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FILED

FILE NO. A11-2072

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against TUCKER JOSEPH HUMMEL,
a Minnesota Attorney,
Registration No. 286230.

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

The above-captioned matter was heard on November 6, 2012, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Craig D. Klausung appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Respondent Tucker Joseph Hummel did not appear. The hearing was conducted on the Director's October 19, 2011, petition for disciplinary action (to which respondent has submitted an answer) and September 4, 2012, supplementary petition for disciplinary action (to which respondent has not submitted an answer).

The Director presented the testimony of Gloria Regan and Lynda Nelson. The Director offered Exhibits 1 through 46 into evidence, all of which were received.

At the conclusion of the hearing, the Referee directed the Director to submit proposed findings of fact, conclusions of law, and a recommendation for discipline by the close of business on November 30, 2012. The Referee's findings of fact, conclusions of law, and recommendation are due to the Supreme Court by December 15, 2012.

The findings and conclusions made below are based upon the admissions in respondent's answer, the documentary evidence submitted, the testimony presented, the demeanor and credibility of the witnesses as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony.

Based upon the evidence as outlined above, and upon all of the files, records and proceedings herein, the Referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in Minnesota on October 30, 1998.

Misappropriation of Client Funds and Failure to Communicate with the Client

2. Respondent represented Gloria Regan in her capacity as personal representative of her mother's estate (Regan Test.).

3. On April 4, 2011, respondent received a check in the amount of \$10,794.04 on Regan's behalf (Regan Test.; Ex. 35). The check represented the proceeds of the sale of Regan's mother's home and was an asset of her estate, to which Regan's brother had at least a partial interest (Regan Test.). Respondent deposited the check into his TCF Bank trust account no. xxxxxx3601 ("respondent's trust account") (Nelson Test.; Ex. 36).

4. During the period April 15 to 22, 2011, respondent misappropriated the Regan funds as evidenced by the following trust account transactions:

<u>DATE</u>	<u>DESCRIPTION</u>	<u>RECIPIENT</u>	<u>AMOUNT</u>
04/15/11	Transfer	TCF Bank A/C -7072	\$1,000.00
04/18/11	Transfer	TCF Bank A/C -7072	\$1,000.00
04/19/11	Check 5108	Respondent	\$1,000.00
04/19/11	Check 5109	Respondent	\$900.00
04/20/11	Check 5110	Respondent	\$900.00
04/20/11	Check 5111	Respondent	\$500.00
04/22/11	Check 5113	Respondent	\$900.00
04/22/11	Check 5114	Respondent	\$1,000.00
04/22/11	Check 5115	Respondent	\$4,500.00

(Nelson Test.; Ex. 36.)

5. Respondent has failed to respond to Regan's multiple attempts to communicate with him regarding distribution of the home sale proceeds or her mother's estate (Regan Test.).

6. Regan paid Respondent over \$ 21,000.00 in legal fees during the time he represented her.

Failure to Maintain Required Trust Account Books and Records

7. On January 20, 2011, respondent's trust account became overdrawn. Pursuant to Rule 1.15(j) through (o), Minnesota Rules of Professional Conduct (MRPC), the bank reported the overdraft to the Director (Ex. 1).

8. On February 1, 2011, the Director wrote to respondent and requested an explanation for, and trust account books and records related to, the overdraft (Nelson Test.; Ex. 2).

9. Respondent provided his substantive response to the Director's February 1, 2011, letter on February 23, 2011 (Ex. 5). In his letter, respondent stated that the trust account check causing the overdraft "was drafted out of the funds available account (TJH cash) and were earned funds that have been transferred to this account but not distributed out of the Trust account." Respondent further explained:

The reason the Trust account went negative for a short period of time is directly related to my lack of completely understanding my accounting program and the failure on my end to be diligent as it relates to the account.

(Ex. 5.)

10. Respondent enclosed with his February 23, 2011, letter copies of his December 17, 2010, January 19, 2011, and February 17, 2011, trust account bank

statements, the cancelled checks reflected on those statements, and client subsidiary ledgers for the period November 1, 2010, to February 23, 2011 (Nelson Test.; Ex. 5).

11. The trust account books and records respondent enclosed with his February 23, 2011, letter reflected that during the period from November 17, 2010, to February 17, 2011, the balance in respondent's trust account was continuously short of that necessary to cover aggregate client balances. The shortage reflected by these materials ranged in amount from \$2,643 to \$4,250 (Nelson Test.; Ex. 6).

12. On March 24, 2011, the Director wrote to respondent and informed him of the shortage in his trust account (Nelson Test.; Ex. 6).

13. On June 13, 2011, respondent stated that he "vigorously disagree[d]" with the Director's finding of a shortage in his trust account, but acknowledged that his trust account records were in "disarray" and that he had been unable to "patch up the Trust Account records given that my computer that held the information prior to August 2010 was destroyed" (Ex. 12).

14. As is more fully detailed below, in his subsequent communications with the Director respondent repeatedly stated that although he did not believe his trust account balance was short of that necessary to cover aggregate client balances, he was unable to either explain why the trust account books and records he produced on February 23, 2011, reflected such a shortage or to produce any corrected trust account books (Nelson Test.; Exs. 14, 17, 20, 22-25 and 27).

15. During the period from at least November 17, 2010, to the present, respondent failed to maintain a proper trust account check register, client subsidiary ledgers, trial balances or reconciliations (R. Ans.; Nelson Test.; Exs. 5, 7, 12, 14, 17, 20, 22-25 and 27).

False Statements to the Director

16. On April 22, 2011, respondent's trust account became overdrawn, a fact that the bank reported to the Director (Ex. 9).

17. The April 22, 2011, overdraft in respondent's trust account was caused by payment of check no. 5115 (Nelson Test.; Ex. 36). As shown above, respondent's issuance of check no. 5115 constituted misappropriation of the Regan funds.

18. In his June 13, 2011, response to the Director's inquiry regarding the April 22, 2011, overdraft, respondent stated:

I just cannot provide the information you are requesting as my books are messed up due to the loss of the data as explained, and frankly because I just really don't have a good handle on the accounting program I am using. **With that I again want to stress the issues I have is [sic] 100% related to those issues and not related to abuse of funds.**

(Emphasis added.) (Ex. 12.)

19. Respondent's statements as quoted above are false. In fact, the April 22, 2011, overdraft in respondent's trust account resulted from his issuance of check no. 5115, misappropriating the Regan funds.

Failure to Cooperate in the Director's Investigation

20. As noted above, the Director wrote to respondent on March 24, 2011, regarding the shortages in his trust account. The Director's March 24, 2011, letter requested respondent to provide: (a) a description of the nature of the client funds in respondent's trust account during the period November 17, 2010, to February 17, 2011, (b) copies of respondent's written fee agreements with the clients with funds in his trust account during that period, together with any billing statements respondent issued to those clients, (c) clarification of discrepancies between certain information reflected on respondent's client subsidiary ledgers and that reflected on his monthly trust account bank statements, and (d) identification of the account into which respondent's bank

statements indicated he was transferring funds from his trust account (Nelson Test.; Ex. 6).

21. On April 1, 2011, respondent requested a 60-day extension to respond to the Director's March 24, 2011, letter (Ex. 7). By letter dated April 5, 2011, the Director granted this extension (Ex. 8). Respondent failed to respond to the Director by the extended deadline (Ex. 11).

22. On April 29, 2011, the Director received notice of the April 22, 2011, overdraft on respondent's trust account (Ex. 9).

23. On May 2, 2011, the Director wrote to respondent requesting an explanation for, and trust account books and records related to, the overdraft (Ex. 10). Respondent failed to timely respond to the Director's letter (Ex. 11).

24. On June 9, 2011, the Director wrote to respondent requesting his response to the Director's March 24 and May 2, 2011, letters (Ex. 11).

25. On June 13, 2011, respondent wrote to the Director and stated that he had been unable to reconstruct his trust account books. Respondent further stated that the April 22, 2011, overdraft was "completely an issue with TCF related to withdrawing fees and a mistake in communications between the bank and myself when I withdrew these fees." Respondent failed to enclose any of the trust account books and records that had been requested in the Director's March 24 and May 2, 2011, letters (Ex. 12).

26. In a July 7, 2011, telephone conversation with a paralegal in the Director's Office, respondent again stated that he had been unable to reconstruct his trust account books. Respondent attributed the errors in his trust account books, and the eventual overdraft, to an August 2010 computer crash and "inputting errors." Despite these errors, respondent stated that since the overdraft he had made no changes to his trust accounting practices.

27. The Director then converted the overdraft inquiry into a formal disciplinary investigation. On July 18, 2011, the Director sent respondent a notice of investigation requesting respondent's complete January 15 to July 15, 2011, trust account books and records (Ex. 13).

28. On July 19, 2011, respondent spoke with a Senior Assistant Director in the Director's Office. Respondent again stated that he had been unable to reconstruct his trust account books, which he said were "in shambles." The Senior Assistant Director suggested, and respondent agreed, that respondent should consult with an accountant to assist him in correcting the problems with his trust account books and records. Respondent and the Senior Assistant Director also agreed that respondent would report back within 14 days (*i.e.*, by August 2, 2011) with an update on his efforts (Ex. 14). The Director confirmed their agreements in a July 22, 2011, letter to respondent (Ex. 15).

29. Respondent did not contact the Director's Office by the agreed upon date, so on August 8, 2011, the Senior Assistant Director telephoned respondent's office again. Respondent was not available and the Senior Assistant Director left a message for respondent to contact him (Ex. 16). In a letter dated August 8, 2011 (although not postmarked until August 10), respondent requested an additional 30 days to provide the requested records. Respondent provided no records with his letter, nor did he identify anyone who was to be assisting him in correcting the problems with his books and records (Ex. 17).

30. On November 9, 2011, respondent was personally served with the Director's petition for disciplinary action (Exs. 26 and 27). Respondent answered the petition on November 29, 2011 (Ex. 28).

31. In December 2011, the postal service began returning as undeliverable the letters the Director sent to respondent at his last known business address (Exs. 29 and 30). At that point, the Director began writing to respondent at the address at which

respondent had been served with the petition for disciplinary action ("the Hopkins address") (Exs. 33 and 34). It appeared that the Director's email communications continued to be successfully delivered to respondent (Exs. 31-32, 37 and 41).

32. Regan filed her complaint with the Director on April 5, 2012 (Ex. 34).

33. On April 12, 2012, the Director mailed a notice of investigation of Regan's complaint to respondent at the Hopkins address. The notice requested respondent's written response to the complaint within 14 days (Ex. 34). Respondent failed to respond.

34. On May 2, 2012, the Director wrote again to respondent at the Hopkins address to request his response to Regan's complaint (Ex. 38).

35. On June 14, 2012, the Director's May 2 letter was returned, with the notations, "Does Not Live Here" and "Return to Sender" (Ex. 38). Subsequent letters to respondent at the Hopkins address were likewise returned (Exs. 39-40 and 45). Beginning in October 2012, the Director's email communications to respondent were returned as undeliverable (Ex. 44).

36. Since November 2011, respondent has not responded to any of the Director's communications and has made no effort to affirmatively communicate with the Director.

37. After the undersigned was appointed referee in this matter by Order dated May 10, 2012, he made several attempts to contact the Respondent by e-mail. Although it was the first e-mails were not rejected the final one of July 22, 2012, was returned marked, "failed". The Respondent has not in any manner contacted the Referee.

CONCLUSIONS OF LAW

1. Respondent's conduct in misappropriating the Regan funds and failing to communicate with Regan violated Rules 1.4 and 8.4(c), MRPC.

2. Respondent's conduct in failing to maintain the required trust account books and records violated Rule 1.15(c)(3) and (h), MRPC, as interpreted by Appendix 1 thereto.

3. Respondent's conduct in making false statements to the Director violated Rules 8.1(a) and 8.4(c), MRPC.

4. Respondent's conduct in failing to cooperate with the Director's investigation regarding the overdrafts in his trust account and of the Regan complaint violated Rule 8.1(b), MRPC, and Rule 25, Rules on Lawyers Professional Responsibility (RLPR).

RECOMMENDATION FOR DISCIPLINE

Based on the foregoing findings and conclusions, the undersigned recommends:

1. That respondent Tucker Joseph Hummel be disbarred.

2. That pursuant to Rule 16(e), RLPR, respondent's authority to practice law be suspended pending final determination of this matter.

3. That respondent comply with Rule 26, RLPR.

4. That respondent pay costs, disbursements and interest pursuant to Rule 24, RLPR.

Dated: December 4, 2012.


CHARLES A. FLINN, JR.
SUPREME COURT REFEREE