

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

IN THE MATTER OF

Case No. CL06-2010

CHARLES LOWENBERG PINCUS, III

ORDER

This matter came to be heard on September 11, 2006, upon an Agreed Disposition between the Virginia State Bar, the Respondent, Charles Lowenberg Pincus, III, and his counsel, David Ross Rosenfeld, Esquire.

A Three-Judge Court impaneled by the Supreme Court of Virginia on July 14, 2006, and on August 31, 2006, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to Section 54.1-3935 of the Code of Virginia (1950) as Amended, consisting of the Honorable Robert G. O'Hara, Jr., Retired Judge of the Sixth Judicial Circuit, the Honorable Joseph A. Leafe, Retired Judge of the Fourth Judicial Circuit, and the Honorable Pamela S. Baskervill, Judge of the Eleventh Judicial Circuit, designated Chief Judge, considered the matter by telephone conference. The Virginia State Bar appeared through its Assistant Bar Counsel, Edward L. Davis. The Respondent, Charles Lowenberg Pincus, III, appeared through his counsel, David Ross Rosenfeld, Esquire.

Upon due deliberation, it is the decision of the Three-Judge Court to accept the Agreed Disposition. The Stipulations of Fact, Disciplinary Rule Violations, and Disposition agreed to by the Virginia State Bar, the Respondent, and his counsel, are incorporated herein as follows:

I. STIPULATIONS OF FACT

1. During all times relevant hereto, the Respondent, Charles Lowenberg Pincus, III, was an attorney licensed to practice law in the Commonwealth of Virginia.

Complainants: Vickie L. Johnston

2. The complainant, Vickie L. Johnston, is a real estate investor.
3. In February 2003, Ms. Johnston decided to purchase a vacation rental home in Virginia Beach, Virginia as an investment.
4. She and another investor bought the home with a \$400,000 mortgage, dated February 19, 2003, that was later sold to Chase Manhattan Mortgage Corporation.
5. The closing took place in February 2003.
6. Ms. Johnston commenced improvements to the property, including the addition of a swimming pool and interior remodeling.
7. An acquaintance, Burton L. Johnson, expressed an interest in buying the home.
8. Ms. Johnston, her partner, and Mr. Johnson reached an agreement for Mr. Johnson to buy the home.
9. Mr. Pincus agreed to serve as settlement agent. After several delays, closing was scheduled for July 1, 2003.
10. Mr. Pincus prepared the closing documents and settlement sheet, but was unable to obtain a payoff statement from Chase Manhattan, the mortgage lender.
11. In the absence of a payoff statement from the lender, and utilizing a figure provided by the sellers and accepted by the purchaser, the purchaser and the sellers agreed to have Mr. Pincus calculate the closing based upon a mortgage payoff figure of \$399,404.42 on the settlement statement.
12. The sellers further neglected to advise Mr. Pincus that there was a significant pre-payment penalty associated with the payoff of the loan although the prepayment provision was in the loan agreement that they executed.
13. At the closing on July 1, 2003, Mr. Pincus disbursed funds to the buyer and sellers, who understood that based upon the information provided by Ms. Johnston, Mr. Pincus would be able to disburse sufficient funds to retire the existing mortgage.
14. Mr. Pincus did not timely retire the existing mortgage because he had not been provided with nor did he obtain the correct information concerning the mortgage balance, and the interest and penalties due.

15. Mr. Pincus' real estate trust account ledger shows that he received \$456,646.58 from Burton Johnson (representing funds he borrowed from SunTrust Mortgage) by wire transfer on July 3, 2003. Of that of that amount, Mr. Pincus disbursed \$19,340 to Ms. Johnston on July 1, 2003 (two days before the funds were on deposit), \$10,000 to Burton Johnson on July 2, 2003 (one day before the funds were on deposit), \$10,000 more to Burton Johnson on July 11, 2003, and \$1,405 to Mr. Pincus for legal fees on July 11, 2003, which sum was comprised of \$600 paid by the purchaser, Burt Johnson, and \$660 paid by the complainant to reimburse Respondent for two bounced checks that complainant had previously given to Mr. Pincus to cover other legal services. Respondent also paid \$1,703 to Seaboard Title on July 10, 2003.

16. Mr. Pincus' trust account bank statements and cancelled checks confirm the above-referenced wire deposit and disbursements, totaling \$42,448.

17. These disbursements of excess loan proceeds to Johnson are not reflected on the settlement statement.

18. Therefore, after July 11, 2003, there should have been at least \$414,198.58 remaining on account for the Johnson closing in Pincus' real estate trust account. His trust account balance, however, was far below this amount on several occasions, sometimes in excess of \$100,000 because in an unrelated real estate closing, Mr. Pincus disbursed funds based upon the mistaken belief that the lender had wired funds into Mr. Pincus' real estate trust account when, in fact, the lender had not wired said funds.

19. On July 15, 2003, Mr. Pincus obtained the accurate payoff statement from Chase Manhattan, \$416,062.26.

20. Having received a wire deposit of \$456,646.58 from Mr. Johnson, and having disbursed \$42,448 of those funds already, Mr. Pincus did not have enough money to complete the closing.

21. Of the shortfall, \$8,653.75 represented unpaid interest dating from May 1, 2003, and a delinquent mortgage payment from June 1, 2003, the sellers having not remained current on the mortgage payments.

22. The other \$7,998 was a prepayment penalty imposed by the lender on the basis that the buyout constituted a refinance instead of a sale.

23. On August 22, 2003, with the prepayment penalty issue still unresolved, Mr. Pincus wired \$100,000 of the settlement funds to Chase Manhattan erroneously believing that \$100,000 was the most he could send without triggering a prepayment penalty under the terms of the mortgage.

24. On October 21, 2003, Mr. Pincus paid the rest of the funds that he held, \$309,596.85 to Chase Manhattan, leaving an unpaid balance of \$29,761.99 on the underlying mortgage. Mr. Pincus succeeded in having the lender waive the prepayment penalty.

25. In his initial response to the bar complaint, dated October 6, 2003, Mr. Pincus said that he had maintained \$411,356.58 on his client subsidiary ledger (representing the erroneous payoff amount plus closing costs that Johnson brought to closing), and attached his August and September 2003 trust account bank statements as purported proof.
26. The July 31, 2003 opening balance in his trust account, however, was only \$306,696.51, according to his bank statements. On August 22, 2003, it dropped to \$109,622.34, the day he sent the \$100,000 wire, according to his bank statements.
27. As noted above, the shortage in his real estate trust account was caused when Mr. Pincus completed an unrelated closing on July 10, 2004, by wiring \$170,000 to retire an existing mortgage on the erroneous belief that the purchaser's lender had wired the funds to his trust account.
28. There is no evidence that Mr. Pincus intentionally misused or misappropriated client funds.
29. Mr. Pincus' real estate trust account ledger balances are inconsistent with the bank statement balances; although the ledgers still reflect that he was out-of-trust in August-September 2003.
30. As a result of the mortgage not being paid off, the lender repeatedly dunned Ms. Johnston for payment and threatened foreclosure up until the mortgage was finally retired.
31. Subsequent to the events described above, Respondent has regularly utilized the services of a certified public accountant who, on no less than a monthly basis, oversees the management of Respondent's trust account, including all funds deposited into and disbursements from said trust account; there have been no further overdrafts in Respondent's trust accounts.
32. Subsequent to the events described above, Respondent has utilized the services of Janean Johnston, Esquire, a risk management consultant routinely utilized by the Virginia State Bar and regularly employed by attorneys in Virginia, who, on two separate occasions, performed an in-depth review of Respondent's office management practices and on each occasion reported that "Mr. Pincus is managing his law practice very efficiently and ethically."
33. Respondent is no longer CRESPA certified and is no longer performing real estate closings.

II. RULE VIOLATIONS

(Johnston Complaint)

The parties agree that the foregoing conduct gives rise to violations of the following Rules of Professional Conduct:

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or
- (2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

RULE 1.15 Safekeeping Property

- (c) A lawyer shall:
- (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and
 - (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.

04-021-1867

Complainant: VSB/Anonymous

I. STIPULATIONS OF FACT (continued)

34. Between March 31, 2003, and April 4, 2003, Mr. Pincus conducted three real estate closings during a time when he knew that his law license was summarily suspended.

35. In July 2004, Mr. Pincus consented to discipline by the Virginia State Bar for, *inter alia*, conducting two of these three real estate closings and the third real estate closing charged by the bar occurred during the exact same time period, which discipline included a 45 day suspension of Respondent's license and a CRESPA fine of \$2,000.

36. The Virginia State Bar discovered the closings in the present case after-the-fact.

II. RULE VIOLATIONS

(VSB/Anonymous Complaint)

The parties agree that the foregoing conduct gives rise to violations of the following Rules of Professional Conduct:

RULE 5.5 Unauthorized Practice Of Law

(a) A lawyer shall not:

- (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

04-021-2075

Complainant: Randy G. Maples and Rebecca L. Maples

I. STIPULATIONS OF FACT (continued)

37. On July 6, 2002, Rebecca L. Maples hired Mr. Pincus for a child custody matter, paid a fee of \$200, and executed a representation contract. (The parties executed the contract on July 6, 2002, although the body of the contract indicates that it was made on August 6, 2002.)

38. Mr. Pincus visited the court and obtained custody petition forms, but took no further action.

39. Mr. Pincus explained to the bar that he needed the father's address, but that Ms. Maples repeatedly failed to give it to him.

40. On February 4, 2003, Ms. Maples wrote to Mr. Pincus asking for a refund, and advising Mr. Pincus that she was terminating his services.

41. Mr. Pincus did not terminate his services as directed, saying that he contacted Ms. Maples by telephone to discuss the matter.

42. Ms. Maples said that she had no recollection of such a call.

43. A handwritten note in Mr. Pincus' file, dated April 11, 2003, reads "She will call to give you info on the children she wants to file custody on. I need kid's info, Dad's and Moms. See petition in the file." This is followed by the inscription, "She never called!"

44. By letter, dated September 12, 2003, Mr. Pincus wrote Ms. Maples to say that he had sent her a letter with an information request, but that he received no response. (There is no letter to this effect in Mr. Pincus' records.) The September 12 letter further asked her to contact him if she was interested in pursuing the case.

45. By letter, dated November 13, 2003, Ms. Maples replied, saying that she needed Mr. Pincus' help the year before, but that the father had moved out of state with the child since then, that she did not need his services, that she had hired another attorney, and that she wanted her money back.

46. On September 1, 2004, after the bar commenced an investigation, Mr. Pincus issued the refund by cashier's check.

II. RULE VIOLATIONS

(Maples Complaint)

The parties agree that the foregoing facts give rise to violations 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.

III. DISPOSITION

In accordance with the Agreed Disposition, it is the decision of this Court to **suspend the license of the Respondent, Charles Lowenberg Pincus, III, to practice law in the Commonwealth of Virginia for a period of one-year**, with execution of the law license suspension suspended for a period of one (1) year subject to the following terms and conditions:

1. The Respondent, Charles Lowenberg Pincus is placed on disciplinary probation for a period of one (1) year, said period to begin on September 11, 2006, the date that this Honorable Court approved the Agreed Disposition. Mr. Pincus will engage in no professional misconduct as defined by the Virginia Rules of Professional Conduct during such one-year probationary period. Any final determination of misconduct determined by any District Committee of the Virginia State Bar, the Disciplinary Board, or a three-judge court to have occurred during such period will be deemed a violation of the terms and conditions of this Agreed Disposition and will result in the imposition of the One-Year Suspension of the Respondent's license to practice law in the Commonwealth of Virginia. The One-Year Suspension will not be imposed while Mr. Pincus is appealing any adverse decision that might result in a probation violation.

2.

A. For a period of eighteen months beginning October 15, 2006, or such shorter period as Assistant Bar Counsel may deem appropriate:

1. Mr. Pincus will provide Assistant Bar Counsel or his designee cash receipts, cash disbursements and reconciliation reports for the preceding three months signed by Respondent and his bookkeeper for all escrow and CRESPA accounts and subsidiary ledgers therein to reflect reconciled balances. Said reports will be due October 15, 2006, January 15, 2007, April 15, 2007, July 15, 2007, October 30, January 15, 2008, and April 15, 2008;
2. Mr. Pincus agrees to allow an on-site inspection by Bar Counsel or his designee at his office of records of escrow accounts with 48 hours written prior notice to Mr. Pincus at his address of record. The scope and purpose of the inspection(s) is to insure compliance with Rule 1.15; and
3. Mr. Pincus shall remain in full compliance with Rule 1.15.

B. Mr. Pincus shall engage the services of law office management consultant Janean S. Johnston, 250 South Reynolds Street, #710, Alexandria, Virginia 22304-4421, (703) 567-0088 who shall no later than September 30, 2007, provide a written report to the Edward M. Davis, Assistant Bar Counsel, or his designee, detailing the results of her evaluation. It shall be sufficient if Ms. Johnston reports that Mr. Pincus is appropriately addressing his client responsibilities. Notwithstanding the reporting schedule set forth herein, should Ms. Johnston at any time determine that Mr. Pincus' law office management functions materially impair Mr. Pincus' ability to practice law in compliance with the Rules of Professional Conduct, and Mr. Pincus fails to cure any deficient law office

management functions to Ms. Johnston's satisfaction after being provided with a reasonable notice and opportunity to cure those deficient management functions by Ms. Johnston, she shall make immediate report to the Virginia State Bar of same. To implement the terms hereof, Mr. Pincus shall immediately provide Ms. Johnston with a copy of the Three-Judge Court's Order and execute such release as necessary to authorize and direct Ms. Johnston to furnish the Virginia State Bar with the information and reports referred to herein. The Virginia State Bar shall have access (by way of telephone conferences and/or written reports) to Ms. Johnston's findings. Mr. Pincus shall be obligated to pay when due Ms. Johnston's fees and costs for her services (including provision to the Bar of information concerning this matter). Mr. Pincus shall have discharged his obligations respecting the terms contained in this Term if Ms. Johnston's reports regarding Respondent confirm that each client matter is current, moving forward, and being attended to timely by the Respondent, and Respondent has remained in compliance with all of the terms contained in herein.

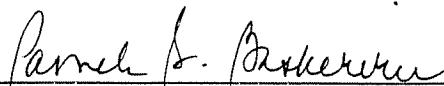
Upon satisfactory proof that the terms and conditions of this Agreed Disposition have been met, this matter shall be closed. Failure to comply with any of the foregoing terms and conditions will result in the imposition of the One-Year Suspension of the Respondent's license to practice law.

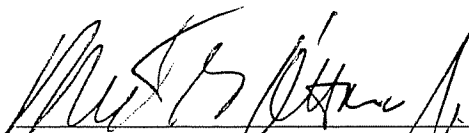
The imposition of the One-Year Suspension will not require a hearing before the Virginia State Bar Disciplinary Board or a three-judge court on the underlying charges of misconduct stipulated to in this Agreed Disposition if the Virginia State Bar discovers that the Respondent has violated any of the foregoing terms and conditions. Instead, the Virginia State Bar shall issue and serve upon the Respondent a Notice of Hearing to Show Cause why the alternate sanction should not be imposed. The sole factual issue will be whether the Respondent has violated the terms of this Agreed Disposition without legal justification or excuse. All issues concerning the Respondent's compliance with the terms of this Agreed Disposition shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

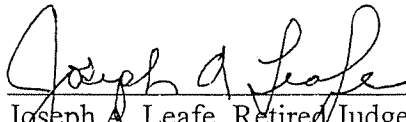
Pursuant to Part 6, Sec. IV, Para. 13. B.8 (c) of the Rules, the Clerk of the Disciplinary System shall assess costs.

The court reporter who transcribed these proceedings is Donna Chandler of Chandler and Halasz, Registered Professional Reporters, P. O. Box 9349, Richmond, Virginia 23227, (804) 730-1222.

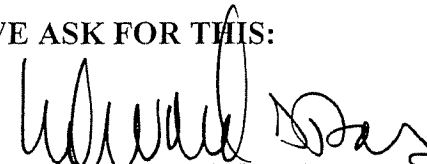
ENTERED THIS 29th DAY OF September, 2006
CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

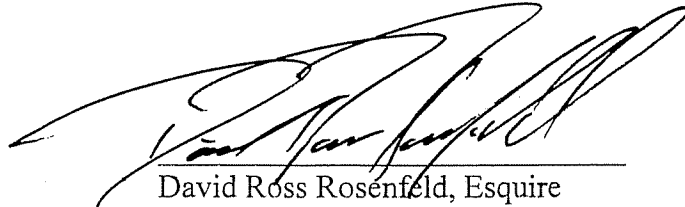

Pamela S. Baskerville, Chief Judge
Three-Judge Court


Robert G. O'Hara, Jr., Retired Judge
Three-Judge Court


Joseph A. Leafe, Retired Judge
Three-Judge Court

WE ASK FOR THIS:


Edward L. Davis, Assistant Bar Counsel
Virginia State Bar


David Ross Rosenfeld, Esquire
Respondent's Counsel