

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

**IN THE MATTER OF
MICHAEL J. BIDDINGER**

VS B Docket No. 03-060-1348

ORDER

This matter came before the Virginia State Bar Disciplinary Board upon certification from the Sixth District Committee. On December 16, 2004, a proposed Agreed Disposition was presented by telephone conference call to a duly convened Disciplinary Board panel consisting of Thaddeus T. Crump, lay member, and attorneys Robert E. Eicher, Joseph R. Lassiter, Jr., William H. Monroe, Jr. and James L. Banks, Jr., presiding. Michael J. Biddinger, participated *pro se*, and Barbara Ann Williams, Bar Counsel, represented the Virginia State Bar.

Mr. Banks polled the panel members to determine whether any member had a personal or financial interest in this matter that might affect or reasonably be perceived to affect his or her ability to be impartial in this proceeding. Each member, including Mr. Banks, verified that he had no conflicts.

Having considered the proposed Agreed Disposition and the representations of counsel, the Disciplinary Board accepted the Agreed Disposition and finds by clear and convincing evidence as follows:

I. Findings of Fact

1. Mr. Biddinger was admitted to the practice of law in the Commonwealth of Virginia on October 11, 1995, and is currently active and in good standing to practice law in Virginia.

2. On or about September 23, 2002, Mr. Biddinger served as settlement agent in a residential refinancing for Marcus N. and Kathleen V. Pomeroy.

3. Mr. Biddinger conducted the Pomeroy closing, and Jeanette C. Battenfield, his nonlawyer assistant, was responsible for the paperwork associated with the closing.
4. The settlement statement specified that Mr. Biddinger was to disburse the refinancing proceeds by September 27, 2002.
5. Mr. Biddinger was to use the refinancing proceeds to pay-off a loan from the Virginia Housing and Development Authority ("VHDA") in the amount of \$155,952 and an equity line of credit from National Bank of Fredericksburg in the amount of \$35,924.
6. Mr. Biddinger was to pay State Farm \$566.00 for a hazard insurance policy.
7. Mr. Biddinger failed to disburse the refinancing proceeds in a timely manner.
8. On October 7, 2002, Mrs. Pomeroy contacted Mr. Biddinger's office after receiving a notice from VHDA requiring proof of payment of homeowners insurance; Ms. Battenfield advised her to disregard it.
9. On October 21, 2002, Mrs. Pomeroy contacted Mr. Biddinger's office after receiving a late payment notice from VHDA; Ms. Battenfield told her that the loan pay-off checks must have been lost.
10. Ms. Battenfield subsequently mailed checks to the Virginia Housing and Development Authority and the National Bank of Fredericksburg, but she misdirected the two checks, so that each entity received a check made payable to the other entity.
11. The two loans were not paid-off until November 1, 2002.
12. The premium for the Pomeroy's hazard insurance policy, which State Farm was to issue, was due on October 19, 2002.
13. On November 1, 2002, Ms. Battenfield issued a check for \$566.00 to State Farm, which had billed the Pomeroy's for the hazard insurance policy.
14. After Mrs. Pomeroy filed a bar complaint, Mr. Biddinger discovered that the Pomeroy's deed of trust had never been recorded.
15. By letter dated February 24, 2003, Mr. Biddinger provided the Pomeroy's a replacement copy of the deed of trust.

16. Mr. Biddinger told the bar investigator that because UPS has no tracking information on the two, original loan pay-off checks, the checks must have been stolen from an unsecured UPS box near Mr. Biddinger's office where Ms. Battenfield had deposited them.

17. Mr. Biddinger maintains that State Farm might have lost the check for the Pomeroy's homeowners insurance policy.

18. Mr. Biddinger contends that Ms. Battenfield assured him that the Pomeroy's deed of trust had been recorded when in fact it had not.

19. Mr. Biddinger claims that he cannot produce the trust account records he maintained when the Pomeroy closing took place because an electrical problem caused his computer to crash and new computers he acquired were not compatible with the software his office previously used, thereby rendering it impossible to retrieve the old data.

20. Theresa A. Ramond, Mr. Biddinger's friend and business partner in Virginia Title & Escrow, helped Mr. Biddinger reconstruct his trust account records by reviewing his real estate files so the data could be re-entered.

21. Ms. Raymond discovered some mortgages that had never been recorded and found some unfiled, original deeds of trust in Mr. Biddinger's office.

22. Title searchers commissioned by Ms. Raymond discovered five to ten instances in Spotsylvania and Caroline counties where deeds of trust in closings handled by Mr. Biddinger had been submitted but never recorded.

23. A partial review of Mr. Biddinger's closing files revealed 25 instances in which deeds of trust were recorded more than one month after closing and three cases in which deeds of trust had never been recorded.

24. According to Mr. Biddinger, Ms. Battenfield reconciled his trust accounts.

25. Mr. Biddinger admits that following the computer malfunction, Ms. Battenfield's termination in December 2002, and his efforts to follow up on delayed recordings, there was a three month period where he did not reconcile his trust account records.

B. Findings of Misconduct

The foregoing findings of fact give rise to the following findings of misconduct:

RULE 1.3 Diligence

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

client.

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RULE 1.15 Safekeeping Property

(c) A lawyer shall:

* * *

(4) 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.

* * *

(e) **Record-Keeping Requirements, Required Books and Records.** As a minimum requirement every lawyer engaged in the private practice of law in Virginia, hereinafter called "lawyer," shall maintain or cause to be maintained, on a current basis, books and records which establish compliance with Rule 1.15(a) and (c). Whether a lawyer or law firm maintains computerized records or a manual accounting system, such system must produce the records and information required by this Rule.

(1) In the case of funds held in an escrow account subject to this Rule, the required books and records include:

- (i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;
- (ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and non-escrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;
- (iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained.

The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

- (iv) reconciliations and supporting records required under this Rule;
- (v) the records required under this paragraph shall be preserved for at least five full calendar years following the termination of the fiduciary relationship.

(f) Required Escrow Accounting Procedures. The following minimum escrow accounting procedures are applicable to all escrow accounts subject to Rule 1.15(a) and (c) by lawyers practicing in Virginia.

* * *

(4) Periodic trial balance. A regular periodic trial balance of the subsidiary ledger shall be made at least quarter annually, within 30 days after the close of the period and shall show the escrow account balance of the client or other person at the end of each period.

- (i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and
- (ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(5) Reconciliations.

- (i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;
- (ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;
- (iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.

(6) Receipts and disbursements explained. The purpose of all receipts and

disbursements of escrow funds reported in the escrow journals and subsidiary ledgers shall be fully explained and supported by adequate records.

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

* * *

- (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

III. Disposition

The Disciplinary Board, Respondent and Bar Counsel agree that a Public Reprimand with Terms is an appropriate disposition of this matter. Mr. Biddinger's full compliance with the following terms and conditions is the predicate for this agreed disposition:

1. For a period of five years ending on December 31, 2009, Mr. Biddinger shall not register himself as an attorney settlement agent under the Consumer Real Estate Settlement Protection Act or represent any client in connection with the sale, lease, exchange or purchase of real estate.
2. By December 31, 2004, Mr. Biddinger shall arrange for Virginia State Bar investigator Oren M. Powell to conduct a random audit of Mr. Biddinger's non-CRESPA trust account records and to present a written report of his findings with respect to whether Mr. Biddinger's non-CRESPA trust account procedures and records comply with Rule of Professional Conduct 1.15 to Bar Counsel no later than March 31, 2005.

3. By December 31, 2004, Mr. Biddinger shall formulate and submit to Bar Counsel a written office policy providing for supervision of non-lawyer assistants in his law office in a manner that complies with Rule of Professional Conduct 5.3.

Mr. Biddinger's failure to comply with any one or more of the agreed terms and conditions, including a finding by the Virginia State Bar investigator that his non-CRESPA trust account record keeping procedures or records do not comply with the Rule of Professional Conduct 1:15, will result in the imposition of the alternate sanction of an eighteen month suspension.

If the Virginia State Bar discovers that Mr. Biddinger has failed to comply with any of the agreed terms or conditions, imposition of the alternate sanction shall not require a hearing on the underlying charges of Misconduct. In that event, the Virginia State Bar shall issue and serve upon Mr. Biddinger a Notice of Hearing to Show Cause why the alternative sanction should not be imposed. The sole factual issue will be whether Mr. Biddinger has violated one or more of the terms of the Public Reprimand without legal justification or excuse.

The court reporter for the hearing on the Agreed Disposition was Tracy Stroh of Chandler and Halasz Court Reporters, P.O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

Pursuant to Part Six, Section IV, Paragraph 13.A.8.c.(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

It is **ORDERED** that a copy teste of this Order shall be mailed by certified mail, return receipt requested, to the Respondent, at his last address of record with the Virginia State Bar, Michael J. Biddinger, Esq., P.C., P.O. Box 2332, Woodbridge, Virginia

22195-2332, and hand delivered to Bar Counsel at the Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this _____ day of _____, 2004.

VIRGINIA STATE BAR DISCIPLINARY BOARD

By: _____
James L. Banks, Jr., Chair Designate