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STATE BAR COURT
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State Bar Court of California
Hearing Department
Los Angeles
ALTERNATIVE DISCIPLINE PROGRAM

PUBLIC MATTER

Counsel for the State Bar Charles A. Murray Deputy Trial Counsel 1149 S. Hill Street Los Angeles, CA 90015-2299 Bar # 146069	Case Number (s) 08-J-10456 and 09-O-11418	(for Court's use) FILED APR 05 2010 STATE BAR COURT CLERK'S OFFICE LOS ANGELES
In Pro Per Respondent David M. Van Sickle 11500 W. Olympic Blvd., Suite 400 Los Angeles, CA 90064 (818) 302-5761 Bar # 167401	Submitted to: **Program Judge** **STIPULATION RE FACTS AND CONCLUSIONS OF LAW** ☐ PREVIOUS STIPULATION REJECTED	
In the Matter Of: DAVID M. VAN SICKLE Bar # 167401 A Member of the State Bar of California (Respondent)		

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

(1) Respondent is a member of the State Bar of California, admitted December 13, 1993.

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition (to be attached separately) are rejected or changed by the Supreme Court. However, except as otherwise provided in rule 804.5(c) of the Rules of Procedure, if Respondent is not accepted into the Alternative Discipline Program, this stipulation will be rejected and will not be binding on the Respondent or the State Bar.

(3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated, except for Probation Revocation proceedings. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of 13 pages, excluding the order. PLUS 4 EXHIBITS.

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".

(6) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(7) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7 and will pay timely any disciplinary costs imposed in this proceeding.

B. Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.

(1) ☒ **Prior record of discipline** [see standard 1.2(f)]

(a) ☒ State Bar Court case # of prior case

(b) ☒ Date prior discipline effective

(c) ☒ Rules of Professional Conduct/ State Bar Act violations:

(d) ☒ Degree of prior discipline

(e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below:

(2) ☐ **Dishonesty:** Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

(3) ☐ **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

(4) ☒ **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.

SEE PAGE 11

(5) ☐ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

(6) ☐ **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.

(7) ☒ **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct. SEE page 11

(8) ☐ **No aggravating circumstances** are involved.

Additional aggravating circumstances:

(Do not write above this line.)

C. Mitigating Circumstances [see standard 1.2(e)]. Facts supporting mitigating circumstances are required.

(1) ☐ **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.

(2) ☐ **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.

(3) ☒ **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation ~~with the victims of his/her misconduct and~~ to the State Bar during disciplinary ~~investigation and~~ proceedings. See page 11.

(4) ☐ **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.

(5) ☐ **Restitution:** Respondent paid $ on in restitution to without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.

(7) ☐ **Good Faith:** Respondent acted in good faith.

(8) ☒ **Emotional/Physical Difficulties:** ~~At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.~~ See pages 11 & 12.

(9) ☒ **Severe Financial Stress:** ~~At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.~~ See pages 11 & 12.

(10) ☒ **Family Problems:** ~~At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.~~ See pages 11 & 12

(11) ☒ **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct. See page 12.

(12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ **No mitigating circumstances** are involved.

Additional mitigating circumstances: See page 12.

Respondent admits that the following facts are true and that he is culpable of violations of the specified Rules of Professional Conduct and provisions of the State Bar Act:

Case No. 08-J-10456

A. Facts:

1. On December 20, 2007, the Office of Lawyers Professional Responsibility for the State of Minnesota ("OLPR") and Respondent entered into a stipulation for the imposition of discipline against Respondent for ethical violations occurring in Minnesota and California while Respondent was admitted to practice law in those states (the "stipulation"). A certified copy of the stipulation is attached as Exhibit 1 and incorporated by reference.[1]

2. In the stipulation, Respondent agreed that OLPR could file a Petition for Disciplinary Action against Respondent regarding the violations in the Minnesota Supreme Court, identified as case number A07-2418 (the "petition"). Also in the stipulation, Respondent waived his right to answer the petition and unconditionally admitted the allegations of the petition. A certified copy of the petition filed in the Minnesota Supreme Court on December 27, 2007 is attached as Exhibit 2 and incorporated by reference. The facts regarding Respondent's violations are fully set forth in Exhibit 2 and are not restated here, but Respondent admitted in the stipulation that his conduct in Minnesota violated the Minnesota Rules of Professional Conduct (the "MRPC"), as follows:

a. Respondent filed lawsuits on behalf of his clients, the Willhites, that as found by the courts lacked a good faith basis in law or fact in violation of Rules 1.1, 3.1 and 8.4(d) of the Minnesota Rules of Professional Conduct (the "MRPC");[2]

b. Respondent failed to timely disburse to his client, Debra Garthe ("Garthe"), settlement funds that indisputably belonged to Garthe in violation of rule 1.15(b) of the MRPC, as that Rule read prior to October 1, 2005;[3]

c. Respondent commingled client and personal funds in his trust accounts in violation of Rules 1.15 (a) and (b) of the MPRC;[4]

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[1]Respondent's California violations were the subject of a prior discipline proceeding against Respondent, State Bar Court case number 99-O-12923, and resulted in the imposition of discipline against him in California.

[2]See First Count, Ex. 2, ¶¶ 1 - 28.

[3]See Second Count, Ex. 2, ¶¶ 29 - 42.

[4]See Third Count, Ex. 2, ¶¶ 43 - 47, and 88.

d. Respondent negligently misappropriated client funds from his trust account to pay his personal expenses and negligently misappropriated funds entrusted to him on behalf of his clients in violation of Rules 1.15 (a), (b) and (c) of the MRPC;[5]

e. Respondent failed to keep required trust account books and records in violation of Rule 1.15(h) of the MRPC, as interpreted by Lawyers Professional Responsibility Board Opinion No. 9 and Appendix 1 to the MRPC Maintenance of Books and Records; [6]

f. Respondent repeatedly issued checks drawn on his trust account when there were insufficient funds in the account to support the checks in violation of Rule 8.4(c) of the MRPC;[7] and

g. Respondent improperly certified to the Minnesota Supreme Court that he maintained the required trust account books and records in violation of Rule 8.4(c) of the MRPC.[8]

3. True and correct copies of the MRPC, Rule 1.1 (Competence); Rule 1.15 (Safekeeping Property); Rule 1.15 (Safekeeping Property, as it read prior to October 1, 2005); the Lawyers Professional Responsibility Board Opinion No. 9; Appendix 1 to the MRPC Maintenance of Books and Records; Rule 3.1 (Meritorious Claims and Contentions); Rule 8.4(c) (Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation); and Rule 8.4(d) (Engaging in Conduct Prejudicial to the Administration of Justice) are collectively attached as Exhibit 3 and incorporated by reference.

4. In the stipulation, Respondent and OLPR jointly recommended that Respondent be suspended from the practice of law in Minnesota for four months and that respondent may petition for reinstatement subject to the conditions that he (a) pay $900 in costs pursuant to Rule 24(d) of the Rules on Lawyers Professional Responsibility ("RLPR"); (b) comply with Rule 26 of the RLPR; (c) provide proof of successful completion of the professional responsibility examination within one year prior to the petition for reinstatement; (d) satisfy continuing legal education requirements pursuant to Rule 18(e) of the RLPR; and (e) pay or enter into an agreement for a payment plan to pay the attorneys' fees assessed against him by the federal district court in the matter of *Willhite v. Collins*, case number 04-CV-4380.

5. On January 17, 2008, the Minnesota Supreme Court, in case number A07-2418, approved the stipulation and the jointly recommended disposition.

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[5]See Third Count, Ex. 2, ¶¶ 48 - 74, and 88.

[6]See Third Count, Ex. 2, ¶¶ 79 - 88.

[7]See Third Count, Ex. 2, ¶¶ 71 - 74, and 88.

[8]See Third Count, Ex. 2, ¶¶ 79 - 88.

6. On January 18, 2008, the Minnesota Supreme Court filed its order in case number A07-2418. In the order, Respondent was suspended for a minimum of four months, effective 14 days from the date of the filing of the order; and was ordered to pay $900 in costs pursuant to Rule 24 of the RLPR and to comply with Rule 26 of the RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals). The Minnesota Supreme Court further ordered that Respondent may petition for reinstatement after 60 days from the effective date of his suspension, provided that he filed with the petition for reinstatement proof of: (a) successful completion of the professional responsibility portion of the state bar examination within one year prior to the date of the petition for reinstatement; (b) satisfaction of continuing legal education requirements pursuant to Rule 18(e) of the RLPR; and (c) proof of payment of attorney fees assessed against Respondent by the federal district court in the matter of *Willhite v. Collins*, case number 04-CV-4830 (D. Minn. 2005), or proof that Respondent had entered into and was in compliance with a payment plan for payment of such attorney fees. Thereafter, the decision of the foreign jurisdiction became final. A certified copy of the order is attached as Exhibit 4 and incorporated by reference.

B. Conclusions of Law:

1. Pursuant to Business and Professions Code section 6049.1(a), the factual findings and the final disciplinary order of the Minnesota Supreme Court constitute conclusive evidence that Respondent is culpable of professional misconduct in this state.

2. Respondent's culpability as determined by the Minnesota Supreme Court indicates that the following California statutes or rules were violated:

a. By filing lawsuits on behalf of his clients, the Willhites, as found by the courts lacked a good faith basis in law or fact in violation of Rule 1.1 of the MRPC, Respondent also failed to perform legal services with competence in wilful violation of rule 3-110(A) of the Rules of Professional Conduct;

b. By failing to timely disburse to his client, Debra Garthe ("Garthe"), settlement funds that indisputably belonged to Garthe in violation of rule 1.15(b) of the MRPC, as that Rule read prior to October 1, 2005, Respondent also failed to promptly pay or deliver, as requested by the client, any funds in the possession of the member which the client was entitled to receive, in wilful violation of rule 4-100(B)(4) of the Rules of Professional Conduct;

c. By commingling client and personal funds in his trust accounts in violation of Rules 1.15 (a) and (b) of the MRPC, Respondent also deposited or commingled funds belonging to Respondent in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, in wilful violation of rule 4-100(A) of the Rules of Professional Conduct;

d. By negligently misappropriating client funds from his trust account to pay his personal expenses and negligently misappropriating funds entrusted to him on behalf of his clients in violation of Rules 1.15 (a), (b) and (c) of the MRPC, Respondent also failed to maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account,"

"Client's Funds Account" or words of similar import, in wilful violation of rule 4-100(A) of the Rules of Professional Conduct;

e. By failing to keep required trust account books and records in violation of Rule 1.15(h) of the MRPC, as interpreted by Lawyers Professional Responsibility Board Opinion No. 9 and Appendix 1 to the MRPC Maintenance of Books and Records, Respondent also failed to maintain, and to preserve for five years from final appropriate disposition, complete records of all client funds coming into Respondent's possession, in wilful violation of rule 4-100(B)(3) of the Rules of Professional Conduct;

f. By repeatedly issuing checks drawn on his trust account when there were insufficient funds in the account to support the checks in violation of Rule 8.4(c) of the MRPC, Respondent also committed acts involving moral turpitude in wilful violation of section 6106 of the Business and Professions Code; and,

g. By improperly certifying to the Minnesota Supreme Court that he maintained the required trust account books and records in violation of Rule 8.4(c) of the MRPC, Respondent also sought to mislead a judge or judicial officer by an artifice or false statement of fact in wilful violation of section 6068(d) and committed an act of moral turpitude in wilful violation of section 6106 of the Business and Professions Code.

C. Agreements and Waivers Pursuant to Business and Professions Code Section 6049.1:

1. Respondent acknowledges that his culpability determined in the disciplinary proceeding in the Minnesota Supreme Court, case number A07-2418, warrants the imposition of discipline in the State of California under the laws or rules stated above in effect in the State of California at the time Respondent's misconduct was committed; and

2. Respondent acknowledges that the disciplinary proceeding in Minnesota provided Respondent with fundamental constitutional protection.

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Case no. 09-O-11418

D. Facts

1. On August 24, 2006, the State Bar Court Review Department issued a decision in case number 99-O-12923 regarding Respondent. On August 24, 2006, the State Bar Court served a copy of the decision on Respondent by mail. Respondent received the copy of the decision.

2. On January 24, 2007, the California Supreme Court filed its Order number S147609 regarding case number 99-O-12923. The Court ordered that Respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that Respondent be placed on probation for two years with conditions, including the condition that he be actually suspended for three months (the "Order"). The Order was effective February 23, 2007. On January 24, 2007, the California Supreme Court clerk served a copy of the order on Respondent by mail. Respondent received a copy of the Order.

3. As a condition of probation, the Supreme Court ordered Respondent to do the following:

> During the period of probation, make restitution to Ivy Hei ("Hei") in the amount of $5,910.45, plus simple interest thereon at the rate of 10 percent per annum from the date of Respondent's receipt of attorney fees in the *Hei v. Beasla* suit (January 15,1995) until paid (or to the Client Security Fund ("CSF") to the extent of any payment from the fund to Hei, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof of such restitution to the State Bar of California's Office of Probation ("Probation"); and,
>
> During the period of probation, make restitution to the United States Department of Labor (USDOL) in the amount of $2,214.54, plus simple interest thereon at the rate of 10 percent per annum from the date of respondent's receipt of payment from the USDOL of attorney fees arising from Hei's workers' compensation matter until paid (or to CSF to the extent of any payment from the fund to USDOL, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof of such restitution to Probation.

4. The Court further ordered that Probation, within the first 90 days after the effective date of the Order, determine the date Respondent received payment from the USDOL; and ordered that Respondent fully cooperate with and assist Probation in making this determination.

5. The Supreme Court also ordered that Respondent, subject to a proper or good faith assertion of any applicable privilege, fully, promptly, and truthfully answer any inquiries of Probation directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of his probation.

6. On March 20, 2007, Probation mailed a letter to Respondent with information regarding his probation conditions. In the letter, Probation informed Respondent that his submission of compliance with the restitution conditions was due by February 23, 2009. Respondent received the letter.

7. On June 13, 2007, Probation faxed a copy of its March 20, 2007 letter to Respondent at his request. Respondent received the fax.

8. On January 24, 2008, Probation asked Respondent when he received the $2,214.54 from USDOL so that the amount of the interest due could be determined. Respondent, in essence, replied that he did not have the records to respond to Probation's inquiry.

9. On January 28, 2008, CSF mailed a letter to Respondent. In the letter, CSF reported that the amount owing to CSF relating to Hei was $14,227.55, including interest and costs, as of January 31, 2008. Respondent received the letter.

10. On January 30, 2008, Probation mailed a letter to Respondent. In the letter, Probation reported that the interest owed to Hei was $4,627.96. In the letter, Probation also reminded Respondent that he owed restitution to USDOL in the amount of $2,214.54, plus simple interest in the amount of $406.50, which was calculated at the rate of 10% per annum from the date he received payment from USDOL, or March 31, 2006. In the letter, Probation reminded Respondent that all the restitution must be paid by February 23, 2009. Respondent received the letter.

11. On February 15, 2008, Probation mailed a letter to Respondent. In the letter, Probation reported that the date of March 31, 2006 identified in Probation's letter of January 30, 2008 was incorrect, that the correct date was March 31, 1996, that the correct amount of the accrued interest due to USDOL as of February 15, 2008 was $2,631.97, and that the total restitution due to USDOL was $4,846.51. Respondent received the letter.

12. Respondent did not pay the restitution owed to Hei, CSF or USDOL; consequently, he did not furnish satisfactory proof of such restitution to Probation by February 23, 2009.

13. As conditions of probation, the Supreme Court ordered Respondent to do the following:

a. During the period of probation, comply with the State Bar Act and the Rules of Professional Conduct;

b. During the period of probation, maintain with the State Bar of California's Membership Records Office ("Membership Records") and Probation in Los Angeles, his current office address and telephone number or, if no office was maintained by him, an address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code; and his current home address and telephone number; and notify Membership Records and Probation of any change in any of this information no later than 10 days after the change;

c. Report, in writing, to Probation no later than April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation stating that the report covered the preceding calendar quarter or applicable portion thereof, and certifying by affidavit or under penalty of perjury under the laws of the State of California, as follows:

(1) in the first report due, whether Respondent had complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and,

(2) in each subsequent report, whether Respondent had complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period; and,

d. During the last 20 days of probation, submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition; certifying by affidavit or under penalty of perjury under the laws of the State of California in such report whether Respondent had complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

14. With Probation's March 20, 2007 letter to Respondent, it sent a blank quarterly report form that he could use to report his compliance to Probation. In the letter, Probation informed Respondent that his first quarterly report was due on April 10, 2007.

15. Respondent did not file his first quarterly report with Probation, covering the period of February 23 to March 31, 2007, by the due date of April 10, 2007 (the "first quarterly report").

16. On June 13, 2007, Probation informed Respondent that the first quarterly report was not received from him. Probation faxed a copy of its March 20, 2007 letter to Respondent at his request. Respondent received the fax.

17. Respondent filed the first quarterly report with Probation on June 18, 2007.

18. Respondent did not file his fifth quarterly report with Probation, covering the period of January 1 to March 31, 2008, by the due date of April 10, 2008 (the "fifth quarterly report").

19. Respondent filed the fifth quarterly report with Probation on April 17, 2008.

20. Respondent did not file his final report with Probation, covering the period of January 1 to February 23, 2009, by the due date of February 23, 2009 (the "final report"). Respondent faxed the final report to Probation on March 23, 2009 and Probation received the original final report on March 26, 2009.

D. Conclusions of Law

21. By not paying the restitution owed to Hei, CSF or USDOL, and consequently, not furnishing satisfactory proof of such restitution to Probation by February 23, 2009, Respondent willfully failed to comply with all conditions attached to any disciplinary probation, in willful violation of Business and Professions Code, section 6068(k).

22. By not filing the first quarterly report with Probation by April 10, 2007, Respondent willfully failed to comply with all conditions attached to any disciplinary probation, in willful violation of Business and Professions Code, section 6068(k).

23. By not filing the fifth quarterly report with Probation by April 10, 2008, Respondent willfully failed to comply with all conditions attached to any disciplinary probation, in willful violation of Business and Professions Code, section 6068(k).

24. By not filing the final report with Probation by February 23, 2009, Respondent willfully failed to comply with all conditions attached to any disciplinary probation, in willful violation of Business and Professions Code, section 6068(k).

Aggravating Circumstances:

B(1) Prior Record of Discipline:

Effective February 23, 2007, in Case No. 99-O-12923, Respondent was actually suspended for 90 days [one year suspension, stayed; two years probation] for violations of the Rules of Professional Conduct, rules 3-300 & 4-200(A).

B(4) Harm to the Administration of Justice:

Inherent in filing lawsuits that lack a basis good faith in law or fact is harm to the administration of justice.

Ivy Hei, who was to be paid restitution under the prior discipline, suffered significant harm from Respondent's failure to pay her restitution.

B(7) Multiple Acts of Misconduct:

Respondent's misconduct evidenced seven different ethical violations.

Mitigating Circumstances:

C(3) Cooperation:

Respondent displayed cooperation with the State Bar in these proceedings.

C(8) Emotional Difficulties:
C(9) Severe Financial Stress:
C(10) Family Problems:

During the time of his misconduct, Respondent was dealing with personal, emotional and financial problems stemming from his marital dissolution [filed April 2001] and on-going child custody matters; other family difficulties; foreclosure

proceedings; living for a period of time in his car and a rooming house; his personal bankruptcy [2002]; and, his father's dementia and death.

C(11) Good Character:

Respondent provided declarations from two Minnesota attorneys; a former Navy and commercial pilot, now minister; an electrical engineer/businessman/and WWII veteran; and two former clients. Familiarity ranged from three to eight years. All provided positive character statements about Respondent.

Additional Mitigating Circumstances:

According to a letter from the Bank where Respondent held his client trust account, there were "several instances where bank employees gave incorrect information or used incorrect procedures, which appeared to escalate the problems [Respondent] already had with [his] accounts."

Respondent provided intermittent volunteer work in church, fraternity; and non-profit organizations, and provided pro bono services.

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OFFICE OF
APPELLATE COURTS
DEC 27 2007
FILED

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against DAVID MAX VAN SICKLE, a Minnesota Attorney, Registration No. 292783.	**STIPULATION FOR DISPENSING WITH PANEL PROCEEDINGS, FOR FILING PETITION FOR DISCIPLINARY ACTION, AND FOR DISCIPLINE**

THIS STIPULATION is entered into by and between Martin A. Cole, Director of the Office of Lawyers Professional Responsibility, hereinafter Director, and David Max Van Sickle, attorney, hereinafter respondent.

WHEREAS, respondent has concluded it is in respondent's best interest to enter into this stipulation,

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the undersigned as follows:

1. It is understood that respondent has the right to have charges of unprofessional conduct heard by a Lawyers Professional Responsibility Board Panel prior to the filing of a petition for disciplinary action, as set forth in the Rules on Lawyers Professional Responsibility (RLPR). Pursuant to Rule 10(a), RLPR, the parties agree to dispense with Panel proceedings under Rule 9, RLPR, and respondent agrees to the immediate filing of a petition for disciplinary action, hereinafter petition, in the Minnesota Supreme Court.

2. Respondent understands that upon the filing of this stipulation and the petition, this matter will be of public record.

EXHIBIT 1

3. It is understood that respondent has certain rights pursuant to Rule 14, RLPR. Respondent waives these rights, which include the right to a hearing before a referee on the petition; to have the referee make findings and conclusions and a recommended disposition; to contest such findings and conclusions; and to a hearing before the Supreme Court upon the record, briefs and arguments. Respondent hereby admits service of the petition.

4. Respondent waives the right to answer and unconditionally admits the allegations of the petition which may be summarized as follows:

a. Respondent filed lawsuits on behalf of a client that, as found by the courts, lacked a good faith basis in law or fact in violation of Rules 1.1, 3.1, and 8.4(d), Minnesota Rules of Professional Conduct (MRPC).

b. Respondent failed to timely disburse to a client settlement funds that undisputedly belonged to the client in violation of Rule 1.15(b), MRPC, as that Rule read prior to October 1, 2005.

c. Respondent commingled client and personal funds in his trust accounts, negligently misappropriated client funds from his trust account to pay for his personal expenses, negligently misappropriated the funds entrusted to him on behalf of a client, failed to keep required trust account books and records, repeatedly issued checks drawn on the trust account when there were insufficient funds in the account to support the checks, improperly transferred funds from his trust account by electronic transfer and ATM, and improperly certified to the Minnesota Supreme Court that he maintained the required trust account books and records in violation of Rules 1.15(a), (b), (c), and (h), as interpreted by Lawyers Professional Responsibility Board Opinion 9 and Appendix 1 to the MRPC, and Rule 8.4(c), MRPC.

d. Respondent, as evidenced by the order suspending his California license to practice law, charged and collected an unconscionable fee, entered into

an improper business transaction, failed to provide written disclosure of a financial interest in the subject matter of the representation, and intentionally or recklessly failed to represent a client competently in violation Rules 1.1, 1.5, and 1.8(a), MRPC.

5. Respondent understands that based upon these admissions, this Court may impose any of the sanctions set forth in Rule 15(a)(1) - (9), RLPR, including making any disposition it deems appropriate. Respondent understands that by entering into this stipulation, the Director is not making any representations as to the sanction the Court will impose.

6. The Director and respondent join in recommending that the appropriate discipline is a four-month suspension pursuant to Rule 15, RLPR. The reinstatement hearing provided for in Rule 18, RLPR, is not waived. Respondent may petition for reinstatement at any time after 60 days from the effective date of his suspension. Reinstatement is conditioned upon: (1) payment of costs in the amount of $900 pursuant to Rule 24(d), RLPR; (2) compliance with Rule 26, RLPR; (3) pursuant to Rule 18(e), RLPR, providing proof of successful completion of the professional responsibility examination within one year prior to the petition for reinstatement[1]; (4) satisfaction of the continuing legal education requirements pursuant to Rule 18(e), RLPR; and (5) paying or entering into an agreement for a payment plan to pay the attorneys' fees assessed against him by the federal district court in the matter of *Willhite v. Collins*, 04-CV-4380.

7. This stipulation is entered into by respondent freely and voluntarily, without any coercion, duress or representations by any person except as contained herein.

8. Respondent hereby acknowledges receipt of a copy of this stipulation.

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[1] Respondent states that, in connection with the reinstatement of his California license to practice law, he took and passed the professional responsibility exam in August 2007.

9. Respondent has been advised by the undersigned counsel concerning this stipulation and these proceedings generally.

IN WITNESS WHEREOF, the parties executed this stipulation on the dates indicated below.

Dated: December 20, 2007.

MARTIN A. COLE
DIRECTOR OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
Attorney No. 148416
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218
(651) 296-3952

Dated: December 20, 2007.

PATRICK R. BURNS
FIRST ASSISTANT DIRECTOR
Attorney No. 134004

Dated: 12/20, 2007.

DAVID MAX VAN SICKLE
RESPONDENT

Dated: 12/20, 2007.

EDWARD F. KAUTZER
ATTORNEY FOR RESPONDENT
Attorney No. 54112
1600 University Avenue, #510
St. Paul, MN 55104
(651) 645-9359

State of Minnesota, Supreme Court
I hereby Certify that the foregoing Instrument is a true and correct copy of the original as the same appears on record in my office this 31 day of Jan 20 08

Asst. Deputy Clerk

A07-2418

STATE OF MINNESOTA

IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

DEC 27 2007

FILED

In Re Petition for Disciplinary Action
against DAVID MAX VAN SICKLE,
a Minnesota Attorney,
Registration No. 292783.

PETITION FOR DISCIPLINARY ACTION

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility. The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 13, 1999. Respondent currently practices law in Roseville, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Willhite Matter

1. In 1996 Cheryl and Donald Collins commissioned a survey of their property which indicated that their property extended approximately 30 feet onto the Willhites' land. In 1997 the Willhites hired attorney Steven Bolton to bring a quiet title action (case C1-97-682) against the Collinses asserting ownership of the disputed land by adverse possession. To support this claim, they commissioned their own survey which confirmed the findings of the survey done by the Collinses. On March 1, 2000, the district court ruled that the Willhites had no interest in the disputed land and ordered them to remove all personal property from the land.

EXHIBIT 2

2. The Willhites appealed the decision but the Minnesota Court of Appeals affirmed and the Minnesota Supreme Court denied review.

3. In March 2002 the Willhites retained attorney Dwain Fagerlund to bring a motion to vacate the state court judgment based upon a new survey done by AMI Surveyors & Mappers indicating that the two previous surveys were flawed.

4. By order in case C1-97-682, dated April 12, 2002, the state court denied the motion to vacate saying, "The time for finding mistakes has passed, to revisit this matter would burden the Defendants with unnecessary costs, undermine the principal of finality of judgment and would be an inefficient use of the Courts time." The court also held the Willhites in contempt of the March 1, 2001, order for failing to remove encroaching structures from the Collinses' property. The Willhites did not appeal the April 12, 2002, order.

5. On August 10, 2002, respondent began representing the Willhites.

6. On October 1, 2002, respondent executed a summons and a complaint entitled, "Action to Determine Boundary Lines" naming the Collinses, Terry and Diane Glinnon, and Does 1 through 10 as defendants. This matter was assigned court file number C8-02-1117.

7. The action initiated by respondent in C8-02-1117 sought to have the Willhites' and Collinses' boundary line set in accord with the survey done by Roger Mustonen of AMI Surveyors & Mappers. This would have the practical effect of locating the boundary between the Willhite and Collins properties differently than it was determined to be in the March 1, 2000, order in C1-97-682. This, despite the clear rulings of the court in C1-97-682 that such boundaries had already been judicially determined and that the issue would not be revisited.

8. Respondent appeared on behalf of the Willhites at an October 4, 2002, hearing in case C1-97-682, regarding the Collinses' compliance or lack of compliance

with the court's April 12, 2002, order to remove their sewer system from the property. During that hearing Judge Haas said:

> Finally, please don't miscalculate by thinking that you have a solution by some registration proceeding, because my off-hand suspicion is that it is not going to remedy your problem. The law of this case has been established, it has been appealed, it has been affirmed. It is over with. . . . My suspicion is it is not going to be opened again by whatever filings you may attempt. Please don't miscalculate thinking that will solve your problem because it won't.
>
> I realize and I can understand that an error could have occurred. For the sake of argument I will say it has, it doesn't matter, folks, the law of this case has been established. If there was an error that needs to be shown you need to have shown it at a proper time. It wasn't. The law of the case is established.
>
> * * *
>
> Mr. Van Sickle, is there anyway I could make anything more clear or is there any area here that is unclear to you or your clients?
>
> * * *
>
> MR. VAN SICKLE: We are clear, Your Honor, thank you.

9. Despite the warning from the court at the October 4 hearing respondent, that same day, filed the summons and action to determine boundary lines with the court and, on October 10, 2002, filed a First Amended Complaint; Action to Determine Boundary Lines in C8-02-1117.

10. On January 6, 2003, Stephen Baker, attorney for the Collinses in C8-02-1117, wrote to respondent asking him to dismiss the case against his clients with prejudice because "[t]he boundary between the Willhite property and that of the Collins' has been judicially established. Res judicata and/or collateral estoppel will prevent your clients, as a matter of law, from claiming otherwise".

11. On April 8, 2003, the court issued an order in C1-97-682, which, amongst other things, denied a motion brought to vacate the court's judgment in that matter. The court, in its memorandum, stated:

> As to Plaintiffs' request to vacate the judgment based on Mr. Mustonen's survey, the Court incorporates the relevant portions of its Order and

Memorandum dated April 12, 2002. Plaintiffs had sufficient time before trial and during the appeals process to uncover new information. Further, Mr. Mustonen's report is not conclusive.

12. On June 26, 2003, the court issued an amended order in case C8-02-1117 denying respondent's motion to compel discovery and *sua sponte,* dismissing the case with prejudice against the Collinses. The court held that collateral estoppel and res judicata barred the matter as to the Collinses. The court awarded costs and disbursements to the Collinses. The Willhites did not appeal this order.

13. On July 21, 2003, respondent filed a motion for declaratory judgment in C8-02-1117.

14. In an October 30, 2003, order in case C8-02-1117, Judge John Smith ruled on the motion for declaratory judgment, stating in part:

> This Court ruled that, regardless of the survey, the surveyor or the location of the section quarter corners, the common boundary line between the property owned by Plaintiffs and the property owned by Defendants Collins had been determined in Court File No. C1-97-682. Nothing in this Court's order or orders in this case changes or alters the common boundary as previously determined in any way. Any attempts to re-litigate, interfere with or otherwise alter that previous determination will result in severe sanctions against the offending party.

15. On March 23, 2004, the Collinses' attorney brought a motion for an award of sanctions in C8-02-1117.

16. On April 12, 2004, Judge Smith entered an order awarding costs and attorney fees in the total amount of $1,440 against respondent in case no. C8-02-1117, stating:

> Parties should not be subjected to repeated litigation over matters that have been finally adjudicated. The attorney for a party is the gatekeeper to prevent such abuses. The Court finds that Mr. Van Sickle did not act as the gatekeeper in this case on behalf of his clients. The Court finds that Mr. Van Sickle violated Minn. Stat. § 549.211, Subd. 2, and therefore, sanctions are appropriate.

17. In May 2004 respondent withdrew from representing the Willhites in case C1-97-682 but continued to represent them in other matters related to the boundary dispute including a lawsuit brought on behalf of the Willhites against Cass County (CX-03-1243) and another lawsuit brought against Cass County and Schellack Engineering (the company who did the first survey on behalf of the Willhites) in the fall of 2002 (case no. C0-03-05).

18. On October 21, 2003, in case CX-03-1243, respondent faxed to the Cass County auditor a motion for *ex parte* relief against Cass County seeking an order directing them to issue a building permit to the Willhites for construction of a septic system on their property. One of the requirements of the final order in C1-97-682 was that the Willhites remove their septic system from the Collinses' property. Respondent sought to have the motion heard the next day. Respondent had not, before bringing the motion, initiated a lawsuit, commenced an action by filing the matter with the court and paying a filing fee, or given adequate notice to the county. The court declined to hear respondent's motion.

19. On October 31, 2003, respondent renewed his request for an *ex parte* motion in matter number CX-03-1243, this time including a summons and complaint for declaratory judgment. Respondent scheduled his motion for hearing on November 3, 2003.

20. On November 3, 2003, a hearing was held on the motion for an *ex parte* order in CX-03-1243. Respondent did not attend that hearing, but an associate, Howard Lazarus, attended on behalf of the Willhites. At that hearing it became clear that the relief sought by respondent was an order directing the issuance of a building permit to permit the construction of a septic system by the Willhites that would, in part, be built on land owned by the Collinses as determined in C1-97-682. The court denied the motion for *ex parte* relief and stated, in part:

> Wait a minute. Let's correct the record right now about that. I just made an order in this case relating to the boundary on the opposite side of the Collins' property. The Collins-Willhite boundary was established by Judge Haas' order sometime ago and the survey does not change that. So if this is an application for a permit to put a system on the property that belongs to the Collinses, then you're not going to be successful in this action.

21. On April 5, 2004, case number CX-03-1243 was ordered dismissed without prejudice for failure to make proper service.

22. On October 8, 2004, respondent commenced a federal lawsuit on behalf of the Willhites against Collinses, et al., based upon claims under 42 U.S.C. §§ 1983 and 1985 and several purportedly supplementary state tort claims all arising out of and based upon the assertion that the survey relied upon the state court in establishing the Willhite/Collins boundary in C1-97-682 was erroneous. Respondent's requested relief included a request that the federal court order Cass County to recognize and enforce the surveys conducted by Roger Mustonen of AMI Surveyors & Mappers.

23. On July 29, 2005, Federal Magistrate Judge Raymond Erickson reprimanded respondent for his conduct during the deposition of one of the defendants. The court found: "While we find the conduct of Plaintiffs' counsel [respondent] to fall below the standards expected of Federal practitioners, in this District, we limit our sanction to a Reprimand." The reprimand was based on the following conduct:

> As to the deposition of Freeman, we have now completed our review of the transcript of that deposition, and have substantial concern about the knowledge of Plaintiffs' counsel [respondent] concerning the Federal Rules applicable to the taking of depositions. Most evident is counsel's misperception that, if he notes a discovery deposition, he "owns' the deposition, and can control its course and scope. . . .
>
> Secondly, Plaintiffs' counsel has no apparent understanding that he may not phase the discovery so as to only benefit his clients. He appears to believe that, if he notices a deposition, then the questioning will proceed

> until the time he has selected for the next deposition, even if counsel for the Defendants have not completed their examination of the deponent. . . .
>
> We also have substantial concern that Plaintiffs' counsel misapprehends the purpose of objections during the course of a discovery deposition. . . . With regularity, Plaintiffs' counsel posed questions to the witness which were vague, oblique and abstruse.
>
> We are particularly troubled by counsel for the Plaintiffs' discourtesies to both the witness, and to opposing counsel.

24. On August 24, 2005, Judge James Rosenbaum granted the defendants' motion for summary judgment and issued an order to show cause why respondent should not be sanctioned. *Willhite v. Collins*, 385 F. Supp. 2d 926 (D. Minn. 2005). In his order, Judge Rosenbaum stated:

> This case represents an entirely improper effort to resuscitate a long-decided Minnesota state court dispute.
>
> * * *
>
> Notwithstanding these conclusive determinations [in state court], the Willhites now come to federal court attempting to exhume their dead claims by alleging a deprivation of constitutional rights under 42 U.S.C. § 1983. Whether framed as state or federal claims, their facts and allegations are for all intents and purposes identical to those litigated in the Minnesota state court cases.
>
> * * *
>
> Even if this Court had jurisdiction, this case presents the quintessential example of collateral estoppel. . . . The boundary line issue has been litigated, litigated, and re-litigated in state court.

25. On November 21, 2005, Judge Rosenbaum issued an order suspending respondent's admission to practice in the United States District Court, District of Minnesota, until he paid a monetary sanction of 50 percent of the attorneys' fees incurred by each defendant in the federal case who was also a party to any of the several related state court actions and offered proof that he had taken and passed a law school course in federal jurisdiction. The court stated:

> Mr. Van Sickle filed this case in federal court, when no competent lawyer could reasonably believe there was a colorable or legally-supportable

claim. In doing so, he has caused each defendant to incur significant attorneys' fees and costs, and such conduct is deserving of sanction.

26. On August 21, 2006, the United States Eighth Circuit Court of Appeals affirmed the district court's finding of misconduct and the imposition of monetary sanctions but remanded for further proceedings as to respondent's suspension from practice and the requirement that he take and pass a course in federal jurisdiction. The Court of Appeals stated, in part, "we agree that sanctions are warranted in this case" and "[t]he amount of the monetary sanction in this case is substantial, but not unwarranted. . . . [W]e believe a large award is necessary to deter Van Sickle from similar misconduct."

27. Respondent has not paid the monetary sanctions imposed.

28. Respondent's conduct in the repeated filing of lawsuits in the Willhite matter that lacked a good faith basis in law or fact violated Rules 1.1, 3.1, and 8.4(d) Minnesota Rules of Professional Conduct (MRPC).

SECOND COUNT

Garthe Matter

29. Respondent represented Debra Garthe in an action against Principal Life Insurance Company (Principal). Respondent agreed to represent Garthe in that matter for a flat fee of $250 plus expenses. That matter was settled and Principal issued a settlement check payable to respondent and Garthe in the amount of $12,775.54.

30. On June 4, 2002, respondent wrote to Garthe telling her he expected the settlement check by June 7 and enclosing a schedule of costs and fees reflecting a balance owed of $969.47.

31. On June 28, 2002, respondent wrote to Garthe noting that he was in possession of the Principal settlement check, requesting payment of $348.47 in costs, and stating, "Please send me your personal check or money order for the costs, $348.47. When those funds have cleared I will endorse the settlement check and mail it to you."

As of the date of respondent's letter, it was undisputed that Garthe was entitled to at least $12,427.07 from the Principal settlement funds.

32. On July 17, 2002, Garthe complained to the Office of Lawyers Professional Responsibility about respondent, making various allegations of misconduct, including misconduct in his handling of the Principal settlement funds.

33. On July 26, 2002, at respondent's request, Principal issued two replacement checks: one in the amount of $423.47 representing amounts claimed owed to respondent and another in the amount of $12,352.07 representing amounts owed to Garthe.

34. On August 6, 2002, respondent wrote to Garthe stating:

> Principal Insurance provided two replacement checks; for $12,352.07, and $423.47. Please endorse the $423.47 check and return it to me as full satisfaction of all claims between us. I will waive the difference [between costs claimed owed by respondent of $447.47 and the $423.47], and return the draft for $12,352.07 endorsed to you, and we can consider all matters between us terminated.

35. Garthe disputed respondent's entitlement to the full $423.47 and declined to endorse and return the check to respondent.

36. Respondent did not promptly pay to Garthe the $12,352.07 represented by the Principal settlement check in his possession despite the fact that he claimed no entitlement to those funds.

37. On March 13, 2003, the Director wrote to respondent noting the provisions of Rule 1.15(c), MRPC, stating, "That check [for $12,352.07] constitutes funds which all agree belong to Ms. Garthe and should not be held as 'ransom' to resolve the fee dispute which you have regarding the other check."

38. On March 15, 2003, respondent replied to the letter from the Director acknowledging that the funds belonged to Garthe and enclosing the $12,352.07 check to the Director for forwarding to Garthe.

39. On May 12, 2003, Garthe wrote to respondent noting receipt of the $12,352.07 check and informing him the bank would not cash the check because it was no longer valid. Garthe asked respondent to obtain a new check from Principal.

40. On May 29, 2003, respondent wrote to Garthe noting receipt of her May 12 letter and refusing to ask Principal to reissue the check.

41. Principal eventually, upon request of the Director, reissued the check to Garthe.

42. Respondent's conduct in failing to disburse to his client Garthe that portion of her settlement funds that was undisputedly hers violated Rule 1.15(b), MRPC, as that rule read prior to October 1, 2005.

THIRD COUNT

Trust Account Violations

Improper Commingling of Personal and Client Funds in Trust Account

43. Respondent is a solo practitioner. At all times relevant, respondent maintained TCF Financial Corporation lawyer trust account no. 9851823039 (trust account). Respondent is solely responsible for the maintenance of his trust account books and records.

44. On October 7, 2002, pursuant to Rule 1.15(j) through (o), MRPC, the Director received notice from TCF of an October 3, 2002, overdraft on respondent's trust account. Documents provided by respondent in response to the Director's inquiry regarding the overdraft indicated that, among other things, he was using his trust account to pay business and personal expenses. The Director opened a disciplinary file and requested respondent provide additional information and records.

45. Respondent provided the Director with various trust account books and records for three periods of time: January 30, 2000, through June 16, 2000; December 18, 2000, through March 18, 2002; and August 16, 2002, through November 16, 2004.

46. The Director reviewed the trust account books and records provided by respondent and identified numerous trust account transactions paying respondent's personal and business expenses. Those include:

a. On April 9 and April 10, 2001, respondent wrote ten checks numbered 5000 through 5009 totaling $807.44 from his trust account to pay personal and/or business expenses (Qwest, AAA, MBNA, Office Max, etc.).

b. From August 17, 2002, through December 3, 2002, respondent wrote at least 42 trust account checks to pay personal or business expenses (food, auto fuel, insurance, phone or respondent's family law attorney, among others) in amounts ranging from $10 to $500.

c. From August 28, 2002, through January 31, 2003, respondent wrote over 30 checks payable to "cash" in amounts ranging between $50 and $1,500.

47. At the times respondent was utilizing his trust account for the deposit and disbursement of his personal funds, he also held client funds in the account.

<u>Trust Account Shortages and Deficiencies</u>

January through October 2001.

48. Respondent provided for the Director's review bank statements for the trust account and reconciliations for the period of December 18, 2000, through March 18, 2002.

49. As of January 17, 2001, respondent held in his trust account $831.62 on behalf of his clients Cybelink and Yang. From January 17 through March 7, 2001, respondent did not disburse any funds on behalf of Cybelink and Yang.

50. Between March 7 and March 30, 2001, respondent made ATM withdrawals from the account that totaled, together with associated fees, $188. These ATM withdrawals are not attributed by respondent to any client and were made for respondent's personal benefit.

51. Respondent deposited no funds into the account to support the ATM withdrawals. The funds withdrawn by ATM were funds that belonged to respondent's clients Cybelink and Yang. Respondent's withdrawals of these funds constitute misappropriation.

52. Respondent cured the shortage created by the ATM withdrawals by depositing $37,701.44 to the account on April 10, 2001. Respondent attributed $37,000 of the deposit to an unidentified client and the balance consisted of respondent's own funds.

53. As of April 10, 2001, respondent should have been holding $37,831.62 in the account on behalf of clients (Cybelink - $487.50, Yang - $344.12, and $37,000 on behalf of the unidentified client). The ending balance in the account on April 10 was $38,345.06, reflecting the client funds plus $513.44 in respondent's own funds in the account (negative $188 + $701.44).

54. Between April 10 through 16, 2001, the bank paid checks nos. 5000-5009 drawn on the trust account (*see* paragraph 44 above). All of these checks were issued in payment of respondent's personal or business expenses. The payment of these checks, totaling $807.44, resulted in a shortage of $294 in client funds that should have been held in the account (4/10 balance of $38,345.06 - $807.44 = balance of $37,537.62 on 4/16; client funds totaling $37,831.62 should be in account – 4/16 balance of $37,537.62 = $294 shortage). Respondent's disbursement from the account of $294 of client funds for his own benefit constitutes misappropriation.

55. In April 2001, Arthur D'Amario retained respondent to represent him in a habeas petition proceeding. At that time, D'Amario was incarcerated in the Federal Correctional Facility in Rochester, Minnesota. Respondent charged and D'Amario paid a flat, nonrefundable fee of $2,500 for representation in the habeas proceedings. No portion of this fee was deposited into a trust account.

56. D'Amario also separately retained respondent to represent him in a medical malpractice claim against psychiatrists who had evaluated and treated him while at the Rochester facility. No separate written retainer agreement was entered into in regard to this representation and respondent did not communicate to D'Amario his intent to charge a fee or the basis or rate of that fee until October 18, 2001.

57. Respondent frequently communicated with D'Amario through an intermediary, Frank Feiner.

58. On May 15, 2001, respondent told Feiner that he had located a psychiatrist to evaluate D'Amario and that the psychiatrist required an $1,800 fee payable in advance.

59. On May 24, 2001, Feiner wrote to respondent asking, "Can you check with FMC Rochester to see if the $1800 transfer [D'Amario] authorized be sent to you to pay Dr. Gratzer was indeed sent?"

60. On June 7, 2001, Feiner wrote to respondent to inform him "that [D'Amario's] brother Jeff has arranged to have Dr. Gratzer's fee sent to you."

61. On June 25, 2001, respondent deposited into his trust account the $1,800 provided by D'Amario to pay the psychiatrist.

62. On June 21, 2001, prior to depositing D'Amario's funds in his trust account, respondent issued and paid to himself check no. 5019 drawn on the trust account payable to himself in the amount of $450. Respondent attributed this check as payment to himself in the D'Amario malpractice matter. D'Amario had not authorized this payment to respondent. Respondent did not provide D'Amario with notification of the time, amount and purpose of the withdrawal from the trust account represented by check no. 5019 or an accounting of D'Amario's remaining funds held in trust as required by Rule 1.15(b), MRPC.

63. On August 6, 2001, respondent issued and paid to attorney Maureen Williams check no. 5023 drawn on the trust account in the amount of $225 as payment

for legal research on the malpractice matter. D'Amario had not authorized this payment to Williams.

64. By letter dated October 15, 2001, D'Amario told respondent he no longer wished to pursue any litigation against the federal government and asked for a refund of all but $500 of the $4,300 he had given respondent.

65. On October 18, 2001, respondent issued and paid to himself check nos. 5028, 5029 and 5030 drawn on the trust account payable to himself in the total amount of $600.10. Respondent attributed these checks as payment to himself in the D'Amario malpractice matter. D'Amario had not authorized these payments to respondent. On the same date, respondent sent D'Amario a check for $525 and a letter and an invoice showing that he had taken $1,275 for "miscellaneous legal work and expenses" from the $1,800 paid by D'Amario for the psychiatric evaluation.

66. Respondent's unauthorized disbursement to himself and Williams of $1,275 of the $1,800 entrusted to him by D'Amario for purposes other than those specified by D'Amario and his failure to return the full $1,800 to D'Amario constitutes misappropriation.

August 2002 through November 2004.

67. At the Director's request, respondent provided trust account books and records for the period of August 16, 2002, through November 16, 2004 (audit period). The Director audited respondent's trust account for this period.

68. Based upon respondent's records it was impossible to determine whether he had sufficient funds in the account throughout the audit period to cover amounts that were to have been held in trust on behalf of clients. Respondent's check register and client subsidiary ledgers improperly reflected transfers of funds between clients, contained inexplicable entries not supported by transactions reflected in the bank statements, attributed as client expenditures many disbursements made directly from the account that were clearly payments of respondent's personal or business expenses,

reflected payments made to cash and/or payments made by ATM withdrawals; failed to reflect transactions that appear on the bank statements; and reflected numerous instances where respondent had disbursed funds from the account on behalf of a client in excess of the funds held in the account on that client's behalf.

69. Examples include, but are not limited to:

a. The bank statement for the account reflects a deposit of $2,789.28 on September 9, 2002. This deposit does not appear on respondent's check register or on any client subsidiary ledger produced by respondent. Respondent's check register and his subsidiary ledger for his client Willhite do reflect a deposit of $2,189.28 on September 17, 2002. Such a deposit is not reflected on the bank statement and the $600.00 difference is not otherwise accounted for.

b. Respondent's Cybelink subsidiary ledger reflects transfers from that sub account to the sub accounts of his clients Fly, Kasaga, Harris and Oduniyi without any indication of the purpose of the transfers or that the matters are related.

c. Respondent's Davis subsidiary ledger reflects a deposit of $50 to the account on March 25, 2004. No such deposit appears on the bank statement.

d. Respondent's Fly subsidiary ledger reflects payments to payees that appear to be expenditures for respondent's personal and business expenses, such as: DV -Mailboxes - $20.69; DV – Midas - $35.00; DV – Walgreens - $33.24; and DV-Office Max - $31.94.

e. Respondent's Siem subsidiary ledger reflects an entry for August 16, 2002, designated as a payment from the account in the amount of $2,834.76 and labeled by respondent as "8/16 Adjustment." The bank statement does not reflect an August 16 debit to the account of $2,834.76 and there is

otherwise no explanation in the records provided by respondent for the adjustment.

70. Despite the difficulty in determining from respondent's records exactly what funds he was to have been holding in trust on behalf of what clients at any given time, it does appear that there were overall shortages in the account. For example, on August 16, 2002, respondent's bank statement balance was $1,363.07. As of that date, respondent's subsidiary ledgers indicated he should have been holding at least $1,598.83 in the account on behalf of four clients (Cybelink - $6.83, Kasaga - $100.00, Siem - $699.84[1], Willhite - $749.16, and Wilson - $43.00). Thus, as of August 16, 2002, respondent's trust account was short $235.76.

April through August 2006.

71. On August 15, 2006, pursuant to Rule 1.15(j) through (o), MRPC, the Director received notice of an August 10, 2006, overdraft on respondent's trust account at Wells Fargo Bank, N.A., account no. 2352-650543.

72. Between August 9 and August 14, 2006, respondent disbursed seven insufficiently funded trust account checks totaling $757.14. All of these checks were for respondent's personal or business expenses. Wells Fargo Bank assessed respondent $231 in overdraft fees.

73. Based on records provided by respondent, the Director determined that prior to respondent's disbursements of August 9 - 14, 2006, respondent's trust account was already short $566.52. In two client matters, respondent had disbursed trust account funds exceeding the funds he had on deposit for those clients (Connor, $341.54 and Willhite, $224.98). The shortage in the Willhite subsidiary ledger had existed since

[1] The August 16, 2002, balance for Siem appears to actually have been $3,552.50. Respondent's ledger reflects a $699.84 balance by deducting from the balance a $17.90 payment to Superamerica, which appears to be a personal expense, and $2,834.76 designated as an "Adjustment." A $3,552.50 balance for Siem would result in a $3,088.42 shortage on August 16.

at least April 2006. The Connor subsidiary ledger had shortages in December 2005 and May 2006.

74. As of August 18, 2006, the total shortage in respondent's trust account was $1,832.77 ($566.52 [Connor and Willhite shortages] plus $1,034.25 [respondent's personal expenses] plus $231 [overdraft fees]). Respondent deposited $1,000 into his trust account on August 18, 2006, to partially cure the shortage. Respondent's trust account remained $831.77 short.

Electronic Transfers from Trust Account

75. Pursuant to Rule 1.15, MRPC, as interpreted by Appendix 1 thereto (formerly Lawyers Professional Responsibility Board (LPRB) Opinion No. 9), lawyers are required to disburse all trust funds by check, except where payment by check would be economically imprudent or when exigent circumstances require a wire transfer.

76. Beginning with a March 4, 2003, transfer withdrawal of $5,363.12 and continuing through at least November 1, 2004, when respondent transferred $1,500 by telephone, respondent made at least 68 automated telephone transfers out of his trust account into account no. 1852119388 in amounts ranging from $250 to $5,363.12.

77. No exigent circumstances existed to justify respondent's electronic withdrawals.

78. Beginning with an October 8, 2002, ATM withdrawal of $15.01 at a SuperAmerica in Roseville, Minnesota, respondent used ATMs to withdraw funds from his trust account at least 22 times between October 8, 2002, and November 16, 2004. Respondent's ATM withdrawals ranged in amount from $10 to $260. Respondent incurred additional bank fees due to his ATM use.

Failure to Keep the Required Trust Account Books and Records

79. For the period of January 30, 2000, through June 16, 2000, respondent provided trust account books and records consisting of bank statements and cancelled checks.

80. During this period respondent failed to maintain a check register, subsidiary ledgers, monthly subsidiary ledger trial balances, monthly reconciliations of the checkbook balance, subsidiary ledger trial balance total and the adjusted bank statement balance, duplicate deposit slips and other bank records as required by Rule 1.15, MRPC, as interpreted by LPRB Opinion 9, now Appendix 1 to the MRPC.

81. Due to respondent's failure to maintain the required records, the Director was unable to accurately attribute ownership of the funds respondent held in his trust account between January 30, 2000, through June 16, 2000.

82. For the period of December 18, 2000, through March 18, 2002, respondent provided trust account books and records consisting of bank statements, canceled checks and monthly subsidiary ledger trial balances.

83. Respondent failed to maintain a trust account check register, subsidiary ledgers, monthly reconciliations of the checkbook balance, subsidiary ledger trial balance total and the adjusted bank statement balance, duplicate deposit slips and other bank records as required by Rule 1.15, MRPC, as interpreted by LPRB Opinion 9, now Appendix 1 to the MRPC.

84. For the period of August 16, 2002, through November 16, 2004, respondent provided partial bank statements, a check register, client subsidiary ledgers and a personal subsidiary ledger for the period August 16, 2002, through November 16, 2004.

85. In spite of requests from the Director, respondent failed to provide any bank statements for the periods of: May 17, 2003, through June 16, 2003; July 18, 2003, through August 16, 2003; and August 17, 2003, through September 16, 2003. Respondent also failed to provide the other required trust account books for these months.

86. For the period of August 16, 2002, through November 16, 2004, respondent failed to maintain monthly subsidiary ledger trial balances, monthly

reconciliations of the checkbook balance, subsidiary ledger trial balance total and the adjusted bank statement balance, duplicate deposit slips and other bank records as required by Rule 1.15, MRPC, as interpreted by LPRB Opinion 9, now Appendix 1 to the MRPC.

87. Respondent falsely certified to the Minnesota Supreme Court that he kept the required trust account books and records from 2002 through 2006.

88. Respondent's conduct in commingling client and personal funds in his trust accounts, misappropriating client funds from his trust account to pay for his personal expenses, misappropriating the funds entrusted to him on behalf of his client D'Amario, failing to keep required trust account books and records, repeatedly issuing checks drawn on the trust account when there were insufficient funds in the account to support the checks, improperly transferring funds from his trust account by electronic transfer and ATM, and falsely certifying to the Minnesota Supreme Court that he maintained the required trust account books and records violated Rules 1.15(a), (b), (c), and (h), as interpreted by LPRB Opinion 9 and Appendix 1 to the MRPC, and 8.4(c), MRPC.

FOURTH COUNT

California Discipline

89. On January 24, 2007, the Supreme Court of California ordered that respondent's California license to practice law be suspended for one year, that the execution of the suspension be stayed, and that he be placed on probation for two years subject to conditions of probation including restitution and three months actual suspension.

90. Respondent's California suspension arose out of respondent, in a single client matter, charging and collecting an unconscionable fee, entering into an improper business transaction, failing to provide written disclosure of a financial interest in the

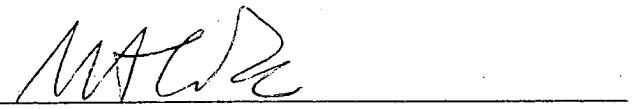
subject matter of the representation, and intentionally or recklessly failing to represent the client competently.

91. Pursuant to Rule 12(d), RLPR, the California adjudication that respondent committed the misconduct set forth above in paragraph 89 establishes the misconduct conclusively for the purposes of these proceedings.

92. Respondent's conduct, as evidenced by the suspension of his California license to practice law, in charging and collecting an unconscionable fee, entering into an improper business transaction, failing to provide written disclosure of a financial interest in the subject matter of the representation, and intentionally or recklessly failing to represent the client competently violated Rules 1.1, 1.5, and 1.8(a), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: December 20, 2007.



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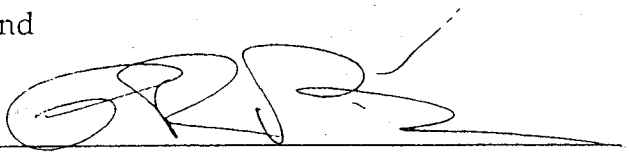

PATRICK R. BURNS
FIRST ASSISTANT DIRECTOR
Attorney No. 134004

State of Minnesota, Supreme Court
I hereby Certify that the foregoing Instrument is a true and correct copy of the original as the same appears on record in my office this 31 day of Jan 20 08

Asst. Deputy Clerk

MINNESOTA RULES
OF
PROFESSIONAL CONDUCT

Effective October 1, 2005
Amended July 1, 2007

On June 17, 2005, the Minnesota Supreme Court ordered that:

1) the amendments to the Minnesota Rules of Professional Conduct contained herein are prescribed and promulgated to be effective October 1, 2005.

2) the inclusion of comments is made for convenience and does not reflect court approval of the comments made therein.

EXHIBIT 3

:ULE 1.1: COMPETENCE

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

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 1.15: SAFEKEEPING PROPERTY

(a) All funds of clients or third persons held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts as set forth in paragraphs (d) through (g) and as defined in paragraph (o). No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein;

(2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein.

(b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the law firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established and the lawyer must provide the client or third person with: (i) written notice of the time, amount, and the purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account. If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client or third person of the receipt of the client's or third person's funds, securities, or other properties;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them;

(4) promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive; and

(5) deposit all fees in advance of the legal services being performed into a trust account and withdraw the fees as earned, unless the lawyer and the client have entered into a written agreement pursuant to Rule 1.5(b).

(d) Each trust account referred to in paragraph (a) shall be an account in an eligible financial institution selected by the lawyer in the exercise of ordinary prudence.

(e) A lawyer who receives client or third person funds shall maintain a pooled trust account ("IOLTA account") for deposit of funds that are nominal in amount or expected to be held for a short period of time.

(f) All client or third person funds shall be deposited in the account specified in paragraph (e) unless they are deposited in a:

(1) separate trust account for the particular third person, client, or client's matter on which the earnings, net of any transaction costs, will be paid to the client or third person; or

(2) pooled trust account with subaccounting which will provide for computation of earnings accrued on each client's or third person's funds and the payment thereof, net of any transaction costs, to the client.

(g) In determining whether to use the account specified in paragraph (e) or an account specified in paragraph (f), a awyer shall take into consideration the following factors:

(1) the amount of earnings which the funds would accrue during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of financial institutions described in paragraph (d) to calculate and pay earnings to individual clients.

Only funds that could not accrue earnings for the client, net of the costs described in subparagraph (2) above, may e placed or retained in the account specified in paragraph (e).

(h) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis, ooks and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice law, and to establish compliance with paragraphs (a) through (f). Equivalent books and records demonstrating same formation in an easily accessible manner and in substantially the same detail are acceptable. The books and records all be preserved for at least six years following the end of the taxable year to which they relate or, as to books and cords relating to funds or property of clients or third persons, for at least six years after completion of the nployment to which they relate.

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer's gistration and in such form as the Clerk of the Appellate Court may prescribe, that the lawyer or the lawyer's law m maintains books and records as required by paragraph (h). The Lawyers Professional Responsibility Board shall blish annually the books and records required by paragraph (h).

(j) Lawyer trust accounts, including IOLTA accounts, shall be maintained only in eligible financial institutions proved by the Office of Lawyers Professional Responsibility. Every check, draft, electronic transfer, or other thdrawal instrument or authorization shall be personally signed or, in the case of electronic, telephone, or wire nsfer, directed by one or more lawyers authorized by the law firm.

(k) A financial institution, to be approved as a depository for lawyer trust accounts, must file with the Office of wyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective whether the instrument is honored. The Lawyers Professional Responsibility Board shall establish rules governing oroval and termination of approved status for financial institutions, and shall annually publish a list of approved ancial institutions. No trust account shall be maintained in any financial institution that does not agree to make such orts. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except on three days notice in writing to the Office.

(l) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in following format:

(1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within (5) banking days of the date of presentation for payment against insufficient funds.

(m) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively eemed to have consented to the reporting and production requirements mandated by this Rule.

(n) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the asonable cost of producing the reports and records required by this rule.

(o) Definitions.

"Trust account" is an account denominated as such in which a lawyer or law firm holds funds on behalf of a ient or third person(s) and is: 1) an interest-bearing checking account; 2) a money market account with or tied to ieck-writing; 3) a sweep account which is a money market fund or daily overnight financial institution repurchase greement invested solely in or fully collateralized by U.S. Government Securities; or 4) an open-end money market nd solely invested in or fully collateralized by U.S. Government Securities. An open-end money market fund must ld itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment ct of 1940, and, at the time of the investment, have total assets of at least $250,000,000. "U.S. Government curities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the iited States or any agency or instrumentality thereof. A daily overnight financial institution repurchase agreement ay be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as fined by applicable federal statutes and regulations.

"IOLTA account" is a pooled trust account in an eligible financial institution that has agreed to:

(1) remit the earnings accruing on this account, net of any allowable reasonable fees, monthly to the Lawyer Trust Account Board (LTAB) established by the Minnesota Supreme Court;

(2) transmit with each remittance a report on a form approved by the LTAB that shall identify each lawyer or law firm for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of earnings applied, the amount of earnings accrued, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and

(3) transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors.

An approved eligible financial institution must pay no less on IOLTA accounts than (i) the highest earnings rate ierally available from the institution to its non-IOLTA customers on each IOLTA account that meets the same nimum balance or other eligibility qualifications, or, (ii) 80% of the Federal Funds Target Rate on all its IOLTA ounts. The rate to be paid shall be fixed on the first day of each month, subject to rate changes during the nth reflected in normal month-end calculations. Accrued earnings and fees shall be calculated in accordance with eligible financial institution's standard practice, but institutions may elect to pay a higher earnings rate and may ct to waive any fees on IOLTA accounts. A financial institution may choose to pay the higher sweep or money rket account rates on a qualifying IOLTA checking account.

"Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, sweep fees and similar rges assessed against comparable accounts by the eligible financial institution. All other fees are the responsibility and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the earnings rued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA accounts or n the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA accounts.

"Eligible financial institution" for trust accounts is a bank or savings and loan association authorized by federal or state law to do business in Minnesota, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Minnesota.

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Notice of dishonor" refers to the notice which an eligible financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (a) (1) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds is the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (b) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(c).

Historical Notes

This rule is similar, in part, to provisions of former EC 7-11 of the Minn. Code of Prof. Responsibility.

Rule 1.15. Safekeeping Property

(a) All funds of clients or third persons held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (d) through (g). No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein.

(2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein,

(b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the law firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established and the lawyer must provide the client or third person with: (i) written notice of the time, amount and the purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account. If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client or third person of the receipt of the client's or third person's funds, securities, or other properties.

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them.

(4) promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.

(d) Each trust account referred to in paragraph (a) shall be an interest bearing account in a bank, savings bank, trust company, savings and loan association, savings association,, or federally regulated investment company selected by a lawyer in the exercise of ordinary prudence.

(e) A lawyer who receives client or third person funds shall maintain a pooled interest bearing trust account for deposit of funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of any transaction costs, shall be paid to the Lawyer Trust Account Board established by the Minnesota Supreme Court.

(f) All client or third person funds shall be deposited in the account specified in paragraph (e) unless they are deposited in a:

(1) separate interest bearing trust account for the particular third person, client or client's matter on which the interest, net of any transaction costs, will be paid to the client or third person; or

(2) pooled interest bearing trust account with subaccounting which will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client.

(g) In determining whether to use the account specified in paragraph (e) or an account specified in paragraph (f), a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

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(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of financial institutions described in paragraph (d) to calculate and pay interest to individual clients.

(h) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis, books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f). The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients or third persons, for at least six years after completion of the employment to which they relate.

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer's registration and in such form as the Clerk of the Appellate Court may prescribe, that the lawyer or the lawyer's law firm maintains books and records as required by paragraph (h).

(j) Lawyer trust accounts shall be maintained only in financial institutions approved by the Office of Lawyers Professional Responsibility.

(k) A financial institution shall be approved as a depository for lawyer trust accounts if it shall file with the Office of Lawyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Lawyers Professional Responsibility Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon (3) days notice in writing to the Office.

(l) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors.

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within (5) banking days of the date of presentation for payment against insufficient funds.

(m) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(n) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(o) Definitions

"Financial Institution"—includes banks, savings and loan associations, savings banks and any other business or person which accepts for deposit funds held in trust by lawyers.

"Properly payable"—refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Notice of dishonor"—refers to the notice which a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument which the institution dishonors.

Adopted June 13, 1985, eff. Sept. 1, 1985. Amended Dec. 27, 1989, eff. Jan. 1, 1990; July 28, 1999, eff. Aug. 1, 1999.

Comment—1985

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the prop-

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erty to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

Historical Notes

This rule is similar to provisions of former DR 9-102 to DR 9-104 of Minn. Code of Prof. Responsibility.

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the client persists in a course of action using the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) the client has used the lawyer's services to perpetrate a crime or fraud;

(2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(4) the representation has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

Adopted June 13, 1985, eff. Sept. 1, 1985.

Comment—1985

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. Withdrawal is permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

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OPINION NO. 9
MAINTENANCE OF BOOKS AND RECORDS

Repealed: January 26, 2006
[now Appendix 1 to 2005 MRPC]

very attorney engaged in the private practice of law must maintain the books and records described in this Opinion to omply with the applicable provisions of the Minnesota Rules of Professional Conduct (MRPC) relating to funds and roperty received and disbursed on behalf of clients or otherwise held in a fiduciary capacity. Equivalent books and cords demonstrating the same information in an easily accessible manner and in substantially the same detail are ceptable. Books and records may be prepared manually or by computer.

Trust Account Records. The following books and records must be maintained for funds and property received and disbursed in a fiduciary capacity, whether for clients or for others:

1. An identification of all trust accounts maintained, including the name of the bank or other depository, account number, account name, date account opened, and an agreement with bank establishing each account and its interest bearing nature. A record should also be maintained showing clearly the type of each such account whether pooled, with net interest paid to the Lawyers Trust Account Board (IOLTA account), pooled with allocation of interest, or individual, including the client name. *See* Rules 1.15(e), (f)(1), and (f)(2), MRPC.

2. A check register for each trust account that chronologically shows all deposits and checks.

   a. Each deposit entry must include the date of the deposit, the amount, the identity of the client(s) for whom the funds were deposited, and the purpose of the deposit.

   b. Each check entry must include the date the check was issued, the payee, the amount, the identity of the client for whom the check was issued (if not the payee), and the purpose of the check.

3. Subsidiary ledgers for each client matter for whom the attorney receives trust funds.

   a. For every trust account transaction, attorneys must record on the appropriate client subsidiary ledger the date of receipt or disbursement, the amount, the payee and check number (for disbursements), the purpose of the transaction, and the balance of funds remaining in the account on behalf of that client matter. An attorney shall not disburse funds from the trust account that would create a negative balance on behalf of an individual client matter.

   b. A separate subsidiary ledger for nominal funds of the attorney held in the trust account pursuant to Rule 1.15(a)(1), MRPC, to accommodate reasonably expected bank fees and charges. This ledger should also record any monthly service charges not offset or waived by the bank in the same month. A separate ledger should be maintained to record interest accrued but not transferred by the bank to the Lawyers Trust Account Board in the same month it is credited.

   c. An attorney maintaining non-IOLTA accounts pursuant to Rule 1.15(f), MRPC, shall record on each client subsidiary ledger the monthly accrual of interest, and the date and amount of each interest disbursement, including disbursements from accrued interest for costs of establishing and administering the account.

4. A monthly trial balance of the subsidiary ledgers identifying each client matter, the balance of funds held on behalf of the client matter at the end of each month, and the total of all the client balances. No balance for a client matter may be negative at any time.

5. A monthly reconciliation of the checkbook balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance. The adjusted bank statement balance is determined from the month-end bank statement balance by adding outstanding deposits and subtracting outstanding checks.

   Sample trial balances and reconciliations are available from the Office of Lawyers Professional Responsibility.

6. Bank statements, canceled checks or copies of canceled checks if they are provided with the bank statements, and duplicate deposit slips. Cash fee payments must be documented by copies of receipts countersigned by the payor. All disbursements must be by check, except when payment by check would be economically imprudent or when exigent circumstances require a transaction by wire transfer. For withdrawal by wire transfer, an attorney or law firm must create a written memorandum authorizing the transaction, signed by the attorney responsible for the transaction. The wire transfer must be entered in the check register and include all the identifying information listed in paragraphs I(2)(b) and I(3)(a) of this Opinion.

7. **Electronic Record Retention.** An attorney who maintains trust account records by computer must print and retain, on a monthly basis, the checkbook register, the trial balance of the subsidiary ledgers, and the reconciliation report. The checkbook register must contain all of the information identified in paragraph 2. Electronic records should be regularly backed up by an appropriate storage device. The frequency of the back up procedure should be directly related to the volume of activity in the trust account.

8. A record showing all property, specifically identified, other than cash, held in trust from time to time for clients or others, provided that routine files, documents and items such as real estate abstracts which are not expected to be held indefinitely need not be so recorded but should be documented in the files of the lawyer as to receipt and delivery.

Business Account Records. An attorney or law firm must maintain at least one bank account, other than the trust account, for funds and property received and disbursed outside the attorney's fiduciary capacity. The following books and records should be maintained for such accounts:

1. A record in the form of a fees book or file of copies of billing invoices reflecting all fees charged and other billing to clients.

2. Copies of receipts, countersigned by the payor, for all cash fee payments.

3. Check registers, bank statements, canceled checks, and duplicate deposit slips sufficient to establish the receipt of earned fee payments from clients, costs advanced on behalf of clients, and similar receipts and disbursements.

4. A periodic reconciliation of the checkbook balance and the bank statement balance.

pted: September 10, 1976.
ended: June 22, 1977, June 23, 1983, December 4, 1987, September 15, 1989, September 18, 1998, August 1, 1999, January 27, 2005.
ealed: January 26, 2006.

1998 Committee Comments

e 9 years since the Lawyers Professional Responsibility Board last revised this Opinion, there have been ificant changes in the ways attorneys may maintain their trust account books and records, most notably the rise of

he personal computer and bookkeeping software as essential office equipment. Moreover, the Director's Office has eviewed hundreds of lawyers' trust accounts since 1990 through the administration of the overdraft notification rogram. This experience has given the Director insight into the most common record-keeping pitfalls and confirmed ie types of records that lawyers must maintain to satisfy their ethical obligations to protect client funds.

'he revised Opinion eliminates the requirement of separate cash receipts and disbursements journals, in favor of a more etailed chronological check register that records all trust account transactions, including the identity of the client and ie purpose of the transaction. This simplifies manual record-keeping and comports with most software packages that low input of all relevant information into one computer screen.

outine monthly printing of hard copies of electronic records is required to allow reconstruction of trust account cords in the event of a hardware failure. Attorneys should implement electronic backup procedures depending on the olume of activity in the trust account. For moderate to high volume trust accounts, weekly or even daily backups to oppy disks or mirrored network servers may be appropriate.

ire transfers may be used for large denomination transactions provided that the lawyer or law firm creates the proper itten authorization. The Board does not recommend that attorneys use wire transfers for transactions under $10,000; ecks signed by an attorney remain the primary means of properly disbursing funds from a trust account.

lated authorities and other resources: Pursuant to Rule 1.15(i), Minnesota Rules of Professional Conduct (Oct. 05), is now Appendix 1 to 2005 Minnesota Rules of Professional Conduct. Brochures entitled: Instructions for ing Quicken 5.0 with Windows 95 or Windows 3.1 for Maintaining, Balancing and Reconciling Minnesota Lawyer ist Accounts; and *Other People's Money* available from the Office of Lawyers Professional Responsibility; *In re acs,* 451 N.W.2d 209 (Minn. 1990).

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APPENDIX 1 TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

MAINTENANCE OF BOOKS AND RECORDS

Adopted September 30, 2005
Amended June 26, 2008

rsuant to Rule 1.15(i), Minnesota Rules of Professional Conduct (MRPC), the Lawyers Professional sponsibility Board adopted the following as the books and records required by Rule 1.15(h), MRPC:

ery attorney engaged in the private practice of law must maintain the books and records described in this pendix to comply with the applicable provisions of the MRPC relating to funds and property received l disbursed on behalf of clients or otherwise held in a fiduciary capacity. Equivalent books and records nonstrating the same information in an easily accessible manner and in substantially the same detail are eptable. Books and records may be prepared manually or by computer.

Trust Account Records. The following books and records must be maintained for funds and property received and disbursed in a fiduciary capacity, whether for clients or for others:

1. An identification of all trust accounts maintained, including the name of the bank or other depository, account number, account name, date account opened, and an agreement with the bank establishing each account and its interest bearing nature. A record should also be maintained showing clearly the type of each such account whether pooled, with net interest paid to the Lawyers Trust Account Board (IOLTA account), pooled with allocation of interest, or individual, including the client name. *See* Rules 1.15(e), (f)(1), and (f)(2), MRPC.

2. A check register for each trust account that chronologically shows all deposits and checks.

   a. Each deposit entry must include the date of the deposit, the amount, the identity of the client(s) for whom the funds were deposited, and the purpose of the deposit.

   b. Each check entry must include the date the check was issued, the payee, the amount, the identity of the client for whom the check was issued (if not the payee), and the purpose of the check.

3. Subsidiary ledgers for each client matter for whom the attorney receives trust funds.

   a. For every trust account transaction, attorneys must record on the appropriate client subsidiary ledger the date of receipt or disbursement, the amount, the payee and check

number (for disbursements), the purpose of the transaction, and the balance of funds remaining in the account on behalf of that client matter. An attorney shall not disburse funds from the trust account that would create a negative balance on behalf of an individual client matter.

b. A separate subsidiary ledger for nominal funds of the attorney held in the trust account pursuant to Rule 1.15(a)(1), MRPC, to accommodate reasonably expected bank fees and charges. This ledger should also record any monthly service charges not offset or waived by the bank in the same month. A separate ledger should be maintained to record interest accrued but not transferred by the bank to the Lawyers Trust Account Board in the same month it is credited.

c. An attorney maintaining non-IOLTA accounts pursuant to Rule 1.15(f), MRPC, shall record on each client subsidiary ledger the monthly accrual of interest, and the date and amount of each interest disbursement, including disbursements from accrued interest for costs of establishing and administering the account.

4. A monthly trial balance of the subsidiary ledgers identifying each client matter, the balance of funds held on behalf of the client matter at the end of each month, and the total of all the client balances. No balance for a client matter may be negative at any time.

5. A monthly reconciliation of the checkbook balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance. The adjusted bank statement balance is determined from the month-end bank statement balance by adding outstanding deposits and subtracting outstanding checks.

[Sample trial balances and reconciliations are available from the Office of Lawyers Professional Responsibility].

6. Bank statements, canceled checks or copies of canceled checks if they are provided with the bank statements, bank wire or electronic fund transfer confirmations and duplicate deposit slips. Cash fee payments must be documented by copies of receipts countersigned by the payor. Attorneys making deposits using substitute checks pursuant to the Check Clearing for the 21st Century Act must request and retain image statements from the bank for each such deposit. For withdrawal by bank wire or electronic fund transfer, an attorney or law firm must create a written memorandum authorizing the transaction, signed by the attorney responsible for the transaction. The bank wire or electronic fund transfer must be entered in the check register and include all the identifying information listed in paragraphs I(2)(b) and I (3)(a) of this Appendix.

7. **Electronic Record Retention.** An attorney who maintains trust account records by computer must print and retain, on a monthly basis, the checkbook register, the trial balance of the subsidiary ledgers, and the reconciliation report. The checkbook register must contain all of the information identified in paragraph 2. Electronic records should be regularly backed up

by an appropriate storage device. The frequency of the back-up procedure should be directly related to the volume of activity in the trust account.

8. A record showing all property, specifically identified, other than cash, held in trust from time-to-time for clients or others, provided that routine files, documents and items, such as real estate abstracts, which are not expected to be held indefinitely, need not be so recorded but should be documented in the files of the lawyer as to receipt and delivery.

I. **Business Account Records.** An attorney or law firm must maintain at least one bank account, other than the trust account, for funds and property received and disbursed outside the attorney's fiduciary capacity. The following books and records should be maintained for such accounts:

1. A record in the form of a fees book or file of copies of billing invoices reflecting all fees charged and other billings to clients.

2. Copies of receipts, countersigned by the payor, for all cash fee payments.

3. Check registers, bank statements, canceled checks, and duplicate deposit slips sufficient to establish the receipt of earned fee payments from clients, costs advanced on behalf of clients, and similar receipts and disbursements.

4. A periodic reconciliation of the checkbook balance and the bank statement balance.

:ULE 8.4: MISCONDUCT

: is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do) through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in :her respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means at violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or her law;

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, marital status in connection with a lawyer's professional activities;

(h) commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on : lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall determined after consideration of all the circumstances, including:

(1) the seriousness of the act,

(2) whether the lawyer knew that the act was prohibited by statute or ordinance,

(3) whether the act was part of a pattern of prohibited conduct, and

(4) whether the act was committed in connection with the lawyer's professional activities; or

(i) refuse to honor a final and binding fee arbitration award after agreeing to arbitrate a fee dispute.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other

organization.

[4] Paragraph (g) specifies a particularly egregious type of discriminatory act-harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

[5] Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

[6] Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

[7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. *See, e.g.*, Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).

[8] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

STATE OF MINNESOTA

IN SUPREME COURT

A07-2418

OFFICE OF
APPELLATE COURTS

JAN 1 8 2008

FILED

In re Petition for Disciplinary Action against
David Max Van Sickle, a Minnesota Attorney,
Registration No. 292783.

ORDER

The Director of the Office of Lawyers Professional Responsibility has filed a petition alleging that respondent David Max Van Sickle committed professional misconduct warranting public discipline, namely, that respondent filed lawsuits on behalf of a client that, as found by the courts, lacked a good faith basis in law or fact, in violation of Rules 1.1, 3.1, and 8.4(d), Minnesota Rules of Professional Conduct (MRPC); failed to timely disburse to a client settlement funds that undisputedly belonged to the client, in violation of Rule 1.15(b), MRPC, as that rule read prior to October 1, 2005; commingled client and personal funds in his trust account, negligently misappropriated funds entrusted to him on behalf of a client, failed to keep required trust account books and records, repeatedly issued checks drawn on the trust account when there were insufficient funds in the account, improperly transferred funds from his trust account by electronic transfer and automated teller machines (ATMs), and improperly certified to this court that he maintained the required trust account books and records, in violation of Rules 1.15(a), (b), (c), and (h), as interpreted by Lawyers Professional

EXHIBIT 4

Responsibility Board Opinion 9 and Appendix 1 to the MRPC, and Rule 8.4(c), MRPC; and, as evidenced by the order suspending his California license to practice law, charged and collected an unconscionable fee, entered into an improper business transaction, failed to provide written disclosure of a financial interest in the subject matter of the representation, and intentionally or recklessly failed to represent a client competently, in violation of Rules 1.1, 1.5, and 1.8(a), MRPC.

Respondent admits his conduct violated the Rules of Professional Conduct, waives his procedural rights under Rule 14, Rules on Lawyers Professional Responsibility (RLPR), and has entered into a stipulation with the Director under which they jointly recommend that the appropriate discipline is a four-month suspension pursuant to Rule 15, RLPR; that the reinstatement hearing provided for in Rule 18, RLPR, not be waived; that respondent may petition for reinstatement at any time after 60 days from the effective date of his suspension; and that reinstatement be conditioned upon: (1) payment of costs in the amount of $900 pursuant to Rule 24(d), RLPR; (2) compliance with Rule 26, RLPR; (3) pursuant to Rule 18(e), RLPR, providing proof of successful completion of the professional responsibility examination within one year prior to the petition for reinstatement; (4) satisfaction of continuing legal education requirements under Rule 18(e), RLPR; and (5) paying or entering into an agreement for a payment plan to pay the attorney fees assessed against him by the federal district court in the matter of *Willhite v. Collins*, No. 04-CV-4380 (D. Minn. 2005).

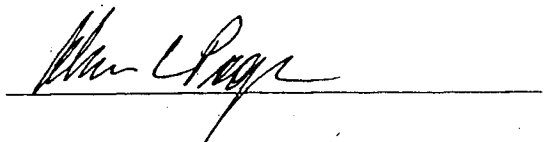
The court has independently reviewed the file and generally approves the jointly recommended disposition.

Based on all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that respondent David Max Van Sickle is suspended from the practice of law for a minimum of four months, effective 14 days from the date of filing of this order. Respondent shall pay $900 in costs pursuant to Rule 24, RLPR, and shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals). Respondent may petition for reinstatement after 60 days from the effective date of his suspension, provided that he files with the petition for reinstatement proof of: (1) successful completion of the professional responsibility portion of the state bar examination within one year prior to the date of the petition for reinstatement; (2) satisfaction of continuing legal education requirements pursuant to Rule 18(e), RLPR; and (3) proof of payment of the attorney fees assessed against respondent by the federal district court in the matter of *Willhite v. Collins*, No. 04-CV-4380 (D. Minn. 2005), or proof that respondent has entered into and is in compliance with a payment plan for payment of such attorney fees.

Dated: January 17, 2008

BY THE COURT:



Alan C. Page
Associate Justice

State of Minnesota, Appellate Courts
I hereby Certify that the foregoing Instrument is a true and correct copy of the original as the same appears on record in my office this 29th day of January 20 08

Asst. Deputy Clerk

(Do not write above this line.)

In the Matter of DAVID M. VAN SICKLE	Case number(s): 08-J-10456; 09-O-11418

SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Facts and Conclusions of Law.

Respondent enters into this stipulation as a condition of his/her participation in the Program. Respondent understands that he/she must abide by all terms and conditions of Respondent's Program Contract.

If the Respondent is not accepted into the Program or does not sign the Program contract, this Stipulation will be rejected and will not be binding on Respondent or the State Bar.

If the Respondent is accepted into the Program, this Stipulation will be filed and will become public. Upon Respondent's successful completion of or termination from the Program, the specified level of discipline for successful completion of or termination from the Program as set forth in the State Bar Court's Confidential Statement of Alternative Dispositions and Orders shall be imposed or recommended to the Supreme Court.

12/16/09 Date	Respondent's Signature	DAVID M. VAN SICKLE Print Name
~~12/16/09~~ Date	Respondent's Counsel Signature	Print Name
12/16/09 Date	Deputy Trial Counsel's Signature	CHARLES A. MURRAY Print Name

(Do not write above this line.)

In the Matter Of **DAVID M. VAN SICKLE**	Case Number(s): **08-J-10456; 09-O-11418**

ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- [x] The stipulation as to facts and conclusions of law is APPROVED.
- [ ] The stipulation as to facts and conclusions of law is APPROVED AS MODIFIED as set forth below.
- [ ] All court dates in the Hearing Department are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation; or 3) Respondent is not accepted for participation in the Program or does not sign the Program Contract. (See rule 135(b) and 802(a), Rules of Procedure.)

4-5-10
Date

Judge of the State Bar Court

RICHARD A. PLATEL

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on April 8, 2010, I deposited a true copy of the following document(s):

STIPULATION RE FACTS AND CONCLUSIONS OF LAW

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

DAVID M. VAN SICKLE
DAVID VAN SICKLE, ATTORNEY
11616 HAWTHORNE BLVD STE 200
HAWTHORNE, CA 90250

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

CHARLES MURRAY, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on April 8, 2010.

Johnnie Lee Smith
Case Administrator
State Bar Court