

FILE NO. A04-1276

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against RICHARD EDWARD EDINGER,
a Minnesota Attorney,
Registration No. 263965.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION
FOR DISCIPLINE**

The above-entitled matter came on for hearing on November 19, 2004, before the undersigned, acting as referee by appointment of the Minnesota Supreme Court. Craig D. Klausung, Senior Assistant Director, appeared for the Director of the Office of Lawyers Professional Responsibility (hereinafter "Director"). Bruce D. Quick, Esq., appeared for the above-named Respondent attorney (hereinafter "Respondent"), who was personally present throughout and testified during the proceedings.

The proceedings were conducted on the Director's July 14, 2004, Petition for Disciplinary Action (hereinafter "Petition").

The Director presented no witnesses. Respondent testified on his own behalf and was cross-examined by the Director. Director's exhibits 1 through 5 and Respondent's exhibits 6 through 15 were received into evidence.

The findings and conclusions made below are based on Respondent's August 5, 2004, Answer, the parties' November 16, 2004, stipulation of facts, the parties' exhibits, the testimony presented, the demeanor and credibility of Respondent as determined by the undersigned, and the reasonable inferences to be drawn from the exhibits and testimony.

Based on the evidence as outlined above, and upon all of the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

1. Respondent is 36 years of age. He was admitted to practice law in Minnesota in May 1996 and was admitted to practice law in North Dakota in October 1996. Respondent currently practices law in Fargo, North Dakota. Respondent's current practice is almost exclusively as a contract public defender for Cass County, North Dakota (Resp. Test.).

False Statements to the Director

2. During the course of the Director's overdraft inquiry (*see*, paragraphs 21 through 52 below) Respondent made false statements to the Director concerning the nature of funds he had deposited into his trust account and the cause of the various overdrafts in his trust account. Respondent also fabricated client ledgers containing false information and submitted these ledgers to the Director in support of his false statements (Resp. Ans.; Dir. Exhs. 4 and 5).
3. In his February 13, 2002, letter, Respondent purported to explain the January 4 and 15, 2002, overdrafts in his trust account. With respect to the January 4, 2002, overdraft, Respondent stated:

[O]n January 3, 2002, I was retained by Wendy Riva ... I was not in the office when Ms. Riva hired me so I did not get her to sign a fee agreement at that time. Later on that afternoon after I got back from court, Ms. Riva came into my office and discussed her case and signed the standard fee agreement.

(Resp. Ans.; Dir. Exhs. 1 and 5).
4. Respondent enclosed with his February 13, 2002, letter a handwritten subsidiary ledger for Wendy Riva that likewise described the \$650 payment as a "Retainer," and stated that the subsequent disbursement of those funds was for "Attorney Fees (signed non-refundable)." (Resp. Ans.; Dir. Exhs. 1 and 5.)

5. In fact, Wendy Riva was not Respondent's client, but a former girlfriend. The \$650 Respondent received from Ms. Riva and deposited into his trust account on January 7, 2002, was actually the proceeds of a personal loan Ms. Riva made to Respondent. Respondent's statements in paragraphs 4 and 5 above were false and his preparation and submission of the Riva client ledger was intended to conceal his misuse of the client trust account (Resp. Ans.; Dir. Exhs. 4 and 5).
6. In his February 13, 2002, letter, Respondent also purported to explain the January 15, 2002, overdraft in his trust account, as follows:

The second overdraft also involves Ms. Riva. Ms. Riva and I had discussed the possibility of hiring an expert witness in her case, Tom Burr, from the Twin Cities. On January 8, 2002, Ms. Riva gave me \$840.00 for Mr. Burr's services. However, the next day, Ms. Riva decided not to hire Mr. Burr.

(Resp. Ans.; Dir. Exhs. 1 and 5).
7. Respondent enclosed with his February 13, 2002, letter a handwritten subsidiary ledger for Wendy Riva. The ledger stated that the \$840 deposit on January 10, 2002, was for an "Expert Witness" and that Respondent's subsequent disbursement of those funds constituted a "Refund of Fees." (Resp. Ans.; Dir. Exhs. 1 and 5.)
8. Wendy Riva was not the source of the \$840 Respondent deposited into his trust account on January 10, 2002. These funds actually constituted the proceeds of a personal loan that another lawyer had made to Respondent. Respondent did not consult with or retain an expert witness on Ms. Riva's behalf nor was she a client. Respondent's statements in paragraphs 6 and 7 above were false and his preparation and submission of the fabricated Riva client ledger was intended to conceal his misuse of the client trust account (Resp. Ans.; Dir. Exhs. 4 and 5).

9. In his May 28, 2002, letter, Respondent purported to explain the April 15, 2002, overdraft in his trust account. Respondent stated:

As the enclosures indicate, the overdraft was caused by Mr. Buchholz's NSF check, which later cleared my account. Mr. Buchholz's case required immediate investigation and expenditure of expenses...

(Resp. Ans.; Dir. Exhs. 2 and 5).

10. Respondent enclosed with his May 28, 2002, letter a statement bearing the purported signature of Paul Buchholz, which authorized Respondent to "immediately withdraw monies from his trust account for expenditures ... These expenditures include but are not limited to filing fees, service costs, investigation expenses and travel expenses ..."

(Resp. Ans.; Dir. Exhs. 2 and 5.)

11. Later, Respondent enclosed with his August 14, 2002, letter another statement bearing the purported signature of Paul Buchholz, which provided, "I ... have reviewed the attached two page ... client subsidiary ledger for my account and have fully reviewed all deposits and expenditures related to my cases. I have consented and agreed to all the expenditures therein ..." (Resp. Ans.; Dir. Exhs. 3 and 5.)

12. Respondent also enclosed with his August 14, 2002, letter a subsidiary ledger for Paul Buchholz. The ledger reflected issuance of various trust account checks in payment of "investigative" and "travel" expenses. The ledger also reflected an April 22, 2002, cash retainer, and a June 8, 2002, deposit for \$1,292, which was described in the ledger as a "Retainer for Investigator (cash)." (Resp. Ans.; Dir. Exhs. 3 and 5.)

13. The checks Respondent attributed in the Buchholz ledger as having been issued in payment of "investigative" and "travel" expenses, were actually checks Respondent issued in payment of his own personal expenses and had no relationship to Buchholz.

Similarly, neither the April 22 nor the June 8 deposits had any relationship to Mr. Buchholz. Respondent's statements in paragraphs 10 to 12 above were false and his preparation and submission of the fabricated Buchholz client ledger was intended to conceal the misuse of the client trust account (Resp. Ans.; Dir. Exhs. 4 and 5).

14. Respondent also enclosed with his August 14, 2002, letter a subsidiary ledger for Paul Dellaneva. The ledger reflected Respondent's receipt of a \$1,500 "Settlement check" for Mr. Dellaneva on April 4, 2002, and issuance of check no. 1204 for \$1,500 to Paul Dellaneva on April 8, 2002 (Resp. Ans.; Dir. Exhs. 3 and 5).
15. Respondent never received any funds from or on behalf of Mr. Dellaneva. Respondent issued trust account check no. 1204, and another trust account check that did not appear on the ledger, to Mr. Dellaneva to resolve a dispute between them concerning the adequacy of Respondent's representation. Respondent's preparation and submission of the fabricated Dellaneva client ledger was intended to conceal his misuse of the client trust account (Resp. Ans.; Dir. Exhs. 4 and 5).
16. Respondent also enclosed with his August 14, 2002, letter a subsidiary ledger for Tony English. The ledger reflected Respondent's receipt of a \$1,208.92 "Settlement" for Mr. English on April 9, 2002, and the disbursement of those funds in their entirety to Mr. English on April 10, 2002 (Resp. Ans.; Dir. Exhs. 3 and 5).
17. Respondent did not receive any funds from or on behalf of Mr. English on April 9, 2002. Respondent disbursed the \$1,208.92 to Mr. English from his own funds to resolve a dispute between them concerning the adequacy of Respondent's representation. Respondent's preparation and submission of the fabricated English ledger was intended to conceal his misuse of the client trust account (Resp. Ans.; Dir. Exhs. 4 and 5).

18. Respondent also enclosed with his August 14, 2002, letter a subsidiary ledger for Deb Menke. The ledger reflected Respondent's receipt of \$2,500 on Ms. Menke's behalf on June 18, 2002, and issuance of check no. 1298 for \$2,500 to Ms. Menke on June 19, 2002 (Resp. Ans.; Dir. Exhs. 3 and 5).
19. Respondent did not receive any funds from or on behalf of Menke on June 18, 2002. Respondent issued check no. 1298 to Ms. Menke from his own funds to resolve a dispute between them concerning the adequacy of Respondent's representation. Respondent's preparation and submission of the fabricated Menke ledger was intended to conceal his misuse of the client trust account (Resp. Ans.; Dir. Exhs. 4 and 5).

Failure to Cooperate with the Director's Overdraft Inquiry

20. On January 14, 2002, pursuant to Rule 1.15(j)-(o), MRPC, the Director received notice of a January 4, 2002, overdraft on Respondent's Wells Fargo Bank trust account number 950004001 (hereinafter "trust account") (Resp. Ans.; Dir. Exh. 5).
21. On January 15, 2002, the Director wrote to Respondent and requested an explanation for, and various documents related to, the overdraft (Resp. Ans.; Dir. Exh. 5).
22. On January 16, 2002, Respondent called the Director and stated he had again overdrawn his trust account. Respondent requested a copy of the Director's informational trust account brochure. However, Respondent did not thereafter respond to the Director's January 15 letter (Resp. Ans.; Dir. Exh. 5).
23. On January 23, 2002, the Director received notice of a second overdraft on Respondent's trust account, this one dated January 15, 2002 (Resp. Ans.; Dir. Exh. 5).
24. On February 8, 2002, the Director again wrote to Respondent requesting a response to the Director's January 15, 2002, letter (Resp. Ans.; Dir. Exh. 5).

25. On February 13, 2002, Respondent faxed a note to the Director that he had “mailed response + attachments, records today.” Respondent had not mailed his response or any other supporting documents as of that date. Respondent faxed his response in two parts on February 15 and 16, 2002, and mailed his response on February 16, 2002 (Resp. Ans.; Dir. Exh. 5).
26. In his response, Respondent explained that both the January 4 and January 15, 2002, overdrafts were caused by his inadvertent delay in depositing client retainer checks (Resp. Ans.; Dir. Exh. 5).
27. On April 15, 2002, the Director received notice of a third overdraft on Respondent’s trust account, this one dated April 15, 2002 (Resp. Ans.; Dir. Exh. 5).
28. On April 22, 2002, the Director wrote to Respondent requesting an explanation for, and various documents related to, the April 15 overdraft. Among the documents requested were Respondent’s February through April 2002 trust account bank statements and client subsidiary ledgers. Respondent failed to respond timely (Resp. Ans.; Dir. Exh. 5).
29. On May 13, 2002, the Director wrote again to Respondent to request a response to the Director’s April 22 letter (Resp. Ans.; Dir. Exh. 5).
30. On May 28, 2002, Respondent faxed to the Director documents indicating that the April 15 overdraft was caused by a deposited check being returned for insufficient funds. On June 4, 2002, Respondent faxed to the Director a separate letter setting forth that explanation. The Director received the hard-copy original on June 7, 2002. The only trust account record Respondent enclosed with either of his responses was his April 2002 trust account bank statement (Resp. Ans.; Dir. Exh. 5).

31. On June 21, 2002, the Director wrote to Respondent requesting his May 2002 trust account bank statement, his client subsidiary ledgers, and the trust account check that caused the overdraft (Resp. Ans.; Dir. Exh. 5).
32. On July 8, 2002, Respondent faxed a note to the Director indicating that he had just returned from vacation and had "mailed the documents you requested in your June 21, 2002, letter." However, the only document Respondent provided was a statement signed by the client whose NSF check when deposited caused the April 15 overdraft (Resp. Ans.; Dir. Exh. 5).
33. On July 9, 2002, the Director received notice of a fourth overdraft on Respondent's trust account, this one dated July 8, 2002 (Resp. Ans.; Dir. Exh. 5).
34. On July 10, 2002, the Director wrote to Respondent requesting an explanation for, and various documents related to, the July 8, 2002, overdraft (Resp. Ans.; Dir. Exh. 5).
35. On July 11, 2002, the Director wrote to Respondent noting that he still had not provided the materials requested by the Director on June 21 and that given this fact and the additional overdraft notice the Director had received, the Director was requesting Respondent's appearance at an August 6, 2002, meeting (Resp. Ans.; Dir. Exh. 5).
36. Respondent appeared for the meeting and at that time announced that he had closed his trust account. Respondent also stated that he believed his secretary had mailed materials responsive to the Director's June 21 letter. The Director requested that Respondent provide his April through August 2002 trust account bank statements and client subsidiary ledgers and an explanation for the July 2002 overdraft (Resp. Ans.; Dir. Exh. 5).

37. On August 13, 2002, Respondent faxed to the Director his July and August 2002 trust account bank statements (Resp. Ans.; Dir. Exh. 5).
38. By letter dated August 14, 2002, which the Director received on August 22, 2002, Respondent explained that the July 2002 overdraft resulted from his bookkeeping error. Respondent enclosed his May through July 2002 trust account bank statements, subsidiary ledgers for his clients Buchholz, Dellaneva, English and Menke, and a statement signed by Buchholz. The bank statements reflected significant activity that did not appear on Respondent's ledgers (Resp. Ans.; Dir. Exh. 5).
39. Based upon this information the Director converted the overdraft inquiry into a formal disciplinary investigation. On September 16, 2002, the Director mailed to Respondent a notice of investigation requesting his complete trust account books and records for the period January 1, 2001, to August 30, 2002, and directing him to provide the information within 14 days, i.e., by October 1, 2002 (Resp. Ans.; Dir. Exh. 5).
40. On October 1, 2002, Respondent faxed a letter to the Director in which he indicated that while his response was due on "Thursday, October 4, 2002" he was requesting an extension to "Saturday, October 6, 2002" (October 6 was actually a Sunday) to provide the requested materials. Respondent did not, however, provide the requested materials by October 6, 2002 (Resp. Ans.; Dir. Exh. 5).
41. On October 10, 2002, the Director wrote to Respondent again requesting his response to the notice of investigation. In that letter, the Director also reminded Respondent that a failure to cooperate with the Director's investigation could constitute a separate basis for discipline. Respondent failed to respond timely (Resp. Ans.; Dir. Exh. 5).

42. On October 25, 2002, the Director wrote to Respondent directing him to appear for a meeting on November 12, 2002, and to bring with him the requested trust account materials (Resp. Ans.; Dir. Exh. 5).
43. On the morning of November 12, 2002, Respondent faxed a letter to the Director stating that he was unable to appear for the meeting and asking the Director to reschedule the meeting for either November 14 or 15, 2002. Respondent indicated that he was free to meet at any time on either of those dates (Resp. Ans.; Dir. Exh. 5).
44. On November 12, 2002, the Director faxed and mailed Respondent a letter rescheduling their meeting to November 14, 2002. Respondent failed to appear for the November 14, 2002, meeting, did not contact the Director to explain why he was unable to attend and did not provide the requested trust account information (Resp. Ans.; Dir. Exh. 5).
45. In February 2003 the Director telephoned Respondent, encouraged him to cooperate in the disciplinary investigation and scheduled a meeting with Respondent for February 19, 2003 (Resp. Ans.; Dir. Exh. 5).
46. Respondent appeared for the February 19, 2003, meeting. Among the materials he produced at that time were most of the requested trust account bank statements (statements for the months of May through July 2001 and September 2001 were not produced) and copies of a few trust account checks. Respondent acknowledged that he had not maintained the required trust account books and records and had used his trust account as a personal account. The Director requested that Respondent provide by March 5, 2003, a reconstructed trust account checkbook register, the missing bank statements and his original trust account checks (Resp. Ans.; Dir. Exh. 5).

47. On March 7, 2003, the Director received from Respondent the missing trust account bank statements and a few original checks. Respondent failed to produce the reconstructed trust account checkbook register and most of the trust account checks. In his cover letter, Respondent stated that (a) he had requested the missing cancelled checks and deposit slips from the bank, (b) “[a]ll original checks that I have I have also forwarded to you,” (c) he had “ninety percent completed” the reconstructed trust account checkbook register, and (d) “I violated the Rules by using the trust account as my own personal account to pay personal expenses and did not keep appropriate records all of the time.” (Resp. Ans.; Dir. Exh. 5.)
48. On March 21, 2003, a representative of the Director spoke by telephone with Respondent. Respondent stated that he had not yet received the checks and deposit slips he had requested from the bank and had not yet finished the reconstructed checkbook register. Respondent agreed to send to the Director, that day, the portion of the reconstructed checkbook register he had completed and any other trust account materials he had assembled since his last submission. The Director did not timely receive these materials (Resp. Ans.; Dir. Exh. 5).
49. On April 1, 2003, the Director wrote to Respondent summarizing the Director’s outstanding requests and requesting Respondent’s appearance at an April 10, 2003, meeting (Resp. Ans.; Dir. Exh. 5).
50. On April 10, 2003, Respondent’s counsel telephoned the Director and stated that he would be representing Respondent from that point forward (Resp. Ans.; Dir. Exh. 5).
51. By January 23, 2004, Respondent, through counsel, had provided most, but not all, of the requested trust account books and records (Resp. Ans.; Dir. Exh. 5). It was not until his

counsel sent the January 23 letter that Respondent acknowledged his prior misrepresentations to the Director.

Trust Account Violations

52. During the period January 2001 to August 2002, Respondent inappropriately used his trust account as a business/personal account by: (a) disbursing numerous trust account checks in direct payment of personal and/or business expenses; (b) repeatedly depositing his own funds into the account to pay his tax obligations, his secretary's salary and other personal and/or business expenses; and (c) making cash withdrawals from the account (Resp. Ans.; Resp. Test.; Dir. Exh. 5).
53. During the period from at least January 2001 to August 2002, Respondent failed to maintain the trust account books and records required by Lawyers Professional Responsibility Board (LPRB) Opinion No. 9 (Resp. Ans.; Resp. Test.; Dir. Exh. 5).
54. Specifically, Respondent failed to maintain proper trust account client subsidiary ledgers, trial balances and reconciliations (Resp. Ans.; Resp. Test.; Dir. Exh. 5).

Other Factors Regarding Recommendation

55. The following facts warrant positive consideration:
- a. Lack of prior discipline against Respondent.
 - b. Lack of actual monetary loss, or risk of loss, to any client.
 - c. No amounts removed by Respondent from his trust account involved money that should remained in his trust account.
 - d. The relatively small sums improperly placed into his trust account by Respondent, and the relatively small portion of his professional services involving use of his trust account.

56. The following facts warrant negative consideration:

- a. Unknown deleterious effect upon any of Respondent's personal or business creditors caused by his sheltering of personal funds in his trust account.
- b. Respondent's acts of intentionally misleading the Director during the investigation, which compounded his other acts warranting discipline.

CONCLUSIONS OF LAW

- (1) Respondent's false statements to the Director and preparation and submission of fictitious client trust ledgers violated Rules 8.1(a)(1) and 8.4(c) and (d), Minnesota Rules of Professional Conduct (MRPC).
- (2) Respondent's failure to cooperate with the Director's investigation violated Rule 8.1(a)(3), MRPC, and Rule 25, Rules on Lawyers Professional Responsibility (RLPR).
- (3) Respondent's use of his trust account for personal purposes violated Rule 1.15(a), MRPC.
- (4) Respondent's failure to maintain proper trust account books, records and procedures violated Rule 1.15(h), MRPC, as further interpreted by LPRB Opinion No. 9.

RECOMMENDATION FOR DISCIPLINE

It is the undersigned referee's recommendation to the Minnesota Supreme Court that Respondent be suspended from the practice of law for a period of three months. Respondent's pattern of false statements to the Director, fabrication of client subsidiary ledgers, non-cooperation and trust account violations, requires such a disposition.

In addition, Respondent should be required to comply with the notification provisions of Rule 26, RLPR, should be assessed costs and disbursements pursuant to Rule 24, RLPR, and should be required to comply with the reinstatement requirements of Rule 18(a) through (e), RLPR.

Dated: December 21, 2004



B.W. Christopherson
Judge of District Court
Referee Appointed by the Supreme Court