

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary
Action against JAMES L. BERG,
a Minnesota Attorney,
Registration No. 139105.

**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 (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 15, 1982. Respondent currently practices law in Chaska, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Forgery and Misappropriation

C.W./L.P. Matter

1. Respondent represented C.W. in a paternity action against L.P. and in a lawsuit a contractor had commenced against C.W. and L.P. regarding the construction of their home.¹ C.W. and L.P. sold the home that was the subject of the lawsuit and a closing was held on June 28, 2004. At that time, the parties entered into an escrow

¹ The Director refers to those clients who filed an ethics complaint by name. During the investigation and audit of respondent's trust account books and records, the Director established that respondent committed further misconduct, including misappropriation, as to other clients who have not filed an ethics complaint. The Director refers to these clients by their initials.

agreement under which respondent agreed to deposit and retain the approximately \$136,000 in real estate sales proceeds in his trust account, pending resolution of financial matters pending between L.P. and C.W. Following the closing, L.P. retained attorney Arlo Vande Vegte and commenced a lawsuit against C.W. for release of the real estate proceeds.

2. On information and belief, respondent deposited the C.W./L.P. real estate proceeds into his Wells Fargo Bank trust account no. 380-0300150 ("trust account") on or about June 28, 2004. Sometime prior to April 1, 2005, however, respondent disbursed substantially all of the real estate sales proceeds from his trust account. In fact, the balance in respondent's trust account as of April 1, 2005, the earliest date for which the Director has obtained records for the account, was only \$694. After April 1, 2005, the balance in respondent's trust account was not again sufficient to cover the C.W./L.P. real estate proceeds until July 28, 2005, when respondent deposited to the account \$750,000 in settlement proceeds he received in the R.L.C. matter. See paragraph 27, below. Respondent's fees in the R.L.C. matter, which he retained in the account for some period of time, appear to have been sufficient to cover the C.W./L.P. real estate proceeds.

3. Respondent's disbursement of the C.W./L.P. real estate sales proceeds from his trust account prior to April 1, 2005, was unauthorized, contrary to the parties' escrow agreement and constituted misappropriation.

4. On August 10, 2005, the court ordered respondent to continue holding the C.W./L.P. real estate proceeds in his trust account. The court further ordered respondent to provide an accounting of the funds to Vande Vegte by August 12, 2005.

5. In his August 12, 2005, accounting, respondent represented to Vande Vegte that his trust account balance on that date was \$750,178. In fact, however, the balance in respondent's trust account on August 12, 2005, was approximately \$240,000. That balance was substantially comprised of the fees to which it appears respondent was entitled in the R.L.C. matter.

6. In his August 12, 2005, accounting, respondent also informed Vande Vegte, apparently for the first time, of two disbursements he made from the real estate proceeds in December 2004, in the amounts of \$45,000 and \$11,495, respectively. Respondent represented that these disbursements were to satisfy loan and credit card debt of the parties.

7. On August 18, 2005, L.P. and C.W. reached a mediated settlement agreement regarding disposition of the real estate proceeds. The agreement required respondent to disburse \$35,000 to L.P. by August 22, 2005, and provided that C.W. was entitled to the remainder of the real estate proceeds.

8. On August 22, 2005, Vande Vegte received a \$35,000 cashier's check from respondent on L.P.'s behalf. The Director has been unable to confirm that C.W. received the balance of funds to which she was entitled; however, it appears respondent had a sufficient remaining balance of his fees in the R.L.C. matter in the trust account to cover the amount due C.W.

John Remer Matter

9. In or about March 2005, John Remer retained respondent to represent him in an accident matter.

10. At a settlement conference in May 2005, respondent agreed to settle the Remer matter for \$5,000. Respondent obtained Remer's endorsement on the settlement check and, on May 26, 2005, respondent deposited the check into his trust account. Respondent advised Remer to pursue a bankruptcy filing and told Remer he would disburse the funds to Remer from his trust account in one to two weeks.

11. By May 31, 2005, however, respondent had withdrawn the entire \$5,000 in Remer settlement proceeds from his trust account. Respondent's actions in this regard constituted misappropriation.

12. On June 3, 2005, respondent received notice from an attorney who had previously represented Remer in the accident matter that he was seeking reimbursement of cost advances made on Remer's behalf.

13. Also on June 3, 2005, respondent deposited \$5,000 in cash into his trust account. Respondent has represented to the Director that this deposit was comprised of the Remer settlement funds.

14. By June 7, 2005, however, respondent had once again withdrawn the entire \$5,000 in Remer settlement funds from his trust account. Respondent's actions in this regard constituted misappropriation. To date, respondent has not remitted any portion of the Remer settlement funds to Remer.

Karen Strand Matter

15. Karen Strand retained respondent in October 2003 to represent her in a dispute with a window contractor.

16. On August 16, 2005, respondent agreed to settle the Strand matter for \$7,500. The settlement amount was to be paid \$3,750 each by the contractor and his insurance company. Respondent did not consult with Strand regarding the settlement, nor did he inform her of the settlement at that time.

17. By October 19, 2006, respondent had received the insurance company's \$3,750 check. Without Strand's knowledge or authorization, respondent forged Strand's name to the endorsement on the check and deposited it into his trust account on that date.

18. By October 25, 2005, respondent had received the contractor's \$3,750 check. Without Strand's knowledge or authorization, respondent forged Strand's name to the endorsement on the check and deposited it into his trust account on that date.

19. Thereafter, respondent disbursed the Strand settlement proceeds in their entirety from his trust account to himself or to others on his own behalf. In fact, by October 25, 2005, the balance in respondent's trust account was less than \$7,500 and, by November 7, 2005, the balance in respondent's trust account was less than \$200.

20. Respondent's actions in this regard constituted misappropriation.

21. On or about January 23, 2006, after Strand filed a complaint against respondent with the Director, respondent delivered to her a \$5,000 check for her share of the settlement.

B.C. Matter

22. Respondent represented B.C. in an employment matter. Respondent agreed to a settlement of the B.C. matter and on October 7, 2005, deposited a \$6,953 check payable to B.C. into his trust account. It appears respondent separately received his fees in the B.C. matter and was not entitled to any portion of the settlement check.

23. Thereafter, respondent disbursed the B.C. settlement proceeds in their entirety from his trust account to himself or to others on his own behalf. In fact, by November 18, 2005, the balance in respondent's trust account was only approximately \$66. Respondent's actions in this regard constituted misappropriation.

24. On March 23, 2006, respondent disbursed the settlement funds to B.C. in the form of a cashier's check.

25. Respondent's conduct in forging Strand's endorsement on the settlement checks and misappropriating the C.W./L.P., Remer, Strand and B.C. settlement funds violated Rules 1.15(a) and (b), and 8.4(b) and (c), Minnesota Rules of Professional Conduct (MRPC).

SECOND COUNT

Commingling, Misuse of a Trust Account and Mishandling of Client Funds

26. Based primarily on the trust account records the Director obtained from Wells Fargo Bank in response to the Director's investigatory subpoena, *see* paragraph 67 below, the Director audited respondent's trust account for the period April 1, 2005, to April 28, 2006.

27. The Director's audit revealed that during virtually the entire audit period, respondent routinely deposited into his trust account non-client funds to which respondent, and not a client or third party in connection with a representation, was entitled, including funds he received from casinos.

28. Also during the audit period, respondent deposited or retained client settlement or other funds on behalf of at least eight clients, including C.W./L.P., Remer, Strand and B.C., in his trust account. These clients, and the dates and amounts of the deposits into respondent's trust account on their behalf, are as follows:

06/28/04	\$135,992.80	C.W./L.P.
04/18/05	\$25,000.00	D.L and K.L.
05/26/05	\$5,000.00	John Remer
07/28/05	\$750,000.00	R.L.C.
10/07/05	\$6,953.00	B.C.
10/19/05	\$3,750.00	Karen Strand
10/25/05	\$3,750.00	Karen Strand
12/23/05	\$6,000.00	L.L.P.
01/04/06	\$10,000.00	T.L.

29. During the periods of time in which respondent made the above deposits and/or retained some balance of client funds in his trust account, respondent was also maintaining a substantial balance of his own funds in the account, thus commingling the client funds with his own funds.

30. During the period April 2005 through February 2006, respondent did not issue a single trust account check. Rather, all disbursements from the account were in the form of cash withdrawals, some of which respondent later converted to cashier's checks, or electronic withdrawals made by respondent's creditors.

31. Of the deposits listed above, the Director has confirmed that L.P., B.C. and Strand received some portion of the funds respondent received on their behalf. In each case, respondent issued the client a cashier's check, rather than a trust account check, in disbursement of the settlement funds.

32. As a result of respondent's reliance on cashier's checks and his non-cooperation with the Director's investigation, *see* paragraphs 61 to 86 below, the Director has been unable to confirm that the other clients identified above received any portion of the settlement funds paid to respondent on their behalf.

33. Respondent's conduct in commingling client funds with his own funds in his trust account, use of his trust account to deposit and disburse his own funds, and general mishandling of client settlement funds violated Rule 1.15(a) and (b), MRPC.

THIRD COUNT

Failure to Enter into Written Contingent Fee Agreements, Failure to Account, Neglect and Inadequate Client Communication

Remer Matter

34. When Remer retained respondent in March 2005, respondent discussed with Remer that his fee would be one-third of any recovery. Respondent did not, however, enter into a written fee agreement with Remer.

35. Various medical providers had served liens or claims against Remer for medical expenses totaling at least \$25,000.

36. Respondent has not, at any time, accounted to Remer for the settlement funds he received on Remer's behalf or paid any portion of those funds to Remer or any creditor on his behalf.

37. After he endorsed the settlement check, Remer contacted respondent on at least two occasions regarding disbursement of the funds. Respondent refused Remer's requests to disburse the settlement funds.

38. In August 2005, Remer retained attorney Jay Benson to file bankruptcy. Benson filed a Chapter 7 bankruptcy petition on Remer's behalf on August 29, 2005.

39. On October 5, 2005, Benson wrote to respondent and advised of the bankruptcy filing. Benson told respondent that Remer had claimed the \$5,000 accident settlement as an exempt asset in his bankruptcy and asked respondent to forward to Remer the funds "being held in [your] trust account." Respondent took no action in response to Benson's letter and made no effort to determine entitlement to the \$5,000 in Remer settlement funds.

40. On December 6, 2005, Remer received a discharge of his debts in bankruptcy. No party had objected to Remer's claim that the \$5,000 settlement was an

exempt asset. In addition, with the exception of a \$987.85 lien by the Minnesota Department of Human Services ("Human Services"), all other medical and attorney's liens against Remer were discharged.

41. On December 14, 2005, Benson wrote again to respondent. After reiterating that the \$5,000 settlement was an exempt asset, Benson asked respondent to "call my office at your earliest convenience to discuss this matter." Respondent did not call Benson as requested and made no effort to determine entitlement to or make proper disbursement of the Remer settlement funds.

42. On July 11, 2006, respondent wrote to Human Services regarding its lien against the Remer settlement funds, which had not been discharged in Remer's bankruptcy. Respondent stated, "If [sic] in the event you choose to make a claim, please notify me in writing within 10 days. In the event I do not hear from you, I will disburse the funds to Mr. Remer."

43. On July 18, 2006, Human Services responded to respondent's letter with an indication that it would accept \$500 in settlement of its lien.

44. Respondent took no action to resolve Human Services' lien or to otherwise determine entitlement to or make proper disbursement of the Remer settlement funds.

Karen Strand Matter

45. When Strand retained respondent in October 2003, respondent required payment of a \$750 retainer from Strand and discussed with her that the balance of his fees would be one-third of any recovery. Respondent did not, however, enter into a written fee agreement with Strand.

46. Respondent did not obtain Strand's advance authorization to settle her case for \$7,500 in August 2005 or even inform her of the settlement at that time.

47. In fact, respondent did not inform Strand of the settlement until at least October 2005; he may not have informed her until as late as December 2005. In late-December 2005, respondent faxed release documents to Strand. Although Strand did not agree that the \$7,500 settlement was sufficient to compensate her for her loss,

respondent told her that the settlement had been finalized and could not be undone. Strand signed the release documents and returned them to respondent.

48. Respondent told Strand that he would deliver to her a \$5,000 check for her portion of the settlement proceeds on January 18, 2006. Respondent failed to do so. In fact, respondent did not deliver Strand's settlement proceeds to her until January 23, 2006.

49. Respondent did not provide Strand with a written statement showing the outcome of her matter, the remittance to her and the method by which that remittance amount was determined.

50. During the entire course of his representation of her and, in particular, during the period August through December 2005, respondent did not respond to Strand's efforts to contact him regarding the status of her case.

L.L.P. Matter

51. Respondent represented L.L.P. in a personal injury matter. Respondent's fee agreement with L.L.P. provided for a contingent fee. Respondent did not, however, enter into a written fee agreement with L.L.P.

52. Respondent received settlement funds on L.L.P.'s behalf and deposited them into his trust account on December 23, 2005. Respondent disbursed to L.L.P. her portion of the settlement on April 18, 2006. Respondent did not, however, provide L.L.P. with a written statement showing the outcome of her matter, the remittance to her and the method by which that remittance amount was determined.

T.L. Matter

53. Respondent represented T.L. in a personal injury matter. Respondent's fee agreement with T.L. provided for a contingent fee. Respondent did not, however, enter into a written fee agreement with T.L.

54. Respondent received settlement funds on T.L.'s behalf and deposited them into his trust account on January 4, 2006. Respondent disbursed to T.L. his portion of the settlement on January 27, 2006. Respondent did not, however, provide

T.L. with a written statement showing the outcome of his legal matter, the remittance to him and the method by which that remittance amount was determined.

55. Respondent's conduct in failing to enter into written contingent fee agreements with Remer, Strand, L.P. and T.L., failing to account for the settlement funds he received on behalf of those clients and B.C., failing to determine entitlement to the Remer settlement funds and make proper disbursement of those funds, failing to inform Strand of the fact and amount of her settlement, and failing to respond to Remer and Strand's attempts to communicate with him regarding their cases violated Rules 1.3, 1.4(a) (for periods prior to October 1, 2005), 1.4(a)(4) (for periods on and after October 1, 2005), and 1.5(c), MRPC.

FOURTH COUNT

False Statements

56. On January 18, 2006, Strand filed a complaint against respondent with the Director.

57. In his March 14, 2006, response to Strand's complaint, respondent made the following statements:

The case was set for trial in December, 2005. I contacted Mr. Jung prior to the trial and suggested a \$10,000.00 settlement, a number my client had said she would accept. Mr. Jung was at \$3,000.00. We both agreed to see if our clients would accept \$7,500.00. Ms. Strand hesitated for a while and finally did agree to accept this sum as settlement.

58. Respondent repeated these statements in a conversation with Mark Metz, the district ethics committee (DEC) investigator assigned to investigate Strand's complaint.

59. Respondent's statements that he contacted Jung and Strand in December 2005 to discuss, and eventually agree to, a settlement, were false. In fact, as noted above, respondent agreed to the settlement in August 2005, and received the settlement funds in October 2005.

60. Respondent's conduct in making false statements in his written response to the Strand complaint and to the DEC investigator violated Rules 8.1(a) and 8.4(c), MRPC.

FIFTH COUNT

Non-Cooperation

Remer Matter

61. On February 6, 2006, Remer filed a complaint against respondent with the Director. In his March 21, 2006, response to Remer's complaint, respondent stated, "I am, however, sending the entire \$5,000 to John Remer as I also have a duty to send the funds to him." Respondent did not, however, at that time or any other, send any funds to Remer.

62. On May 26, 2006, Daniel Honsey, the DEC investigator assigned to investigate Remer's complaint against respondent, wrote to respondent. Honsey requested that respondent produce "copies of your records showing the deposit of the \$5,000 into your trust account and copies of your recent trust account statements showing the \$5,000 in your trust account." Respondent failed to produce the requested trust account records.

63. During a meeting with Honsey on June 6, 2006, respondent stated that he was not claiming any attorney's fees from the Remer settlement. Respondent also stated that he would fax copies of the requested trust account records. Respondent failed to do so.

64. On June 27, 2006, the Director wrote to respondent and requested that within 10 days he produce his trust account books and records for the period May through December 2005. Respondent failed to produce the requested trust account books and records.

65. On July 13, 2006, respondent faxed to the Director copies of his July 11, 2006, letter to Human Services and Remer's bankruptcy petition.

66. On July 14, 2006, the Director wrote to respondent and stated that his fax transmission was not responsive to the Director's June 27, 2006, letter. The Director stated that respondent failed to include the requested trust account books and records. The Director requested that respondent produce those materials within one week. Respondent failed to do so.

67. On July 20, 2006, respondent wrote to the Director. Respondent failed to include copies of the requested trust account books and records with his letter.

68. In his July 20, 2006, letter, respondent acknowledged and explained his withdrawal of the Remer settlement funds from his trust account as follows:

My recollection is that I was going to file bankruptcy for Mr. Remer and that pursuant to bankruptcy rules Mr. Remer could avoid the transfer to creditors rule if disbursement was made 90 days prior to filing. Mr. Remer was going to gather a list of creditors and return it to me for preparation of the bankruptcy. I held the money in unsecured funds waiting to hear back from him but wanted to establish a date of transfer. He instead without my knowledge hired a different bankruptcy attorney. Instead of redepositing these funds into my trust account, I have kept them in an unsecured form. . . . I believe now that I improperly took these funds out of my trust account. I should have kept the funds there pending resolution of all matters. I know after reviewing the rules that this is a serious violation.

69. On July 25, 2006, respondent appeared for a meeting in the Director's Office. Respondent did not bring any of the requested trust account books and records to the meeting.

70. During the meeting, respondent stated that he was holding the Remer funds "in cash" in a safe place in his home. Respondent stated that he had a claim to at least some of the funds and did not agree that his removal of the funds from his trust account constituted misappropriation. The Director directed respondent to return the Remer settlement funds into his trust account until entitlement to those funds could be determined. Respondent failed to do so.

71. On July 25, 2006, the Director wrote to respondent and requested, among other things, that he produce within 10 days verification that he had returned the Remer settlement funds to his trust account and copies of his trust account books and records. Respondent failed to respond to the Director's letter or to produce any of the requested materials.

72. On August 9, 2006, the Chair of the Lawyers Professional Responsibility Board approved the Director's request for an investigatory subpoena directed to Wells Fargo Bank pursuant to Rule 8(c), RLPR. The Director thereafter obtained from Wells Fargo Bank some of the trust account records the Director had previously requested from respondent.

73. On August 10, 2006, respondent wrote to the Director. Respondent stated:

I have done research on my contention that the \$5,000.00 funds in the Remer case were fees owed to me and not misappropriation of funds . . . If a client has a contingency fee agreement with an attorney but either misrepresents that cause of action or otherwise gives the attorney good cause to withdraw, the attorney is allowed hourly fees on a quantum merit [sic] basis.

74. In his letter, respondent also questioned the Director's authority to demand that he produce various documents and information, including trust account books and records, stating privacy concerns.

75. On August 15, 2006, the Director responded to respondent's August 10, 2006, letter. The Director again urged respondent to return the Remer funds to his trust account and requested, among other things, copies of his trust account books and records. Respondent failed to respond to the Director's letter and failed to produce the requested trust account books and records.

76. On September 7, 2006, respondent wrote to the Director and objected to the investigatory subpoena the Director had obtained and had served on respondent's bank.

77. The Director responded to respondent's letter on September 8, 2006. The Director explained the basis for the investigatory subpoena and stated that because respondent's letter was not a formal motion to quash or modify the subpoena, the Director did not intend to make any further response to it. The Director again requested that respondent produce his trust account books and records. Respondent again failed to produce any trust account books and records.

78. On October 23, 2006, after receiving records for respondent's trust account from respondent's bank and auditing those records, the Director wrote to respondent. The Director identified settlements additional to the Remer settlement that respondent had deposited into his trust account and requested that respondent produce documents and information related to those settlements, including verification that the clients had received their portion of the settlements.

79. On October 26, 2006, the Director served on respondent notice of his November 9, 2006, sworn statement. The Director stated that the sworn statement would only be necessary if respondent failed to produce a timely and complete response to the Director's October 23, 2006, letter. Respondent failed to provide a substantive response to the Director's October 23, 2006, letter.

80. On the afternoon of November 8, 2006, respondent faxed a letter to the Director in which he requested an extension of time to respond to the Director's October 23, 2006, letter and a continuance of the sworn statement.

81. On November 9, 2006, the Director wrote to respondent and granted an extension and continuance. The Director requested respondent's response to the Director's October 23, 2006, letter by November 20, 2006, and rescheduled his sworn statement to November 27, 2006.

82. Respondent failed to respond to the Director's October 23, 2006, letter by November 20, 2006.

83. On November 26, 2006, respondent faxed a letter to the Director in which he produced some, but not nearly all, of the documents and information the Director requested on October 23 and November 20, 2006.

84. A representative of the Director called respondent's office on the morning of November 27, 2006, to inquire as to whether he would be appearing for his sworn statement later that day. Respondent's staff member informed the Director's representative that respondent was in court and provided respondent's cell phone number.

85. The Director's representative called respondent on his cell phone. Respondent stated that he was in trial that day and would be unable to attend the sworn statement. Respondent further stated that he would call the Director later that day to further discuss the matter. Respondent failed to do so.

86. On December 1, 2006, the Director wrote to respondent to request the information and documents that had been missing from his November 26 fax, and to request additional materials. Respondent failed to timely respond to the Director's December 1 letter.

C.W./L.P. Matter

87. On March 10, 2006, the Director issued to respondent a notice of investigation in the matter involving C.W. and L.P. The notice requested respondent's written response to the complaint within 10 days. Respondent failed to respond.

88. On July 30, 2006, respondent wrote to the Director, stating that he would submit his "full response" to the complaint regarding the C.W./L.P. matter by August 4, 2006. Respondent failed to do so.

89. On November 13, 2006, the Director wrote to respondent requesting respondent's written response to the complaint and additional materials by November 27, 2006. Respondent failed to respond.

90. In his November 26, 2006, fax transmission, *see* paragraph 79 above, respondent stated that he would provide his response to the Director's November 13, 2006, letter within 10 days. Respondent failed to do so.

91. Respondent's conduct in failing to cooperate with the DEC investigator and the Director in their efforts to investigate the matters detailed above violated Rule 8.1(b), MRPC, and Rule 25, RLPR.

WHEREFORE, the Director respectfully prays for an order of this Court imposing suspension or disbarment, 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: March 13, 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

and



CASSIE HANSON
ASSISTANT DIRECTOR
Attorney No. 303422