say that the Respondent did not inform them of his intent not to record their deed, nor was there ever any agreement with the sellers to hold the deed in escrow or not to record it.
19. When confronted about the problem, the Respondent said that he could not record the deed because he had not received the recording fees from his clients.
20. The Respondent directed the sellers to send him the tax bills and he would send them on to the purchasers. Accordingly, they sent him the first tax bill received after the closing, and the Respondent sent it on to the purchasers but they did not pay it.

21. Therefore, the sellers sent no more tax bills to the Respondent, and on the advice of counsel, did not pay them, and continued to be dunned for payment by the City of Norfolk.
22. Although the purchasers had paid for the property, they did not maintain it, causing the City of Norfolk to issue a notice to the sellers to cut the grass or be subjected to fines and jail.
23. The sellers communicated this new dilemma to the Respondent.
24. Finally, on May 24, 2007, seven months after the closing, the Respondent paid the recording fees and recorded the deed, removing the sellers' names from the records.
25. Mitigating factors recognized by the American Bar Association include the Respondent's total lack of a prior disciplinary record in forty-two years of practice, his cooperation with the Bar throughout the investigation of this matter, and his lack of a dishonest or selfish motive.
26. Currently, the Respondent is in the process of closing down his practice in anticipation of retirement and is accepting no new clients.

II. NATURE OF MISCONDUCT

The parties agree that such conduct by Jay H. Zimmerman constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

By conducting a real estate closing before the funds necessary to complete the transaction had been credited to his real estate trust account; drawing checks against his real estate trust account before the necessary funds had been credited to the account; issuing checks to the sellers in the amounts due to them before settlement had been completed, and then failing to record the deed, causing the sellers to remain owners of record and be dunned for unpaid property taxes, and threatened with fines and incarceration; breaching his fiduciary obligations as settlement agent by disbursing funds in anticipation of completing the settlement when he never received necessary funds to do so; and then breaching his obligation to record the deed as required by the

Wet Settlement Act, (Section 6.1-2.13 of the Code of Virginia (1950) as Amended); and, in summary, conducting the settlement when his duty to the parties was to delay settlement until the necessary funds were available rather than cause damage to the sellers; the Respondent was in violation of the following Rules of Professional Conduct:

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.15 Safekeeping Property

- (c) A lawyer shall:

promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

III. SANCTION

Following the finding of misconduct as stipulated by Bar Counsel, Respondent, and Respondent's counsel, the Board received from the parties such evidence and statements as they chose to present in mitigation and/or aggravation of the misconduct. The Bar reiterated that the Respondent had no prior disciplinary offenses; no dishonest or selfish motive; had acknowledged the wrongful nature of his conduct; did not engage in any illegal conduct and, most significantly, was extremely cooperative with the disciplinary investigation. Both the Bar and Respondent's counsel spoke of Respondent's good reputation in the legal community based upon his 42 years of practice in the Commonwealth. The Board notes that Respondent, in his brief statements, accepted personal responsibility and did not attempt to minimize the severity of his

misconduct. Upon learning that his actions had caused inconvenience and potential harm to the sellers involved in the real estate transaction, Respondent promptly took steps to ameliorate the effects of his misconduct, and it appears that the sellers did not suffer any financial loss or unremediated harm.

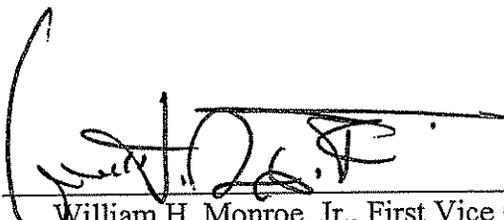
It is therefore **ORDERED** that the Respondent, Jay H. Zimmerman, be issued a **PUBLIC REPRIMAND** effective September 26, 2008.

It is further **ORDERED** that pursuant to Part Six, § IV, ¶ 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further **ORDERED** that the Clerk of the Disciplinary System shall mail an attested copy of this Order to the Respondent, Jay H. Zimmerman, at 1224 Lawrence Grey Drive, Virginia Beach, Virginia 23455, by certified mail to his last address of record with the Virginia State Bar, by regular mail to Respondent's counsel, Franklin A. Swartz, at Rabinowitz, Swartz, Taliaferro, Swartz & Goodove, PC, Town Point Center, 150 Boush Street, Suite 800, Norfolk, Virginia 23510, and hand-delivered to Edward L. Davis, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

ENTERED this 10th day of October, 2008.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: 
William H. Monroe, Jr., First Vice Chair