FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against DONALD J. FRALEY,
a Minnesota Attorney,
Registration No. 31392.

PETITION FOR 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 upon the parties' agreement pursuant to Rules 10(a) 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 October 4, 1957. Respondent currently practices law in Wayzata, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

Respondent's history of prior discipline, including admonitions is as follows:

1. On November 3, 1993, respondent received an admonition for acknowledging a contract for deed that was not signed in his presence in violation of Rule 8.4(c) and (d), Minnesota Rules of Professional Conduct (MRPC) (Exhibit 1).

2. On February 2, 2001, the Minnesota Supreme Court publicly reprimanded respondent for collecting a fee in a workers' compensation matter without complying with required statutory provisions, improperly obtaining a signature on an attorney fee

withholding request and improperly providing financial assistance to a client in violation of Rules 1.8(a) and (e), 3.4(c), 8.4(c) and (d), MRPC (Exhibit 2).

3. On March 9, 2003, respondent received an admonition for attempting to settle potential claims against him without advising the client to consult independent counsel in violation of Rules 1.8(h) and 8.4(a), MRPC (Exhibit 3).

FIRST COUNT

Mildred Johnson Matter

Incompetent Representation

1. Mildred Johnson, an elderly widow, was born in 1909. In December 2002 Johnson fell and broke her pelvis. After discharge from the hospital she was admitted to Maranatha Care Center (MCC) for rehabilitation.

2. Johnson was a vulnerable adult who also suffered from dementia at the time she was admitted to MCC in late December 2002.

3. Brian J. Peterson, a suspended attorney who had been working for respondent as an independent contractor paralegal since about November 2001, served as Johnson's power of attorney (POA).

4. On or about January 3, 2003, respondent entered into a retainer agreement prepared by Peterson to represent Mildred Johnson regarding medical assistance planning. Peterson signed the retainer agreement as Johnson's POA (Exhibit 4).

5. The retainer agreement provided that respondent would be paid $220 per hour and that Peterson would be paid $110 per hour for work as respondent's paralegal/POA on Johnson's matters. Aside from the retainer agreement, respondent and Peterson agreed that Peterson would receive half of respondent's $220 fee for the time Peterson collaborated with respondent on the matter.

6. Respondent never met Johnson or even talked with her on the telephone.

7. Respondent never met with or talked to MCC personnel.

8. Respondent obtained all of his information regarding Johnson's wishes, assets and medical status from Peterson.

9. When respondent was asked under oath in what context Peterson had brought Mildred Johnson to his attention he replied:

> [H]e [Peterson] had had -- his license was suspended and he needed an attorney particularly to handle funds that she had he was collecting to go into the trust account, to run it through a trust account. He didn't feel that since he had a license -- didn't have a license anymore that he should use his trust account (sic), and that he should use mine.

Exhibit 5, Respondent's March 12, 2005, Sworn Statement, p. 8, ll. 2-8.

10. Respondent had Peterson draft a pooled trust agreement which respondent signed on or about January 30, 2003. Peterson signed the pooled trust agreement as Johnson's POA (Exhibit 6).

11. When asked why Johnson needed a pooled trust, respondent replied:

> [Peterson] told me that she needed some money, a trust, to put her money in trust that she had that was not all spend-down. He was in the process of working a spend-down for her. This is before I became involved. And then he indicated she needs to have a pooled trust, and we talked about it, and I discussed it with him and asked him to draft the pooled trust agreement. So that's what he did.

Exhibit 5, p. 45, ll. 17-24.

12. When respondent was asked what legal skills he employed in drafting or advising on the creation of a pooled trust agreement (PTA), he replied, "I discussed it with Brian and I relied on him to draft it correctly." (Exhibit 5, p. 46, ll. 8-9.)

13. Respondent had little or no understanding of pooled trust agreements (Exhibit 5, pp. 42-56).

14. The pooled trust agreement respondent executed for Johnson was defective. *See*, Deposition of Stuart Bear, Exhibit 7, pp. 41-42, 49-50.

15. Respondent's conduct in providing incompetent representation in medical assistance planning violated Rule 1.1, MRPC.

Unreasonable Fees

16. During 2003-2004 respondent billed Mildred Johnson more than $44,000 for legal, paralegal/POA services.

17. By invoice dated January 31, 2003 (Exhibit 8, pp. 2-4), respondent billed Johnson for work performed by him and by Peterson. The invoice included a charge of $1,935.25 for "prior balance owed BJP from December 2000 through November 2002." Respondent did not seek verification of the charges for these alleged services. Peterson has been unable to produce billing statements justifying these charges.

18. In January 2003 respondent billed Johnson $330 for mileage. Respondent billed her for more than 400 miles (at $.50 per mile) for Peterson, his legal assistant, to visit car dealerships. Even after Peterson as POA purchased a 1998 Infinity (on January 20, 2003) as part of the medical spend down respondent recommended, respondent billed Johnson an additional $122 for mileage (Exhibit 8, pp. 4-7).

19. Johnson had a small investment with the Nicholas Fund from which she received a monthly check of less than $5.00. Respondent billed her $517 for his and Peterson's time to review the Nicholas Fund's statements and to obtain a payout of the $188 balance (Exhibit 8, pp. 2-4, 16-19).

20. Johnson needed a pair of pants and some undergarments. Respondent billed her $452 for Peterson's time and expenses to purchase and deliver $42.84 worth of clothing (Exhibit 8, p. 28).

21. Respondent billed Johnson a minimum of 12 minutes for Peterson (as his paralegal and her POA) to open a piece of mail. During 2003, Johnson received 204 pieces of mail. Respondent billed her $4,488 to receive that mail. Respondent billed Johnson again each time the bill was paid (Exhibit 8).

22. Respondent never required Peterson to provide verification for time or expenses charged to Johnson.

23. Respondent billed Johnson $5,707 for his representation in 2003-2004. Respondent billed Johnson $38,521.41 for Peterson's time and expenses. Respondent paid Peterson $42,828.59 from Johnson's funds in respondent's trust account.

24. Part of the additional $4,307.18 respondent paid Peterson may be accounted for as Peterson's half of the fees respondent billed at his $220 hourly rate and minor math errors, the remainder is unexplained.

25. For example, respondent's January 31, 2003, billing statement (Exhibit 8) itemizes $1,296 for attorney time and $5,489 for paralegal/POA time. On February 14, 2003, respondent wrote trust account check number 3110 to himself for $3,435.06. He wrote trust account check number 3109 to Peterson for $13,613.35. When asked how much of each check was disbursed on Johnson's behalf, respondent did not know and referred the Director to Peterson.

26. By facsimile dated March 28, 2003, Peterson provided a breakdown of the two checks (Exhibit 9). Peterson's account indicated as follows: $7,352 of check 3109 for $13,613.35 to Peterson was attributed to Johnson; and $648 of check 3110 for $3,435.06 to respondent was attributed to Johnson. Respondent received exactly one-half of the amount charged for his services (receiving $648 vs. $1,296). Peterson received the other half.

27. Respondent's conduct in billing Johnson unreasonable fees violated Rules 1.5(a) and 8.4(a), MRPC.

Conflict of Interest

28. In March 2003 while respondent was representing Mildred Johnson, Hennepin County commenced an investigation of Brian Peterson regarding allegations of financial exploitation of a vulnerable adult including his purchase of a $37,300 Acura with Johnson's money (Exhibit 10).

29. At the same time, respondent also represented Peterson regarding the appeal of Johnson's denial of medical assistance based upon the purchase of the $37,300 Acura (Exhibit 11).

30. During the Medical Assistance appeal and the Hennepin County criminal investigation, Johnson and Peterson had differing interests.

31. Respondent's conduct in simultaneously representing Johnson and his legal assistant violated Rules 1.7(a) and (b), MRPC.

SECOND COUNT

Failure to Adequately Supervise a Suspended Lawyer

32. In or about November 2001 Brian J. Peterson, who had been suspended from the practice of law effective February 1, 2001, began working as a paralegal for respondent. Peterson worked as an independent contractor. Peterson worked exclusively on client matters he had brought into respondent's office (hereinafter Peterson clients).

33. Using respondent as a front, Peterson continued to represent clients he had previously represented in his own pre-suspension law practice at Chadwick & Mertz (C&M), or who became clients after contacting Peterson through Peterson's office telephone number. Peterson had authorized the telephone company to redirect all his office calls to his home.

34. Respondent profited significantly from his association with Peterson. In 2002 respondent received $54,955.64 from his law practice. Of that amount, income from Peterson clients accounted for $30,395.44.

35. Respondent used the written retainer agreement form that Peterson had previously used in his law practice for Peterson clients. Respondent did not use this retainer agreement form for his own clients.

36. Peterson clients were charged for photocopying, faxes and 50 cents per mile for mileage. Peterson received the money collected from Peterson clients for these

expenses. Peterson clients were also charged 18 percent annual interest on unpaid fees. Respondent did not charge clients in his own practice for photocopying, faxes and mileage. Such charges were built into his hourly rate which was typically less than the $220 per hour he charged Peterson clients.

37. Respondent paid Peterson the money collected for expenses from clients billed pursuant to the Peterson client retainers.

38. Peterson clients were billed $110 for Peterson's work as a paralegal and $220 per hour for respondent's time. Respondent had Peterson keep track of both his own time and respondent's time and prepare the billing statements for the Peterson clients on respondent's letterhead.

39. Respondent also agreed that Peterson would receive one half of all fees charged to clients at respondent's hourly rate for meetings, hearings, phone calls and other work in which Peterson was involved. For example, on January 7, 2003, respondent charged client Mildred Johnson .9 hours, or 54 minutes, to review documents and analyze spend down alternatives with Peterson. Respondent's bill reflects a charge of $198. Dispersal checks from respondent's trust account indicate that he received $99 and Peterson received the other $99.

40. Peterson received payment for his work as a paralegal if, but only if, the Peterson client paid the bill. If the Peterson client did not pay the bill, Peterson received no compensation from respondent.

41. Respondent did not maintain a list of Peterson clients. Peterson maintained all records and documents and files relating to Peterson clients. When asked to produce a list of all Peterson clients, respondent had to obtain the list from Peterson. The list contained the names of 39 clients who had retainer agreements with respondent that Peterson brought into respondent's office between November 2001 and May 2003 (Exhibit 12).

42. Respondent maintains all or almost all client related records and documents on his computer. None of the 39 Peterson clients are listed on his computer client list. None, or almost none, of the documents generated in respondent's representation of the 39 Peterson clients were created or maintained on his computer.

43. Respondent did not keep independent billing or trust account records for Peterson clients. Respondent did not keep independent records of how much he paid Peterson on each Peterson client matter. Respondent allowed Peterson to prepare his own federal 1099 and 1096 tax forms for respondent's signature.

44. Respondent directed Peterson to create his own 2002 1099-MISC and 1096 tax forms pertaining to wages earned at respondent's law firm (Exhibit 13). The 2002 1099-MISC and 1096 Peterson prepared and respondent signed showed compensation from respondent to Peterson of $39,829. Respondent told the Director's Office that Peterson was paid only through respondent's trust account and that by adding up the checks made out to Peterson, the figures would match (Exhibit 14).

45. Checks written to Peterson from respondent's trust account in the year 2002 amount to $39,863.32. Respondent's business account records indicate that on at least two occasions Peterson was also paid from respondent's business account. On April 1, 2002, respondent transferred $13,978.05 from his trust account to his business account. He then paid Peterson $8,582.07 and himself $5,395.98. On December 24, 2002, respondent transferred $8,924.95 from his trust account into his business account and then wrote a business account check to Peterson for $8,924.95. Respondent underreported to the IRS $17,541.34 in payments made to Peterson in 2002 (Exhibits 13 and 14).

46. Respondent directed Peterson to create his own 2003 1099-MISC and 1096 tax forms pertaining to wages earned at respondent's law firm. The 2003 1099-MISC showed compensation from respondent to Peterson of $66,514 (Exhibit 15).

47. Checks written to Peterson from respondent's trust account in the year 2003 amount to $70,599.68 (Exhibit 16). Respondent underreported to the IRS $4,085.68 in payments made to Peterson.

48. Respondent's failure to adequately supervise a suspended attorney he had hired to do paralegal work, and sharing fees with the suspended attorney and underreporting his compensation to the IRS violated Rules 5.3, 5.4(a), 5.7, and 8.4(c), MRPC.[1]

THIRD COUNT

Trust Account Violations

49. Respondent has failed to maintain trust account books and records as required by Rule 1.15, MRPC.

50. In 2002, 2003, 2004 and 2005 respondent falsely certified to the Minnesota Supreme Court on his attorney registration renewal application that he maintained trust account books and records as required by Rule 1.15, MRPC.

51. Respondent failed to maintain or produce records regarding funds he held on behalf of Mildred Johnson in his trust account from 2003-2005, other than a partial unannotated checkbook register in which some of the deposits and withdrawals on behalf of Johnson were combined with deposits and withdrawals on behalf of other clients. From these records, it was impossible to reconstruct an individual client ledger showing Johnson's funds going into and out of respondent's trust account and showing the running balance of Johnson's funds on a given date.

52. Peterson provided attributions for checks made payable to respondent and to himself from respondent's trust account. From these attributions, billing statements and bank records, the Director's Office reconstructed an individual client

[1] Respondent's conduct predates October 1, 2005. After October 1, 2005, Rule 5.7 was renumbered to Rule 5.8.

ledger for Johnson which indicates that $942 of Johnson's money has not yet been accounted for or turned over to her conservator.

53. Respondent failed to produce records regarding funds he held in his trust account from 2003-2005 on behalf of the other 38 Peterson clients, other than a partial unannotated checkbook register in which some of the deposits and withdrawals on behalf of clients were combined with deposits and withdrawals on behalf of other clients. From these records, it is impossible to reconstruct an individual client ledger showing any given client's funds going into and out of respondent's trust account and showing the running balance of those funds on a given date.

54. Despite multiple requests from the Director's Office for all of respondent's trust account books and records from December 2001 through January 2005, respondent has been unable to provide sufficient books and records to enable the Director's Office to conduct a complete audit of respondent's trust account to account for all client funds.

55. Respondent's conduct in failing to maintain required trust account books and records and falsely certifying to the Supreme Court that he did so violated Rules 1.15(a) and (h), 8.4(c) and (d), MRPC.

FOURTH COUNT

Business Account Books and Records

56. Respondent has not maintained the business account books and records necessary to show income and expenses from the practice of law as required by Rule 1.15(h), MRPC, for 2002, 2003 and 2004.

57. Respondent's conduct in failing to maintain the required business account books and records violated Rule 1.15(h), MRPC.

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: December 9, 2005.

KENNETH L. JORGENSEN
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
Attorney No. 159463
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218
(651) 296-3952

and

BETTY M. SHAW
SENIOR ASSISTANT DIRECTOR
Attorney No. 130904