

FILE NO. A12-0333

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against JOHN D. ELLENBECKER,
a Minnesota Attorney,
Registration No. 13465X.

**AMENDED PETITION FOR
REVOCATION OF PROBATION
AND FOR FURTHER
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this amended petition pursuant to Rule 12(a), Rules on Lawyers Professional Responsibility (RLPR), and pursuant to this Court's February 17, 2010, order in the matter.

The above-named attorney, hereinafter respondent, is currently the subject of a February 14, 2012, petition for revocation of probation and for further disciplinary action. Respondent served and filed an answer to the petition on March 9, 2012. Based on respondent's answer, and additional information he has provided, the Director hereby amends the allegations in the February 14, 2012, petition as shown below.

Respondent was admitted to practice law in Minnesota on October 30, 1981. Respondent currently practices law in St. Cloud, Minnesota.

INTRODUCTION

By its February 17, 2010, order, this Court publicly reprimanded respondent and ordered respondent placed on probation for two years. A copy of the Court's order is attached as Exhibit 1.

Respondent's discipline was based on his misplacing or failing to properly account for client property, failing to pay a professionally-incurred judgment, failing to

diligently pursue a client matter and to communicate with that client and failing to cooperate with the Director's investigation, in violation of Rules 1.15(c)(2), (3) and (4), 8.4(d), 1.3, 1.4 and 8.1(b), Minnesota Rules of Professional Conduct (MRPC), and Rule 25, RLPR.

Respondent has committed the following unprofessional conduct warranting revocation of probation and further public discipline:

FIRST COUNT

Pattern of Neglect and Inadequate Client Communication

J.M. Matter

1. J.M. is a resident of Texas. On May 24, 2008, while traveling in Minnesota, J.M. was arrested for driving while intoxicated (DWI). J.M. was criminally charged with that offense in April 2009.

2. On approximately May 6, 2009, J.M. contacted respondent by telephone regarding representation in the DWI matter. Respondent agreed to represent J.M. and sent him a retainer agreement for signature. J.M. signed and returned the retainer agreement and, pursuant to its terms, paid respondent a \$2,000 retainer.

3. The first hearing in J.M.'s DWI case was scheduled for May 20, 2009. Respondent told J.M. that he would request a continuance of that hearing.

4. Respondent appeared at the hearing on May 20, 2009. Respondent requested and was granted a continuance of the hearing to July 21, 2009. Respondent informed J.M. of the July 21, 2009, hearing date and J.M. made arrangements to both travel to Minnesota and to be jailed and unavailable to attend to his business for some period of time after the hearing.

5. Shortly before July 21, 2009, respondent informed J.M. that the hearing was again being continued. Respondent told J.M. that he would inform him of the new hearing date as soon as it was known.

6. The matter was rescheduled for hearing on September 9, 2009.

7. Respondent did not inform J.M. of the September 9, 2009, hearing date. In fact, after informing J.M. of the continuance of the July 21, 2009, hearing, respondent took no further action in J.M.'s case and had no further communications with J.M. J.M. attempted to reach respondent on numerous occasions after July 21, 2009, but respondent failed to return any of J.M.'s numerous telephone messages.

8. Respondent appeared at the September 9, 2009, hearing. After informing the court that J.M. was not present, respondent stated, "I apologize, Your Honor, I'm not quite sure what happened, because I didn't have it on my calendar . . . I don't know why I don't have it on the -- on the calendar today."

9. As a result of J.M.'s failure to appear for the September 9, 2009, hearing, a bench warrant was issued for his arrest. Respondent did not inform J.M. of the bench warrant or otherwise make any effort to communicate with J.M.

10. In January 2010, J.M. was arrested in Texas on the Minnesota bench warrant. At that time, J.M. retained both a Texas lawyer and a Minnesota lawyer, paying retainers to each of them. J.M. was returned to Minnesota and the DWI matter has been resolved.

R.R. Matter

11. In September 2008, R.R. retained respondent to represent him in a criminal matter. At the time, and during the entire course of respondent's representation, R.R. was detained in the Wright County (Minnesota) jail.

12. During the course of respondent's representation, R.R. left numerous telephone messages for respondent which respondent failed to return. In addition, R.R. wrote numerous letters to respondent, to which respondent failed to respond, either timely or at all.

13. Examples of respondent's failure to respond to R.R.'s communications include the following:

a. On April 7, 2009, R.R. informed respondent that jail staff was opening mail from respondent outside R.R.'s presence. Respondent did not respond to R.R.'s request to discuss this issue until June 2, 2009.

b. On July 21, 2009, the court conducted an evidentiary hearing based on R.R.'s motion for dismissal of the charges against him. By order dated August 27, 2009, the court denied R.R.'s motion. R.R. repeatedly called and wrote to respondent to learn the substance and result of the order. Respondent failed to respond to R.R.'s communications. Respondent failed to inform R.R. of the substance and result of the court's order until late September or early October 2009.

c. Prior to a November 20, 2009, hearing, R.R. asked respondent to provide him with a copy of the argument he submitted in support of the motion for dismissal. Respondent did not provide this document to R.R. until December 28, 2009.

d. An evidentiary hearing in R.R.'s case was scheduled for March 17, 2010. Prior to this hearing, R.R. attempted to reach respondent by telephone on two or three occasions, leaving messages for respondent on each occasion. Respondent failed to return R.R.'s telephone messages.

e. Instead, on March 16, 2010, respondent wrote to R.R. to inform him that the March 17, 2010, hearing had been rescheduled. R.R. did not receive respondent's letter prior to the March 17, 2010, hearing and R.R. spent the afternoon of March 17, 2010, in shackles awaiting transport.

14. In addition, on several occasions, R.R. reasonably understood that respondent would be meeting with him at the jail, but respondent did not meet with R.R.

15. On August 18, 2010, R.R. applied for a public defender to replace respondent as his attorney. Through his public defender, R.R. entered a plea on November 1, 2010, and was sentenced on February 16, 2011.

C.K. Matter

16. In approximately February 2010, C.K. retained respondent to represent her in a criminal matter.

17. A hearing in C.K.'s case was scheduled for May 17, 2010. Respondent failed to appear for the hearing. While the judge and prosecutor waited, C.K. attempted to contact respondent on both his office and cell phones, but was unable to reach him.

18. Respondent contacted C.K. by telephone shortly after the May 17, 2010, hearing. At that time, C.K. demanded that respondent refund to her a portion of her fee. Respondent failed to do so.

19. Respondent's conduct in failing to work diligently on J.M.'s case, failing to appear for the May 17, 2010, hearing in C.K.'s case, failing to affirmatively communicate with J.M. or respond to J.M.'s numerous telephone messages after July 21, 2009, failing to adequately communicate with R.R., and failing to appear for meetings with R.R., violated Rules 1.3 and 1.4(a)(3) and (4), MRPC, and the Court's February 17, 2010, order.

SECOND COUNT

Misuse of a Trust Account, Failure to Maintain Required Trust Account Books and Records and Failure to Cooperate with Trust Account Overdraft Inquiry

20. On May 2, 2011, respondent's TCF National Bank trust account xxxxxx5959 ("respondent's trust account") became overdrawn, a fact that the bank reported to the Director pursuant to Rule 1.15(j) through (o), MRPC.

21. On May 11, 2011, the Director wrote to respondent and requested an explanation for, and various trust account books and records related to, the overdraft.

22. In his May 20, 2011, response, respondent explained that the overdraft had been the result of a reversed deposit into the trust account.

23. On May 24, 2011, the Director wrote to respondent and requested additional trust account information and documents. Respondent failed to respond.

24. On June 9, 2011, the Director wrote to respondent and again requested the additional trust account materials. Respondent again failed to respond.

25. On June 22, 2011, the Director wrote to respondent for a third time and requested the additional trust account materials.

26. Respondent finally responded to the Director on July 1, 2011. At that time, respondent acknowledged that he had been using his trust account as his "de facto personal account," depositing earned fees into the account and disbursing those fees in direct payment of respondent's own personal and business expenses.

27. Respondent further acknowledged a failure to maintain the trust account books and records required by Rule 1.15, MRPC, as interpreted by Appendix 1 thereto.

28. On January 4, 2012, the Director wrote to respondent to request additional documents and information regarding his trust account. Respondent failed to respond.

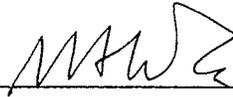
29. On January 24, 2012, the Director wrote again to respondent to request his response to the Director's January 4 letter. On February 1, 2012, respondent wrote that he would "need an additional week to respond." Eventually respondent provided sufficient information to allow the Director to conclude his investigation.

30. Respondent's conduct in using his trust account as a personal account, failing to maintain the required trust account books and records and failing to timely respond to the Director's inquiries regarding the overdraft in his trust account violated Rules 1.15(a), (c)(3) and (h) (as interpreted by Appendix 1 thereto), and 8.1(b), MRPC, and Rule 25, RLPR.

WHEREFORE, the Director respectfully prays for an order of this Court revoking respondent's probation, suspending respondent's license to practice law or imposing otherwise 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: Sept. 13, 2012.



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