

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against DONALD W. FETT,
a Minnesota Attorney,
Registration No. 29014.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

At the direction of a Lawyers Professional Responsibility Board Panel, the Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition.

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on April 15, 1977. Respondent currently practices law in Brooklyn Center, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

A. On December 9, 1986, respondent was issued an admonition for neglect of a client matter and non-communication with a client.

B. On March 7, 1996, respondent was issued an admonition for failing to promptly respond to requests for information in connection with a disciplinary investigation.

C. On October 22, 1996, respondent was issued an admonition for neglect of a client matter, non-communication with a client, and non-cooperation with the disciplinary investigation.

D. On July 25, 2000, respondent signed a stipulation for private probation for failing to timely file employer withholding tax returns and pay withholding taxes.

E. On March 18, 2003, respondent was issued an admonition for failing to deposit the original copy of a client's will with the probate court as agreed and failing to inform the client that the will was not deposited with the probate court.

F. On July 27, 2005, respondent was issued an admonition for failing to deposit an advance fee payment into his client trust account.

FIRST COUNT

Gumbusky Matter

1. At all times material, Robert Gumbusky has been the successor attorney-in-fact for his brother, Martin P. Gumbusky, under a Minnesota statutory short form power of attorney. The power granted all of the powers listed in the statutory form. The power did not authorize the attorney-in-fact to transfer the principal's property to the attorney-in-fact. Although the power of attorney included the power to make gifts, Minnesota Statutes § 523.24, subd. 8, provides in part as follows:

Gift transactions. In the statutory short form power of attorney, the language conferring general authority with respect to gift transactions, means that the principal authorizes the attorney-in-fact:

(1) to make gifts to organizations, whether charitable or otherwise, to which the principal has made gifts, and to satisfy pledges made to organizations by the principal;

(2) to make gifts on behalf of the principal to the principal's spouse, children, and other descendants or the spouse of any child or other descendant, and, if authorized by the principal in part Third, to the attorney-in-fact

2. In the summer of 2008, Martin Gumbusky was an 88-year old widower who suffered from dementia and resided in a nursing home. The value of Martin Gumbusky's assets, which consisted primarily of an Edward Jones portfolio and life insurance, approximated \$600,000. All of the assets were set up to be transferable on death to Martin's siblings (not in equal shares) and to charities. When the monthly cost

of Martin's care more than doubled, Robert Gumbusky became concerned about preservation of Martin's assets. On the advice of friends, he sought legal advice on the subject, eventually retaining respondent.

3. On or about July 9, 2008, respondent and Robert Gumbusky met. During the meeting, respondent gathered information from Robert, and they discussed generally medical assistance planning. Robert did not have a copy of the power of attorney at the meeting. Robert states that although respondent asked about whether the power of attorney prohibited transfers to the attorney-in-fact, respondent stated it did not really matter because they "could get around it." After the initial conference, Robert retained respondent to go forward with the medical assistance planning.

4. On July 17, 2008, respondent sent a letter to Robert summarizing the relevant facts and providing his evaluations and recommendations (Exhibit 1). The following are excerpts from that letter:

The purpose of this letter is to summarize our conference and to outline and review my recommendations.

Goals – You would like to protect some of the remaining inheritance your brother had hoped to leave to you, your siblings and charities.

* * *

Here are my evaluation and recommendations:

Gift – . . . Subject to the allowance of up to \$3,000 and the prepaid funeral costs, all of the remainder of your brother's assets should be completely transferred to out of your brother's ownership as soon as possible.

* * *

To accomplish this, all of the assets to be gifted should be withdrawn and deposited into your brother's checking account. . . . You should then write a check or checks to accomplish the gift in a total amount that will leave about \$2800 in your brother's account.

* * *

During the penalty period you will deposit funds given to you as needed back into your brother's account and then pay for his care from his checking account.

* * *

The remainder of the gift to you will be yours to keep.

* * *

You will initially deposit all funds given to you into an account in which your brother does not have any ownership interest.

* * *

As we have discussed, the ownership and control of the gifted portion is problematic. From the standpoint of simplicity, it is easiest if you own it, invest it and continue to transfer funds into your brother's account to pay his expenses. Upon the death of Martin you could then distribute the funds according to Martin's distribution plan. Here are some problems with this approach: [This is followed by a list of seven areas of concern.]

* * *

For now, you plan to deposit all funds given to you into a checking/savings account owned by you.

* * *

Caution – The planning recommended herein represents my best efforts to achieve your objectives based upon current law and the facts as I understand them.

5. On or about July 23, 2008, respondent had a telephone conversation with Robert Gumbusky during which he encouraged Robert to liquidate Martin's investment account and deposit the proceeds in Martin's checking account to facilitate the anticipated transfers (gifts). Respondent expected that the gifting transfers would be made by the end of July 2008 so that the medical assistance penalty period would begin to run as of July 1, 2008. Respondent planned to meet with Robert Gumbusky again on July 25, 2008, to finalize the gifting plan.

6. The clear implication of the letter, when read as a whole, is that Robert Gumbusky should embark on a gifting program to dispose of substantially all of Martin Gumbusky's assets, including transferring funds to himself, either directly or indirectly. Although the July 17, 2008, letter notes on the first page that the power of attorney does not allow Robert Gumbusky to transfer assets directly to himself, it subsequently refers to "gift to you" and "funds given to you." Similarly, the letter states: "For now, you plan to deposit all funds given to you into a checking/savings account owned by you." The letter does not state that Robert cannot or should not attempt to use the power of attorney to accomplish such a transfer. In addition, although the letter lists seven reasons why Robert's ownership and control of Martin's assets is "problematic," the prohibition in the power of attorney against transfers to Robert Gumbusky is not among them. When he created the power of attorney, Martin Gumbusky made a deliberate choice in selecting one of two alternatives: to allow Robert to transfer assets to himself or to not allow such transfers. He chose the latter. Respondent's recommendations to Robert directly contravene this expressed desire, whether a transfer was accomplished directly or indirectly.

7. Further, even if respondent's recommended plan did not involve the transfer of any of Martin's assets to Robert Gumbusky, the power of attorney does not authorize Robert to make any gifts as recommended by respondent. Under the power, as construed by Minn. Stat. § 523.24, subd. 8, Robert, as attorney-in-fact, was authorized only to make gifts to organizations to which Martin previously had made gifts or had made pledges (none of which is recommended by respondent's plan) or to Martin's spouse or descendants (of which there are none). Advising Robert to pursue a course clearly prohibited by the power of attorney is contrary to Martin's wishes and applicable law, could have exposed Robert to claims of breach of his fiduciary duties, and could have placed Martin's assets and financial wellbeing in jeopardy.

8. Under Minnesota law, the plan recommended by respondent could not have been accomplished using the power of attorney due to the limitations imposed by Minn. Stat. § 523.24, subd. 8. Respondent exhibited a lack of knowledge regarding, and failed to adequately research, this essential element of his recommended plan.

9. After receiving the July 17, 2008, letter, Robert Gumbusky consulted with a brokerage representative regarding transfer of Martin's assets to that brokerage firm. During that conversation, Robert shared the advice he had received from respondent. The brokerage representative suggested to Robert that he seek a second legal opinion regarding the advice he had received from respondent. Robert then consulted a lawyer, who filed a complaint about respondent's conduct in this matter.

10. Respondent's conduct violated Rules 1.1 and 1.4(b), Minnesota Rules of Professional Conduct.

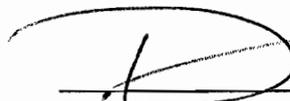
WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: September 29, 2009.



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