

FILE NO. \_\_\_\_\_

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against JOHN D. ELLENBECKER,  
a Minnesota Attorney,  
Registration No. 13465X.  
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**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 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, 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. In <sup>May</sup> April 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 \$1,500 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, based on the short notice provided of the hearing and J.M.'s related travel difficulties.

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 because of problems with the judge and/or the judge's schedule. 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. As a result, R.R. unnecessarily spent the afternoon of March 17, 2010, in shackles awaiting transport.

14. In addition, respondent failed to appear for numerous meetings he scheduled with R.R. at the jail. Specifically:

a. R.R. scheduled meetings with respondent for March 17, 2009, March 23, 2009, and April 23, 2009. Respondent failed to appear for any of these meetings.

b. Prior to a June 9, 2009, hearing in R.R.'s case, respondent stated that he would meet with R.R. at the jail after the hearing. Respondent failed to appear for the meeting.

c. Prior to a July 21, 2009, hearing in R.R.'s case, respondent stated that he would meet with R.R. at the jail on August 4, 2009. Respondent failed to appear for the meeting.

d. Prior to a September 29, 2009, hearing in R.R.'s case, respondent stated that he would meet with R.R. at the jail sometime during the week of October 5 to 9, 2009. Respondent failed to appear anytime that week to meet with R.R.

e. Prior to a November 20, 2009, hearing in R.R.'s case, respondent stated that he would meet with R.R. at the jail sometime during the week of November 23 to 27, 2009. Respondent failed to appear.

f. During a February 16, 2010, meeting with R.R. at the jail, respondent stated that he would be back to meet with R.R. during the week of March 1 to 5, 2010. Respondent failed to appear.

g. During the first week of May 2010 respondent stated that he would meet with R.R. at the jail sometime during the week of May 17 to 21, 2010. Respondent failed to appear.

h. Prior to a hearing on R.R.'s case on July 27, 2010, respondent stated that he would meet with R.R. at the jail on July 29 or 30, 2010, or August 3, 2010. Respondent failed to appear.

i. On August 8, 2010, respondent called the jail's inmate voicemail system and left a message for R.R. stating that he would meet with him at the jail sometime during the week of August 9 to 13, 2010. Respondent failed to appear anytime that week to 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 did not return C.K.'s calls until approximately 4:00 p.m. on May 17, 2010; leaving a message for C.K. that he had failed to properly calendar the hearing.

19. C.K. spoke with respondent on May 19, 2010. C.K. demanded that respondent refund to her a portion of her fee. C.K. then applied for and was appointed a public defender.

20. C.K. attempted to reach respondent on multiple occasions thereafter regarding the refund, but respondent failed to respond. Respondent did not respond until after C.K. submitted her complaint to the Director.

21. 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., failing to appear for scheduled meetings with R.R., and failing to respond to C.K.'s attempts to communicate with him regarding a refund, violated Rules 1.3 and 1.4(a)(3) and (4), MRPC, and the Court's February 17, 2010, order.

### SECOND COUNT

#### False Statement

22. Paragraphs 1 through 10 above ("J.M. Matter") are re-alleged and incorporated herein by reference.

23. Respondent appeared at the July 21, 2009, hearing in the J.M. matter.

24. At that time, respondent informed the court that, "[J.M.] asked that I continue [the hearing] so that he can come up and take care of it all at once."

25. Respondent's statement was false. J.M. had not requested a continuance of the matter.

26. Respondent's conduct in falsely informing the court that J.M. had requested continuance of the July 21, 2009, hearing violated Rules 3.3(a)(1), 4.1 and 8.4(c), MRPC, and the Court's February 17, 2010, order.

### THIRD COUNT

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

27. 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.

28. 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.

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

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

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

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

33. 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.

34. 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.

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

36. 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." As of the date of this petition, respondent has failed to provide the information requested by the Director.

37. 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: February 14, 2012.

  
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