

FILE NO. A10-977

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
Against JO M. FAIRBAIRN,
a Minnesota Attorney,
Registration No. 28137.

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

The above-captioned matter was heard on September 15 and 16, 2010, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. Cassie Hanson, Senior Assistant Director, appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Allen I. Saeks appeared on behalf of respondent, Jo M. Fairbairn, who was personally present throughout the proceedings.

The hearing was conducted on the Director's May 14, 2010, petition for disciplinary action ("petition"). The Director presented the testimony of Lynda Nelson. Respondent testified at the hearing and presented the testimony of Rosemary Martin, LCSW. Respondent later presented the testimony of Dr. Karen Dickson, M.D., by deposition, which occurred on November 2, 2010. Director's exhibits 1-14 and Respondent's exhibits 101-115 were received into evidence. Martin Cole, Director of the Office of Lawyers Professional Responsibility (OLPR) testified at the request of the Referee in an attempt to resolve a dispute between counsel over taking the deposition of Dr. Karen Dickson. This deposition had originally been scheduled prior to September 15, 2010 but was continued because Cassie Hanson was on vacation at the time it was originally scheduled for.

The parties were directed to submit on or before November 19, 2010, proposed findings of fact, conclusions of law, a recommendation for appropriate discipline and a brief. The referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court no later than December 16, 2010.

Upon all of the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

1. Respondent is 60 years of age. She was admitted to the practice of law in Minnesota on September 16, 1974. She had been practicing law for 36 years at the time of the hearing. She has no prior disciplinary history.

2. Respondent is currently employed at the law firm of Kinney & Lange, P.A. (hereinafter "K&L"), where she is one of four shareholders. Respondent is the treasurer of K&L and has primary responsibility for the K&L trust account and operating account. Respondent also acts as a type of managing partner by overseeing staffing issues and K&L's trust and operating accounts. In addition to her administrative duties for K&L, Respondent also maintains an active case list and represents clients. Respondent's husband, David Fairbairn, is also a shareholder in K&L and acting president.

3. At all times relevant, K&L has maintained client trust account no. x-xxx-2602 at US Bank. On February 27, 2009, the K&L trust account became overdrawn, which US Bank subsequently 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 and requested an explanation for the overdraft and that various trust account books and records relating to the overdraft be produced. As treasurer for K&L, Respondent answered the Director's correspondence and provided the requested trust account books and records.

5. The Director audited the trust account books and records provided by Respondent, for the period of January 1, 2008 through December of 2009. The audit revealed a small shortage of client funds in the K&L trust account at the time of the audit along with a series of Internet transfers back and forth between the K&L trust account and operating account which showed substantial shortages had occurred in the past. At the time Respondent was notified of the investigation it appears that all shortages had been reimbursed.

6. The small shortage identified above resulted from three transactions:
 - a. A shortage of \$1,944 which existed at the time Respondent assumed responsibility for the account. It has never been determined how this shortage came about or who is entitled to the funds.
 - b. A check issued on behalf of a client on January 10th 2008 in the sum of \$2,820 when that client was only entitled to \$1,150 from the account.
 - c. A check issued on behalf of a client on February 22nd 2008 in the sum of \$1,180 when that client was only entitled to \$930 from the account.

7. The substantial shortages identified in the audit and the repayment of said shortages is shown in the following chart prepared by Respondent:

Date	Transfers from Trust	Deposits to Trust from Operating Account	Balance Owed
Oct 1, 2008	\$25,000.		\$25,000.
Oct 3, 2008	\$35,000.		\$60,000.
Oct 31, 2008		\$25,000.	\$35,000.
Dec 31, 2008		\$35,000.	0.
Jan 5, 2009	\$25,000.		\$25,000.
Jan 7, 2009	\$30,000.		\$55,000.
Jan 15, 2009	\$20,000.		\$75,000.
Feb 2, 2009	\$9,000.		\$84,000.
Feb 24, 2009		\$4,000.	\$80,000.
Mar 2, 2009		\$4,000.	\$76,000.
Mar 5, 2009		\$5,000.	\$71,000.

Date	Transfers from Trust	Deposits to Trust from Operating Account	Balance Owed
Mar 9, 2009		\$26,000.	\$45,000.
Mar 10, 2009		\$45,000.	0.

8. The transfers of funds described above were for the purpose of paying a variety of firm expenses including payroll and withholding taxes.

9. Respondent's firm, at the time of the transfers, was suffering from the economic downturn and from rental payments on the building which it occupied.

10. The transfers from the trust account to K&L firm account were for the benefit of the firm and thereby provided incidental benefit to the Respondent. The transfers were not primarily for the benefit of Respondent.

11. The transfers from the trust account were reimbursed in full before Respondent was notified of the investigation by the OLPR. (The last repayment was made on March 10, 2020, the date K&L received notice of the investigation. This referee accepts as true Respondent's testimony that the repayment was made before she was aware of the investigation.)

12. The transfers of funds from the K&L Trust account to the K&L firm account on October 1 and 3, 2008 and on January 5, 7 and 15, 2010, and on February 24, 2010 constituted a misappropriation of funds.

13. Funds held in the K&L Trust account were primarily funds advanced by clients to pay future costs and disbursements and attorney fees when earned.

14. Clients of K&L suffered no direct harm as a result of the misappropriation.

AGGRAVATING FACTORS

15. There are no aggravating factors.

MITIGATING FACTORS

16. Respondent suffers from depression and has been treated for this illness for over 22 years. Respondent's depression may have been a factor in Respondent's behavior, but was not the cause of it. Said illness is, therefore, not a mitigating factor.

17. Respondent's conduct is unlikely to happen again.

CONCLUSIONS OF LAW

1. 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), Minnesota Rules of Professional Conduct (MRPC).

2. Respondent's conduct in intentionally misappropriating client funds for the benefit K&L, in which she is a major shareholder and treasurer violated Rule 8.4(c), MRPC.

RECOMMENDATION FOR DISCIPLINE

The undersigned recommends:

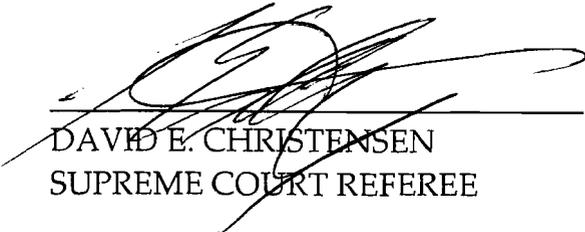
1. That Respondent, Jo M. Fairbairn, be suspended from the practice of law by the Minnesota Supreme Court for a period of six months.

2. That Respondent shall not be responsible for, nor otherwise handle, the trust account accounting for funds in her present law firm nor in any other law firm for which she may work in the future.

3. That Respondent pay \$900 in costs pursuant to Rule 24(a), RLPR, and disbursements pursuant to Rule 24(b), RLPR.

Dated: December 7, 2010.

BY THE COURT:


DAVID E. CHRISTENSEN
SUPREME COURT REFEREE

MEMORANDUM

The petition for discipline in this matter requests that Respondent be suspended from the practice of law based upon her misappropriation of funds. Respondent agrees that she misappropriated funds and further agrees that she should be suspended.

Contrary to its initial petition, Petitioner now argues that Respondent should be disbarred and in support therefore has presented what it alleges are aggravating factors. Respondent has in turn presented mitigating factors. From the evidence presented, it appears that Petitioner had all relevant information in regard to this matter at the time the petition was filed. This Referee has limited his recommendations for discipline to suspension because this is the relief that was originally requested. To do otherwise would cause the appearance of punishing Respondent more harshly because she has gone through the hearing process.

Setting aside the recommendation for disbarment, the issues in this case are relatively simple. The Respondent admits that she misappropriated funds. That leaves the issues of aggravation and mitigation.

In regard to the issue of aggravation, the parties quibble about terms such as stole and borrow. This referee finds such terms meaningless in the context of this case. Respondent transferred the money and that was a serious violation of the code. The Respondent benefited from the transfer in the same way as all employees and partners in the firm did. She did not, however, use the money for her personal benefit (except indirectly) and all of the money was paid back. Had Respondent been acting rationally, she would have obtained a short term loan or a line of credit to cover the financial problems her firm was having at the time of this incident. Having failed to act rationally, Respondent now faces the consequences of her action.

The opposite side of aggravation is that of mitigation. Respondent has long suffered from depression but this referee does not believe that depression, in of itself, caused the bad conduct. At the time of the conduct in this matter, Respondent's firm was suffering financial problems both from the economic downturn and expenses related to the purchase of a building. This would have placed Respondent, as firm treasurer, under a great deal of stress, and she may have made bad choices which were contributed to by the depression but not solely because of it.

The fact that such conduct is unlikely to occur in the future is a mitigating factor considered by this Referee in making its decision.

This Referee would note that while none of Respondent's clients suffered any harm as a result of her actions, the legal system may suffer as a result of a loss of confidence in the system and in addition the misappropriations reduced income to the Lawyers Trust Account.

DEC