

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against KENNETH M. HOLKER,
a Minnesota Attorney,
Registration No. 46267.

**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 October 21, 1977. Respondent currently practices law in Maple Grove, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

DiGiamBattista Matter

1. In 1996 Italina DiGiamBattista (DiGiamBattista) and her sister, Ellen, consulted with respondent concerning estate planning matters. Respondent prepared estate planning documents for both DiGiamBattista and Ellen.

2. Ellen died on April 1, 1997. The next day, DiGiamBattista, who was personal representative of Ellen's estate, contacted respondent regarding representation. On April 18, 1997, DiGiamBattista signed a retainer agreement with respondent.

3. When DiGiamBattista retained respondent to represent her as personal representative, she was 78 years old. For the first couple of years after her sister's death, DiGiamBattista was extremely -- at times, uncontrollably -- distraught, in a pronounced state of depression and unable to handle the affairs of her sister's estate.

4. From June 1997 until February 1998 and from May until December 1998, respondent failed to work on the matter and failed to communicate with DiGiamBattista.

5. Under federal and state law, estate tax returns were due nine months after Ellen's death, i.e., January 1, 1998. Respondent failed to ensure the returns were prepared and filed timely.

6. Under federal and state law, income tax returns for the estate were due 16 months after Ellen's death and every 12 months thereafter while the estate was open, i.e., on July 31, 1998, and every July 31 thereafter. Respondent failed to ensure the returns due July 31, 1998, and July 31, 1999, were prepared and filed timely.

7. Respondent failed to request DiGiamBattista to provide the names and addresses of beneficiaries, information necessary to commence the probate proceeding, until February 1999, more than 22 months after Ellen's death.

8. Respondent failed to commence a probate proceeding until August 1999, more than 27 months after Ellen's death.

9. The inventory respondent filed in August 1999 valued the estate at greater than \$1,400,000. The vast majority of the estate's assets were in the nature of stock, bonds, and other investments. Starting in August 1999, respondent arranged to have the stocks and other investment assets liquidated. By the end of December 1999, more than \$1,000,000 in stock and other investment assets had been sold.

10. On multiple occasions during the representation, respondent paid to himself estate funds in an amount greater than the amount the estate owed to him for attorney's fees and expenses at the time respondent made the payment to himself.

Respondent failed to hold the unearned fees in a trust account. Respondent's retainer agreement with DiGiamBattista did not advise her that the unearned fees would not be held in trust and she may not receive a refund of these unearned fees if representation was subsequently terminated.

a. On January 8, 2001, respondent withdrew from his client trust account \$5,000 toward payment of his fees. As of that date, however, the estate owed respondent only \$100. Respondent failed to deposit or hold the remaining \$4,900 in a client trust account. Respondent did not earn the full \$5,000 until March 22, 2002, more than a year later.

b. On or about June 19, 2002, respondent withdrew \$4,000 of the estate's funds from his trust account toward payment of his bill. As of that date, however, the estate owed only \$2,880. Respondent failed to deposit or hold the remaining \$1,120 in a client trust account. Respondent did not earn the \$1,120 until March 10, 2003, more than eight (8) months later.

11. On December 20, 2000, January 8, 2001, and June 19, 2002, respondent withdrew from his client trust account funds belonging to the DiGiamBattista estate and paid the funds to himself toward attorney's fees and expenses. On each occasion, respondent failed to provide timely notice of the withdrawal to DiGiamBattista.

12. On or about March 1, 2001, respondent retained accountant Judd Nordquist on behalf of the estate to prepare unfiled tax returns. Respondent failed to act diligently to provide to Nordquist the information and documents Nordquist needed to prepare the returns.

13. In June 2003 DiGiamBattista retained Robert Hajek to replace respondent as counsel. On June 27, July 9 and July 18, 2003, Hajek requested respondent to forward the client file and all estate funds remaining in respondent's trust account. Respondent failed to respond, failed to return the file and failed to forward the funds until July 24, 2003.

14. On July 24, 2003, respondent forwarded documents to Hajek, who had sent a courier to pick up the estate file. Respondent personally gave the file materials to Hajek's courier. Respondent told the courier that respondent had given the courier the entire file. This statement was false. Respondent had not delivered the entire client file. At no time did respondent indicate to the courier or to Hajek that there were any file materials beyond those respondent had personally handed to the courier.

15. On July 18, 2003, Hajek filed a disciplinary complaint. Among other things, the complaint alleged that respondent: (a) failed to commence and complete DiGiamBattista's probate promptly, resulting in an increased tax liability to the estate; and (b) liquidated many of the estate's stock holdings without adequate communication with DiGiamBattista.

16. In November 2003 Hajek provided to the Director a complete copy of the DiGiamBattista file that Hajek had received from respondent.

17. On August 18, 2004, respondent (with counsel) met with representatives of the Director. During that meeting, respondent was questioned on a variety of matters related to the DiGiamBattista estate, including: (a) the date on which respondent first asked DiGiamBattista for the names and addresses of the heirs; (b) respondent's communications with DiGiamBattista regarding the stock liquidation and whether respondent confirmed those communications in writing; and (c) respondent's involvement in the preparation of tax returns for the estate and past-due individual income tax returns for the decedent.

18. The file respondent had provided to Hajek (see ¶ 14, above) contained no correspondence between respondent and DiGiamBattista addressing any of these issues.

19. Early during the meeting, the Director's representative noted to respondent that the Director's representative had received from Hajek a complete copy of the entire DiGiamBattista file. Respondent then stated that the courier had "left a

couple of stacks of things" at respondent's office, including checkbook registers. Respondent then stated that he had immediately called Hajek and informed Hajek of the oversight. This statement was false. Respondent did not communicate or attempt to communicate with Hajek after the courier had received the documents from respondent.

20. During that August 18 meeting, and in a subsequent confirming letter, the Director requested respondent to produce the additional file materials that respondent claimed Hajek's courier had left at respondent's office.

21. By letter dated December 30, 2004, and received by the Director on January 4, 2005, respondent provided documents to the Director. Respondent failed to provide all requested documents. In the meantime, DiGiamBattista had passed away.

22. The purported file materials respondent produced with respondent's December 30, 2004, letter included correspondence that had not been included with the file he previously produced to Hajek. This correspondence included five letters from respondent to DiGiamBattista that were not included with the file respondent provided to Hajek. These letters were dated April 25, 1997, December 7, 1998, August 31, 1999, October 1, 1999, and March 1, 2001.

23. The April 25, 1997, December 7, 1998, August 31, 1999, October 1, 1999, and March 1, 2001, letters respondent enclosed with his December 30, 2004, letter were fabricated.

a. Each of these letters purports to address an issue respondent was specifically asked about during the August 18 meeting.

b. The December 7, 1998, letter shows a "763" area code with respondent's telephone number. However, the 763 area code did not go into effect until February 2000, more than a year later.

c. The March 1, 2001, letter shows a "612" area code with respondent's telephone number. However, the 612 area code ceased to be in

effect in that area on January 14, 2001. Additionally, other letters written before and after that date reflect the 763 area code.

d. Each of the letters bears a return address formatted differently from other letters written during the same period as the letters in question.

e. Each letter fails to reflect respondent's post office box number, which appears on all of the letters in the file that respondent provided to Hajek that were written during the same period.

24. On January 19, 2005, the Director requested respondent to provide additional documents and information, including confirmation that the documents delivered to the Director on January 4, 2005, constituted all of the DiGiamBattista file materials respondent claimed that Hajek's courier left behind.

25. On January 24, 2005, the Director requested respondent to provide the "original" file copies of the materials enclosed with respondent's January 4, 2005, letter, i.e., the materials respondent claimed to have been left behind by Hajek's courier.

26. On January 31, 2005, respondent informed the Director of health difficulties and that he was retaining new counsel to represent him. Respondent stated that he would direct counsel to respond to the Director's January 19 and 24, 2005, letters.

27. On February 23, 2005, the Director again requested respondent's response to the January 19 and 24, 2005, letters. On February 24, 2005, respondent informed the Director of continuing health difficulties and stated that he would soon meet with counsel.

28. On March 11, 2005, the Director received from respondent's counsel the purported "original" file materials respondent claimed Hajek's courier had left behind. This set included original bank records that had not been enclosed with respondent's December 30, 2004, letter.

29. The Director thereafter questioned whether the materials produced on March 11, 2005, were, in fact, the "original" file materials. On April 12, 2005, counsel produced what respondent, through counsel, represented to the Director to be the "original" file materials. This set included items that had not been included with the materials provided on March 11, 2005.

30. Respondent's conduct violated Rules 1.3, 1.4, 1.15(a), as further interpreted by Lawyers Professional Responsibility Board Opinion No. 15, 1.15(b), 1.15(c)(4), 1.16(d), 8.1(a)(1) and (3) and 8.4(c) and (d), Minnesota Rules of Professional Conduct, and Rule 25, Rules on Lawyers Professional Responsibility.

DISCIPLINARY HISTORY

Respondent has a disciplinary history as follows:

- A. On October 15, 1982, respondent was issued an admonition for failing to return files.
- B. On December 28, 1990, the Supreme Court affirmed an admonition issued to respondent for failing to remit interest accruing in his pooled client trust account to the Lawyers Trust Account Board.
- C. On May 31, 1991, respondent stipulated to an admonition for charging interest at the rate of 1.5% per month (18% annual percentage rate) without complying with applicable law.
- D. On April 3, 1995, respondent was issued an admonition for failing to pay for advertisements that he had published in newspapers.
- E. On January 6, 1998, respondent was issued an admonition for failing to explain adequately to clients the basis of his fee and using an inappropriate fee agreement.
- F. On February 4, 2000, the Supreme Court publicly reprimanded respondent and placed him on probation for failing to file federal and state individual income tax returns timely, failing to file federal and state employer's

quarterly withholding tax returns timely and failing to pay state and federal employer's withholding tax timely.

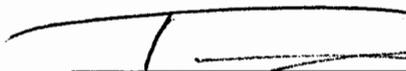
WHEREFORE, the Director respectfully prays for an order of this Court suspending respondent from the practice of law or imposing otherwise appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief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

Dated: May 11, 2006.



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