

FILE NO. A07-563

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary  
Action against JAMES L. BERG,  
a Minnesota Attorney,  
Registration No. 139105.  
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**SUPPLEMENTARY 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 supplementary petition for disciplinary action pursuant to Rules 10(e) and 12(a), Rules on Lawyers Professional Responsibility (RLPR).

Respondent is currently the subject of a March 13, 2007, petition for disciplinary action. The Director has investigated further allegations of unprofessional conduct against respondent.

The Director alleges that respondent has committed the following additional unprofessional conduct warranting public discipline:

SIXTH COUNT

Additional Misappropriation, False Statements and Mishandling of Client Funds  
**Humphreys Matter**

92. Respondent represented Lindy Lee Humphreys ("Lindy") in a marriage dissolution matter.

93. On September 15, 2006, the Humphreys' homestead was sold. Following the sale, the homeowner's insurance carrier issued a \$519.82 check for the unearned insurance premiums on the homestead. On October 3, 2006, the mortgage company issued a \$2,354.21 check for the balance in the Humphreys' mortgage escrow account.

94. On February 8, 2007, based on the disparity in the parties' respective incomes and Lindy's desperate need for the funds, the parties stipulated that the

insurance premium and mortgage escrow checks would be paid to Lindy. (An order to that effect was issued on February 20, 2007.)

95. Respondent received the Humphreys' insurance premium and mortgage escrow checks from opposing counsel. On February 9, 2007, respondent deposited those checks into his Wells Fargo Bank trust account no. 380-0300150 (hereinafter, "trust account"). On February 12, 2007, without Lindy's knowledge or authorization, respondent withdrew the entire balance of the Humphreys' funds for his own use and benefit. Respondent's actions in this regard constituted misappropriation.

96. In response to Lindy's inquiries following his receipt and misappropriation of the Humphreys' funds, respondent stated that he was unable to release the funds to her because additional signatures on the court's order were required. Respondent's statements to Lindy were false.

97. On approximately April 1, 2007, after Lindy's repeated requests, respondent issued to her a cashier's check for the full amount of her funds.

#### **G.B. Matter**

98. Respondent represented G.B. in post-dissolution matters.

99. On November 21, 2006, second amended findings and order were issued in the G.B. post-dissolution proceeding. Judgment was entered on the findings and order on November 27, 2006.

100. Respondent recommended that G.B. appeal the November 21 order/November 27 judgment. G.B. agreed. On approximately January 12, 2007, at respondent's request, G.B. gave respondent a \$1,500 cashier's check for the cost of the appeal. G.B.'s payment included \$500 for the appellate filing fee. Respondent did not enter into a written fee agreement with G.B. and did not deposit any portion of G.B.'s payment into his trust account as required under Rules 1.5(b) and 1.15(a), Minnesota Rules of Professional Conduct (MRPC). Respondent's failure to do so constituted misappropriation of G.B.'s advance fee payment.

101. On January 30, 2007, respondent filed an appeal on G.B.'s behalf with the Minnesota Court of Appeals. Respondent issued a check in the amount of \$500 from his business account in payment of the court's filing fee. Respondent's check was returned for insufficient funds.

102. On March 9, 2007, the Court of Appeals wrote to respondent informing him of the return of his check and requesting issuance of a replacement money order or cashier's check. Respondent did not respond and did not issue a replacement money order or cashier's check.

103. On March 13, 2007, the Court of Appeals dismissed G.B.'s appeal as untimely. *See* paragraphs 107 through 111, below. During the period before and after the dismissal, respondent stated to G.B. that opposing counsel, Amy Senn, had asked him to withdraw the appeal and had made an offer of settlement, to which he was preparing to respond. Respondent's statements to G.B. were false.

104. In fact, respondent telephoned Senn on February 1, 2007, to discuss a possible settlement. On February 2, 2007, Senn wrote to respondent with her client's settlement proposal. Respondent failed to respond to Senn's letter and based on that failure, as further detailed below, Senn proceeded to make the filings required of her with the Court of Appeals.

105. Respondent's conduct in misappropriating the Humphreys and G.B. funds and making false statements to conceal the misappropriation violated Rules 1.15(a) and (b), 4.1, and 8.4(b) and (c), MRPC.

106. Respondent's conduct in failing to deposit an advance fee payment into his client trust account, issuing an insufficient funds check to the Court of Appeals and failing to issue a replacement money order or cashier's check in response to the Court of Appeals' request, violated Rules 1.5(b), and 8.4(c) and (d), MRPC.

## SEVENTH COUNT

### Neglect, Incompetence and Failure to Communicate

107. On February 16, 2007, the Court of Appeals issued an order in the G.B. appeal. The order directed the parties to file by February 27, 2007, informal memoranda addressing the timeliness of G.B.'s appeal.

108. On February 23, 2007, Senn filed and served a memorandum pursuant to the Court of Appeals' order.

109. Respondent did not file a memorandum or otherwise make any response to the Court of Appeals' February 16, 2007, order.

110. On March 13, 2007, the Court of Appeals dismissed G.B.'s appeal as untimely. The Court stated, "The appeal was filed by mail on January 30, which was after the appeal period expired on January 26. We must dismiss this untimely appeal."

111. At no point did respondent inform G.B. of the dismissal of his appeal or of the reasons for that dismissal. G.B. learned that his appeal was dismissed when contacted by the Director.

112. Respondent's conduct in failing to timely file G.B.'s appeal and to communicate with G.B. regarding dismissal of the appeal violated Rules 1.1, 1.3, 1.4, 3.2, 3.4(c), and 8.4(d), MRPC.

## EIGHTH COUNT

### Continued Non-Cooperation

113. On March 16, 2007, the Director received a complaint from the Court of Appeals regarding respondent's handling of the G.B. appeal. On March 22, 2007, the Director wrote to respondent's counsel to request respondent's response to the complaint, including a copy of respondent's complete file and retainer agreement with G.B., within 14 days.

114. On March 30, 2007, the Director received a complaint from Lindy Lee Humphreys regarding respondent's handling of the insurance premium and mortgage escrow funds. On April 2, 2007, the Director sent respondent's counsel a notice of

investigation of Lindy's complaint requesting respondent's complete response to the complaint within 14 days.

115. Pursuant to Rule 1.15(j) – (o), MRPC, the Director received notice that respondent's trust account was overdrawn on April 3, 2007. On April 11, 2007, the Director wrote to respondent to request an explanation for, and various trust account books and records related to, the overdraft within 10 days.

116. Respondent's counsel responded to the Director's March 22, 2007, letter in the G.B. matter on April 11, 2007. Respondent did not include his file or retainer agreement in the G.B. matter, stating that he was retrieving it from storage.

117. Respondent's counsel responded to the Director's April 2, 2007, notice of investigation in the Humphreys matter on April 11, 2007.

118. On April 23, 2007, the Director wrote to respondent's counsel to request additional documents and information regarding the G.B. and Humphreys matters, including respondent's trust account books and records.

119. Respondent's counsel responded to the Director's April 11, 2007, overdraft inquiry on April 25, 2007. The response failed to include the requested trust account books and records. The Director made a second request for those materials on April 30, 2007.

120. On May 4, 2007, respondent's counsel responded to the Director's outstanding requests in the G.B., Humphreys and trust account overdraft matters. With respect to the Director's requests for respondent's trust account books and records, counsel stated that he was in the process of obtaining and/or recreating those materials and would produce them within 15 days.

121. On May 9, 2007, the Director subpoenaed respondent's January 2007 through the present trust account bank statements, cancelled checks, deposit slips and deposit instruments from Wells Fargo Bank. The Director received the subpoenaed materials from Wells Fargo Bank on June 4, 2007.

122. To date, respondent has not produced any of the trust account books and records requested by the Director.

123. Respondent's continued non-cooperation and failure to produce required trust account books and records in response to the Director's requests violated Rule 8.1(b), MRPC, and Rule 25, RLPR.

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: June 6, 2007.



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MARTIN A. COLE  
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PROFESSIONAL RESPONSIBILITY  
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and



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CASSIE HANSON  
ASSISTANT DIRECTOR  
Attorney No. 303422

This supplementary petition is approved for filing pursuant to Rule 10(e), RLPR, by the undersigned.

Dated: June 12, 2007.



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KENT A. GERNANDER  
CHAIR, LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD