

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

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary  
Action against JO M. FAIRBAIRN,  
a Minnesota Attorney,  
Registration No. 28137.  
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**PETITION FOR  
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Upon the approval of a Lawyers Professional Responsibility Board Panel Chair, the Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition pursuant to Rules 10(d) and 12(a), Rules on Lawyers Professional Responsibility. The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on September 16, 1974. Respondent currently practices law in Minneapolis, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Trust Account Shortages and Misappropriation

1. Respondent is treasurer of the Kinney & Lange law firm ("K&L") and, in that capacity, has responsibility for maintaining the firm's business and client trust accounts.
2. At all times relevant, K&L has maintained client trust account no. x-xxx-xxxx-2602 at US Bank.
3. On February 27, 2009, K&L's US Bank trust account became overdrawn, a fact that US Bank reported to the Director pursuant to Rule 1.15(j)-(o), Minnesota Rules of Professional Conduct (MRPC).

4. On March 9, 2009, the Director wrote to K&L to request an explanation for, and various trust account books and records related to, the overdraft. Respondent's response to the Director's March 9, 2009, letter, and to a subsequent letter, indicated a substantial shortage in the K&L trust account. On that basis, the Director converted the informal overdraft inquiry into a formal disciplinary investigation. Based on the trust account books, records and information respondent submitted in the context of the Director's disciplinary investigation, the Director audited the K&L trust account for the period January 2008 through December 2009, which audit reflected the misappropriation and shortages described below.

#### **Shortages and Inadvertent Misappropriation**

5. As of January 1, 2008, the balance in the K&L trust account was \$1,944 short of that necessary to cover aggregate client balances. Respondent stated that this shortage existed in the trust account when she assumed responsibility for the account in approximately 2007, but that she did not know how it occurred or how to correct it.

6. On January 10, 2008, K&L trust account check no. 1601160 in the amount of \$2,820, which respondent had issued on behalf of a client, cleared the trust account. At the time, however, the client on whose behalf check no. 1601160 was issued was entitled to only \$1,150 from the trust account. Payment of check no. 1601160 therefore created a \$1,670 negative balance in the client's account (\$1,150 minus \$2,820), caused the inadvertent misappropriation of other clients' funds in that amount, and increased the overall shortage in the trust account to \$3,614 (\$1,944 plus \$1,670).

7. On February 22, 2008, K&L trust account check no. 1601176 in the amount of \$1,180, which respondent had issued on behalf of a client, cleared the trust account. At the time, however, the client on whose behalf check no. 1601176 was issued was entitled to only \$930 from the trust account. Payment of check no. 1601176 therefore created a \$250 negative balance in the client's account (\$930 minus \$1,180), caused the inadvertent misappropriation of other clients' funds in that amount, and increased the overall shortage in the trust account to \$3,864 (\$3,614 plus \$250). Funds sufficient to

eliminate the shortage in this client's account were deposited into the trust account on April 21, 2008. However, an additional \$250 shortage was created by payment of trust account checks on this client's behalf on April 29, 2008 (shortage eliminated May 13, 2008), May 20, 2008 (shortage eliminated July 21, 2008), July 25, 2008 (shortage eliminated September 30, 2008), and October 8, 2008 (shortage eliminated June 15, 2009). Thus, during the periods April 29 to May 13, 2008, May 20 to July 21, 2008, July 25 to September 30, 2008, and October 8, 2008, to June 15, 2009, other clients' funds were inadvertently misappropriated to cover checks paid on behalf of this client.

8. On February 14, 2010, respondent deposited into the K&L trust account funds sufficient to eliminate the \$1,944 shortage that existed in the account since at least 2007 and the \$1,670 shortage caused by payment of check no. 1601160.

#### **Intentional Misappropriation**

9. Respondent has acknowledged that the transfers of funds from the K&L trust account to the business account described in paragraphs 10 through 16 below were for the purpose of enabling the firm to meet its payroll and employer withholding tax obligations. Respondent's conduct in this regard constituted the intentional misappropriation of client funds.

10. On October 1, 2008, respondent transferred the sum of \$25,000 from the K&L trust account into the K&L business account. K&L was not entitled to the funds transferred. Respondent's conduct in this regard constituted the intentional misappropriation of client funds.

11. On October 3, 2008, respondent transferred the sum of \$35,000 from the K&L trust account into the K&L business account. K&L was not entitled to the funds transferred. Respondent's conduct in this regard constituted the intentional misappropriation of client funds.

12. On October 31, 2008, respondent replaced the \$25,000 she transferred out of the trust account on October 1, 2008. On December 31, 2008, respondent replaced the \$35,000 she had transferred out of the trust account on October 3, 2008.

13. On January 5, 2009, respondent transferred the sum of \$25,000 from the K&L trust account into the K&L business account. K&L was not entitled to the funds transferred. Respondent's conduct in this regard constituted the intentional misappropriation of client funds.

14. On January 7, 2009, respondent transferred the sum of \$30,000 from the K&L trust account into the K&L business account. K&L was not entitled to the funds transferred. Respondent's conduct in this regard constituted the intentional misappropriation of client funds.

15. On January 15, 2009, respondent transferred the sum of \$20,000 from the K&L trust account into the K&L business account. K&L was not entitled to the funds transferred. Respondent's conduct in this regard constituted the intentional misappropriation of client funds.

16. On February 2, 2009, respondent transferred the sum of \$9,000 from the K&L trust account into the K&L business account. K&L was not entitled to the funds transferred. Respondent's conduct in this regard constituted the intentional misappropriation of client funds.

17. After the overdraft referenced above in paragraph 3 was reported to the Director, respondent incrementally replaced the funds she had transferred out of the K&L trust account as follows: on February 24, 2009, respondent deposited \$4,000; on March 2, 2009, respondent deposited \$4,000; on March 5, 2009, respondent deposited \$5,000; on March 9, 2009, respondent deposited \$26,000; and on March 10, 2009, respondent deposited \$45,000. Respondent's deposits into the K&L trust account totaled \$84,000, the exact amount respondent had misappropriated from the K&L trust account from through January through February 2009 to pay the firm's payroll and employer withholding tax obligations.

18. Between October 1, 2008, and February 2009, respondent misappropriated a total of \$144,000 from the K&L trust account in order to pay the firm's payroll and employer withholding tax obligations.

19. Respondent's conduct in allowing shortages to exist in the K&L trust account, thus causing the inadvertent misappropriation of client funds to the benefit of other clients, violated Rule 1.15(a), MRPC.

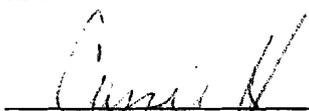
20. Respondent's conduct in intentionally misappropriating client funds to the benefit of K&L, violated Rule 8.4(c), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court suspending respondent 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.

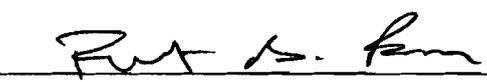
Dated: May 12, 2010.

  
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MARTIN A. COLE  
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(651) 296-3952

and

  
\_\_\_\_\_  
CASSIE HANSON  
SENIOR ASSISTANT DIRECTOR  
Attorney No. 303422

This petition is approved for filing pursuant to Rules 10(d) and 12(a), RLPR, by the undersigned Panel Chair.

Dated: May 14<sup>th</sup>, 2010.   
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ROBERT B. BAUER  
PANEL CHAIR, LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD