

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against JAMES P. MULVAHILL,
a Minnesota Attorney,
Registration No. 151932.

**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 21, 1983. Respondent was suspended on July 1, 2003, for non-payment of his attorney registration fee.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

Respondent has the following disciplinary history:

1. On April 8, 2002, respondent was issued an admonition for charging \$25,000 for post-trial work that the client had not authorized, failing to properly pursue a claim on behalf of the client and failing to respond to the client's requests for information and documents, in violation of Rules 1.3, 1.4, 1.5(a) and 1.15(c)(4), Minnesota Rules of Professional Conduct (MRPC).
2. On November 13, 2003, respondent was issued an admonition for engaging in the practice of law while suspended for nonpayment of his attorney registration fee, in violation of Rule 5.5(a), MRPC.

FIRST COUNT

Pattern of Misappropriation, False Statements to Conceal Misappropriation, Check-kiting, Mishandling of Client Retainers and Knowing Issuance of Worthless Checks

Introduction

1. At various times during the period January to November 2003, respondent maintained at least 12 separate checking accounts at seven different banks, as follows:

- a. Wells Fargo trust account no. 600-3103014 (hereinafter, "Wells Fargo TA");
- b. Wells Fargo business account no. 600-3103121 (hereinafter, "Wells Fargo BA");
- c. First National Bank of the Lakes business account no. 8608803 (hereinafter, "FNB BA");
- d. First National Bank of the Lakes trust account no. 8608790 (hereinafter, "FNB TA");
- e. First National Bank of the Lakes personal account no. 8516749 (hereinafter, "FNB PA");
- f. Associated Bank trust account no. 86504 (hereinafter, "AssocBk TA");
- g. Associated Bank business account no. 2283-029-607 (hereinafter, "AssocBk BA");
- h. US Bank trust account no. 1 715 3472 2581 (hereinafter, "USBk TA");
- i. US Bank business account no. 1 047 5668 3801 (hereinafter, "USBk BA");
- j. US Bank personal account no. 1 415 0676 2964 (hereinafter, "USBk PA");
- k. Thrivent Financial Bank business account no. 0200216083 (hereinafter, "Thrivent BA"); and
- l. Community Bank Plymouth joint personal account no. 1003433 (hereinafter, "CommBk PA").

2. During the year 2003, as is more fully set forth below, respondent engaged in a pattern of (a) misappropriation and check-kiting involving the bank accounts identified above, (b) false statements to conceal his misappropriation, (c) mishandling client retainers, and (d) knowing issuance of insufficient fund checks.

A. Gill Corporation Matter

(Misappropriation)

3. Respondent was general counsel and secretary for the Gill Corporation ("Gill"), a Minnesota corporation formed to market a drug device used during dental anesthesia.

4. Tom Vanderheyden was president of Gill. Among Vanderheyden's responsibilities was to receive and review the monthly bank statements for Gill's Community Bank-Plymouth checking account, the only such account Gill maintained. Both respondent and Vanderheyden had signatory authority on the account.

5. On April 22, 2003, Gill and its various investors signed a purchase agreement. The agreement provided for payments "upon closing" totaling \$50,000, including \$15,000 each to respondent and Vanderheyden. The purchase agreement further provided for additional payments totaling \$60,000, again including \$15,000 each to respondent and Vanderheyden, "upon submission of FDA information package."

6. On May 1, 2003, respondent received the "initial" \$15,000 payment provided for by the purchase agreement and deposited these funds into his FNB BA.

7. The FDA information package contemplated by the purchase agreement was neither completed nor submitted. Nonetheless, respondent thereafter paid himself the following amounts:

a. On June 9, 2003, respondent withdrew \$6,000 from Gill's checking account and deposited it into his FNB BA. It was necessary for respondent to deposit funds into his FNB BA because a \$5,700 deposit respondent had previously made to the account as part of his check-kiting scheme was returned on June 9. *See*, paragraph 145, below. If not for this deposit a substantial overdraft would have occurred in the account.

b. On June 13, 2003, respondent withdrew \$2,000 from Gill's checking account and transferred it to his CommBk PA.

c. On June 17, 2003, respondent withdrew \$7,006 from Gill's checking account and deposited \$2,700 of this amount into his FNB BA. It was necessary for respondent to deposit funds into his FNB BA to eliminate a negative balance in the account. In addition, if not for this deposit, several other checks, which reached the account for payment on June 17 and 18, could not have cleared the account.

8. In making the withdrawals identified above, respondent misappropriated Gill funds to his own use and benefit.

9. On July 2, 2003, without the knowledge or consent of the other Gill principals, respondent transferred \$43,300 from Gill's account to respondent's Wells Fargo TA.

10. Also on July 2, 2003, respondent transferred \$5,000 of the Gill money from his Wells Fargo TA to his Wells Fargo BA. This transfer was necessary because a \$4,500 deposit respondent made into his Wells Fargo BA on June 27, 2003¹, was reversed on July 3, 2003. If not for the \$5,000 transfer, respondent's Wells Fargo BA would have become substantially overdrawn and check no. 2020 for \$1,500, which respondent had issued to himself on July 1, 2003, would not have cleared the account.

11. On July 7, 2003, respondent issued his Wells Fargo TA check no. 2001 for \$28,595.51, funded entirely by the Gill funds, to Wells Fargo Bank in payment of the second mortgage on respondent's home, which was then in foreclosure.

12. On July 8, 2003, respondent issued Wells Fargo TA check no. 2003 for \$9,700, funded entirely by the Gill funds, also to Wells Fargo Bank. Respondent used the proceeds of Wells Fargo TA check no. 2003 to purchase a money order, which he then deposited into his FNB BA. Respondent thereafter disbursed these funds in their entirety from his FNB BA to himself or in payment of his own personal and business expenditures.

¹ The source of this deposit was check no. 1078 drawn on respondent's FNB BA.

13. In making the transfers and issuing the trust account checks described above, respondent misappropriated the Gill funds to his own use and benefit.

14. On August 27, 2003, Vanderheyden discovered respondent's misappropriation and demanded that respondent make restitution of the misappropriated funds by August 29, 2003. Respondent failed to do so.

15. On the evening of August 29, 2003, respondent telephoned Vanderheyden and stated that he would make restitution by September 2, 2003. Respondent failed to do so.

16. In a conversation with Vanderheyden on September 1, 2003, respondent admitted his misappropriation and stated that financial difficulties, including foreclosure of the second mortgage on his home, prompted his misappropriation.

(Check-kiting)

17. On August 29, 2003, respondent deposited \$48,527.83 into his Wells Fargo TA. The source for this deposit was AssocBk BA check no. 5129, which respondent issued on August 27, 2003. At the time, the balance in respondent's AssocBk BA account was a negative \$3,736.64. In fact, the balance in respondent's AssocBk BA had been continuously overdrawn since June 11, 2003. Respondent knew when he issued AssocBk BA check no. 5129 that the account did not contain sufficient funds. Payment on AssocBk BA check no. 5129 was refused on September 2, 2003, and the Wells Fargo TA deposit on which it was based was reversed on September 5, 2003.

18. On September 12, 2003, respondent deposited \$43,500 into his Wells Fargo TA. Respondent obtained \$40,000 of these funds by way of a loan from a family member. The source of the \$3,500 was check no. 2064 drawn on respondent's Thrivent BA. Respondent knew when he issued check no. 2064 that the balance in his Thrivent BA was not sufficient to cover it.

19. On September 16, 2003, relying on the funds he had deposited on September 12, respondent issued Wells Fargo TA check no. 2121 for \$43,300 to Gill as restitution of the funds he misappropriated.

20. On September 18, 2003, however, Thrivent BA check no. 2064 was returned for insufficient funds. Respondent, recognizing that his Wells Fargo TA check no. 2121 to Gill would not clear, stopped payment on the check.

21. On or about September 23, 2003, respondent wire transferred \$40,000 to Gill's bank account. To date, however, respondent has not made restitution to Gill for the remaining \$3,300 he misappropriated.

(False Statements)

22. On July 30, 2003, respondent telephoned Vanderheyden. Respondent told Vanderheyden that he had transferred \$43,300 of Gill Corporation funds into his trust account in connection with a purported agreement with Meridian Medical Technology ("Meridian"), an entity that was considering assisting Gill in connection with the medical device it intended to develop.

23. Respondent's statements to Vanderheyden were false and made for the purpose of concealing respondent's misappropriation of the Gill funds. In fact, Meridian had not asked respondent to move funds into his trust account and respondent had not entered into any agreement with Meridian. Moreover, respondent concealed from Vanderheyden that he had actually transferred the Gill funds into his trust account almost one month earlier and that he had since disbursed the funds from his trust account for his own personal benefit.

24. Respondent also stated during his July 30, 2003, telephone conversation with Vanderheyden that Meridian was in the process of securing final approval of its agreement to assist Gill from King Pharmaceutical ("King"), which was acquiring Meridian. Respondent told Vanderheyden that approval was expected no later than August 15, 2003.

25. Respondent's statements were false and were made for the purpose of furthering respondent's scheme to conceal his misappropriation of Gill funds. In fact, by July 8, 2003, King had decided to eliminate the Meridian division that would have

assisted Gill. Respondent had been informed of this fact prior to his July 30, 2003, telephone conversation with Vanderheyden.

B. Valarie Kreps Matter

(Misappropriation and Check-Kiting)

26. On or about November 19, 2002, Valarie Kreps, DDS, retained respondent to represent her regarding the purchase of a dental practice and the building it occupied.

27. In or around February 2003, the seller, who was becoming increasingly impatient with the protracted sales negotiations, demanded that Dr. Kreps deliver a check for earnest money.

28. On February 25, 2003, Dr. Kreps met with respondent. At that time, Dr. Kreps proposed that she pay earnest money of \$20,000 and stated she would make her check payable to the seller. Respondent instead directed Dr. Kreps to make the check payable to his trust account, because "that's how it's done." Dr. Kreps complied. Respondent deposited Dr. Kreps' \$20,000 check into his AssocBk TA on February 26, 2003.

29. On February 26, 2003, respondent issued his USBk TA check no. 1002 for \$20,000 payable to, "[the seller of the dental practice] and James Mulvahill" and caused the check to be delivered to the seller's attorney. At the time respondent issued this check, the balance in his USBk TA was only \$21.97. *See*, paragraphs 123-126, below. Because respondent had included himself as a payee on the USBk TA check and had not endorsed it, the seller's attorney was unable to negotiate it.

30. Respondent moved at least \$18,000 of Dr. Kreps' funds from his AssocBk TA to his USBk BA as part of a series of check-kiting transactions between AssocBk and USBk.² The checks that ultimately resulted in the movement of Dr. Kreps' \$18,000 were AssocBk TA check nos. 20 and 21, both in the amount of \$9,000. Respondent deposited AssocBk TA check nos. 20 and 21 into his USBk BA on February 21, 2003, in an effort to cover his USBk BA check no. 5119. *See*, paragraphs 116-117, below. Thereafter:

² *See*, paragraphs 60-126, below.

- a. On February 24, 2003, respondent deposited USBk TA check no. 1003 for \$20,000 into his AssocBk TA to cover check nos. 20 and 21, *see*, paragraphs 119-120, below;
- b. On February 25, 2003, respondent deposited AssocBk TA check no. 22 for \$20,000 into his USBk TA in an effort to cover USBk TA check no. 1003, *see*, paragraphs 122-123, below;
- c. On February 26, 2003, respondent deposited USBk TA check no. 1001 for \$17,500 into his AssocBk TA in an effort to cover AssocBk TA check no. 22, *see*, paragraphs 124-125, below; and
- d. On February 26, 2003, respondent deposited Dr. Kreps' funds into his AssocBk TA, *see*, paragraph 28, above.

31. By February 28, 2003, however, all of the kited checks, except AssocBk TA check nos. 20 and 21, had been reversed. *See*, paragraphs 123, 125 and 126. These checks were ultimately paid because of the deposit of Dr. Kreps' funds. Consequently, as of February 28, 2003, at least \$18,000 of the \$19,286.65 balance in the USBk BA were actually Dr. Kreps' funds.

32. On March 5, 2003, respondent's USBk BA was closed and its \$19,286.65 balance disbursed to respondent. Also on March 5, 2003, respondent opened his FNB PA with the deposit of a \$19,308.62 US Bank "Official Check"³. This opening deposit into respondent's FNB PA was funded by the closing balance in respondent's USBk BA, which closing balance, as discussed above, consisted primarily of Dr. Kreps' funds.

33. On March 10, 2003, respondent transferred \$6,000 of Dr. Kreps' funds from his FNB PA into his FNB BA, and transferred \$10,000 of Dr. Kreps' funds from his FNB PA to his FNB TA. These transfers constituted the opening deposits for respondent's FNB BA and FNB TA accounts.

³ Respondent withdrew the sum of \$108.62 in cash at the time of deposit so that the net deposit into his FNB PA was \$19,200.

34. In addition, by March 17, 2003, respondent had disbursed an additional \$3,053.89 of Dr. Kreps' funds from his FNB PA to himself or for his personal use and benefit, leaving a balance of \$254.73 in that account (\$19,308.62 minus \$3,053.89 minus \$6,000 minus \$10,000).

35. On March 17 and 18, 2003, respondent disbursed an additional \$307.20 of Dr. Kreps' funds from his FNB PA, and \$5,789.30 of Dr. Kreps' funds from his FNB BA, to himself or for his personal use and benefit. As a result, at the close of business on March 18, 2003, respondent's FNB PA had a negative \$52.47 balance (\$254.73 minus \$307.20) and his FNB BA had a balance of only \$210.70 (\$6,000 minus \$5,789.30).

36. Also on March 18, 2003, using Dr. Kreps' funds, respondent purchased a \$9,900 money order from his FNB TA. Respondent deposited \$1,000 of the money order proceeds into his FNB PA to eliminate the negative balance then in the account. Respondent deposited another \$1,000 of the money order proceeds into his FNB BA to cover checks respondent had issued and which cleared the account on March 19, 2003. Finally, respondent deposited \$7,000 of the money order proceeds back into his FNB TA. Respondent withdrew the remaining \$900 in cash at the time of the FNB TA deposit.

37. During the period March 19 to 26, 2003, respondent disbursed \$1,411.75 of Dr. Kreps' funds from his FNB PA to himself or for his personal use and benefit. As a result, at the close of business on March 26, 2003, the balance in respondent's FNB PA was a negative \$464.22.

38. During the period March 19 to 25, 2003, respondent disbursed \$1,134.47 of Dr. Kreps' funds from his FNB BA to himself or for his personal use and benefit. On March 25, 2003, respondent transferred \$300 from his FNB TA to his FNB BA to cover checks respondent had issued on his FNB BA. As a result, the balance in respondent's FNB BA at the close of business on March 25 was \$376.23.

39. On or about March 25, 2003, respondent issued a FNB TA check for \$5,000 to "Shea Practice Transitions," the broker involved in Dr. Kreps' purchase of the dental

practice, as and for earnest money on Dr. Krep's purchase. The check cleared respondent's FNB TA on March 25, 2003.

40. On March 26, 2003, respondent disbursed \$260 from his FNB BA to himself and disbursed \$1,000 from his FNB TA to himself. At the close of business on March 26, respondent's FNB PA still had a negative \$464.22 balance his FNB BA had a \$116.23 balance and his FNB TA had a \$98 balance. In short, by at least the close of business on March 26, 2003, respondent had misappropriated all but \$5,000 of Dr. Kreps' money for his personal use and benefit.

(False Statements)

41. Sometime in March or April 2003, Dr. Kreps noted in reviewing a draft purchase agreement that respondent had paid earnest money of only \$5,000, rather than the \$20,000 she had provided to respondent. Dr. Kreps asked respondent to explain the discrepancy. Respondent stated that he paid a reduced escrow amount because he did not "trust [the seller]." Respondent falsely stated to Dr. Kreps that he was holding the remaining \$15,000 in his trust account. In fact, respondent was not holding any funds in trust for Dr. Kreps.

42. In late April 2003, Dr. Kreps asked respondent for a billing statement. At that time, respondent told Dr. Kreps that he had provided approximately 40 hours of services on her behalf. Dr. Kreps, concerned about the amount of respondent's fees, told respondent to immediately discontinue work on her behalf.

43. During the summer of 2003, Dr. Kreps scheduled four separate appointments with respondent to obtain a billing statement and discuss disposition of her remaining \$15,000, which Dr. Kreps understood to be in respondent's trust account. Respondent failed to appear for any of these meetings.

44. On August 14, 2003, respondent appeared at Dr. Kreps' office unannounced. At that time, respondent presented Dr. Kreps with a billing statement purporting to indicate that she owed him almost \$17,000 in fees. (Respondent's billing statement failed to take into account a \$2,250 advance fee Dr. Kreps had paid him. *See,*

paragraph 46, below.) Respondent offered to compromise his almost \$17,000 bill by paying Dr. Kreps \$5,000 and retaining the \$10,000 balance in satisfaction of his fees. At that time, respondent again falsely told Dr. Kreps that the \$15,000 balance of her earnest money remained in his trust account. In fact, respondent was not holding any funds in trust for Dr. Kreps.

45. Despite repeated promises to do so, respondent has not repaid any portion of Dr. Kreps' \$15,000 earnest money.

(Mishandling of Retainer)

46. When she retained respondent on or about November 19, 2002, Dr. Kreps paid respondent a \$2,250 advance fee. The parties did not sign a written fee agreement.

47. As of November 19, 2002, respondent had not earned any portion of Dr. Kreps' \$2,250 advance fee payment. Further, respondent did not at any time enter into a written retainer agreement with Dr. Kreps. Nonetheless, respondent deposited Dr. Kreps' \$2,250 payment directly into his USBk BA.

48. Throughout the course of respondent's representation, Dr. Kreps repeatedly asked respondent to provide her with a billing statement. Respondent failed to provide a billing statement, or to otherwise account for Dr. Kreps' \$2,250 advance fee payment, until August 14, 2003.

C. 701 Executive Suites, Inc., Matter

(Misappropriation and Check-Kiting)

49. In October 2002, respondent and Melody Hach formed 701 Executive Suites, Inc. (701), a corporation that sub-leased office space to lawyers. Respondent and Hach were equal shareholders in 701. Hach served as 701's CEO and respondent served as its CFO, for which each was paid a salary.

50. Respondent's law practice occupied an office within the suite, for which respondent was responsible for paying rent. Respondent was also required to pay for secretarial and other services associated with his law practice. Respondent failed to remain current on these obligations, and as of August 2003 owed almost \$19,000 to 701.

51. On August 27, 2002, at respondent's request, 701 loaned respondent the sum of \$10,000. On October 17, 2002, again at respondent's request, 701 again loaned respondent the sum of \$10,000. Respondent has not repaid any portion of these loans.

52. By March 6, 2003, the bank account activity respondent undertook as part of his check-kiting scheme involving his AssocBk TA and US Bank accounts had all been reversed, resulting in a \$16,601.67 overdraft in respondent's AssocBk TA. See, paragraph 125, below.

53. During the period from approximately March 10 to March 18, 2003, Sandra Monticello, an Associated Bank branch manager, had at least five telephone conversations with respondent. During these telephone conversations, Monticello demanded that respondent deposit funds sufficient to eliminate the AssocBk TA overdraft. In her final telephone conversation on March 18, 2003, Monticello told respondent that if he failed to rectify the overdraft, she would report him to the Office of Lawyers Professional Responsibility.

54. On March 18, 2003, without Hach's knowledge or consent, respondent transferred the sum of \$16,700 from 701's Associated Bank account no. 2283037188 ("701 bank account") ("Miscellaneous Debit") into his AssocBk TA to eliminate the \$16,601.67 overdraft then in that account ("Miscellaneous Credit"). Respondent's actions constituted misappropriation of 701's funds.

55. On March 28, 2003, again without Hach's knowledge or consent, respondent transferred the sum of \$5,800 from the 701 bank account ("Miscellaneous Debit") into his AssocBk BA ("Miscellaneous Credit") and thereafter disbursed these funds in their entirety for his own use and benefit, as follows:

a. On March 27, 2003, respondent disbursed \$1,500 of the 701 funds from his AssocBk BA and deposited it into his FNB PA to cure an overdraft (\$1,500 check paid on 3/28/03) and (\$1,500 deposit on 3/27/03).

b. On March 31, 2003, respondent disbursed an additional \$1,000 of the 701 funds from his AssocBk BA and deposited it into his FNB PA to

temporarily cure an overdraft (\$1,000 check paid on 4/2/03) and (\$500 deposit on 4/1/03).⁴

c. On April 1, 2003, respondent disbursed an additional \$1,600 of 701 funds from his AssocBk BA and deposited it into his FNB BA to cure an overdraft (\$1,600 check paid on 4/2/03) and (\$1,600 deposit on 4/1/03).

d. By April 28, 2003, respondent had disbursed the remaining \$1,700 (\$5,800 minus \$1,500 minus \$1,000 minus \$1,600) from his AssocBk BA to himself or for his own use and benefit (balance on 4/28/03).

56. In making the transfers and disbursements described in paragraph 55 above respondent misappropriated the 701 funds.

57. Respondent has not repaid any portion of the funds he misappropriated from 701.

D. Pattern of Check-Kiting Involving AssocBk TA/USBk PA/USBk BA/USBk TA

58. During the period from at least January to March 2003, respondent engaged in a pattern of dishonest and fraudulent check "kiting" involving his AssocBk TA, USBk PA, USBk BA and USBk TA. Specifically, respondent repeatedly issued NSF checks on these accounts and then deposited them into another of the accounts, creating the temporary appearance of a substantial balance. Checks that respondent had issued to himself or to his personal creditors would then clear against these artificial balances, or "floats."

59. Respondent's check-kiting included, but was not limited to, the series of transactions described below. (These transactions are illustrated in Attachment A to these amended and supplemental charges of unprofessional conduct.)

60. Date: 01/31/03 -- Respondent issues AssocBk TA counter checks 1 and 2.
On January 31, 2003, respondent issued himself counter check nos. 1 and 2⁵ on his AssocBk TA, both in the amount of \$1,500. At the time, the actual balance in

⁴ Respondent retained \$500 in cash from the FNB PA deposit.

⁵ For ease of reference, the Director has assigned sequential numbers to the numerous otherwise unnumbered counter checks respondent issued on his AssocBk TA.

respondent's AssocBk TA was only \$210.33. Respondent knew when he issued AssocBk TA counter check nos. 1 and 2 that the account did not contain sufficient funds.

61. Also on January 31, 2003, respondent deposited AssocBk TA counter check no. 1 into his USBk BA, and deposited AssocBk TA counter check no. 2 into his USBk PA. The deposit of counter check no. 2 into respondent's USBk PA was necessary to cover checks that reached the account for payment on January 31, 2003.

62. Date: 02/03/03 -- Respondent issues USBk BA check 5093 to cover AssocBk TA checks 1 and 2. By the time AssocBk TA counter check nos. 1 and 2 were presented for payment on February 3, 2003, respondent had created a "float" in the account, *i.e.*, the appearance of a balance not supported by actual funds, to enable the checks to clear.

63. Specifically, on February 3, 2003, respondent issued to himself USBk BA check no. 5093 for \$3,000 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check 5093 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 3, 2003, would have been overdrawn.

64. When AssocBk TA counter check nos. 1 and 2 were presented for payment on February 3, 2003, it appeared that the account had a balance of \$3,210.33 and the counter checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5093, the balance in respondent's AssocBk TA on February 3, 2003, would have been only \$210.33.

65. Date: 02/03/03 -- Respondent issues AssocBk TA checks 3 and 4 to cover various USBk BA checks. On February 3, 2003, respondent issued to himself counter check nos. 3 and 4 on his AssocBk TA, in the amounts of \$1,000 and \$4,000, respectively. Respondent knew when he issued AssocBk TA counter check nos. 3 and 4 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 3, 2003, was only \$210.33.

66. Also on February 3, 2003, respondent deposited AssocBk TA counter check no. 3 into his USBk PA, and deposited AssocBk TA counter check no. 4 into his USBk BA. The deposit of counter check no. 4 into respondent's USBk BA was necessary to cover checks that were presented for payment on February 3, 2003.

67. Date: 02/04/03 -- Respondent issues USBk BA check 5097 to cover AssocBk TA checks 3 and 4. By the time the AssocBk TA counter check nos. 3 and 4 were presented for payment on February 4, 2003, respondent had again created a "float" in the account to enable the checks to clear.

68. Specifically, on February 4, 2003, respondent issued to himself USBk BA check no. 5097 for \$5,000 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check 5097 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 4, 2003, would have been overdrawn.

69. When AssocBk TA counter checks 3 and 4 were presented for payment on February 4, 2003, it appeared that the account had a balance of \$5,210.33 and the counter checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5097, the balance in respondent's AssocBk TA on February 4, 2003, would have been only \$210.33.

70. Date: 02/04/03 -- Respondent issues AssocBk TA check 5 to cover USBk BA check 5093. By the time USBk BA check no. 5093 was presented for payment on February 4, 2003, respondent had again created a "float" in the account to enable the check to clear.

71. Specifically, on February 4, 2003, respondent issued to himself AssocBk TA counter check no. 5 for \$3,000 and deposited it into his USBk BA. Respondent knew when he issued AssocBk TA counter check no. 5 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 4, 2003, was only \$210.33.

72. When USBk BA check 5093 was presented for payment on February 4, 2003, it appeared that the account had a balance of \$4,130.09 and the check cleared. In fact, however, if not for the "float" respondent had created with the deposit of AssocBk TA check no. 5, the balance in respondent's USBk BA on February 4, 2003, would have been overdrawn.

73. Date: 02/05/03 -- Respondent issues USBk BA check 5098 to cover AssocBk TA check 5. By the time AssocBk TA counter check no. 5 was presented for payment on February 5, 2003, respondent had again created a "float" in the account to enable the check to clear.

74. Specifically, on February 5, 2003, respondent issued to himself USBk BA check no. 5098 for \$3,100 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check no. 5098 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 5, 2003, would have been overdrawn.

75. When AssocBk TA counter check no. 5 was presented for payment on February 5, 2003, it appeared that the account had a balance of \$3,310.33 and the counter check cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5098, the balance in respondent's AssocBk TA on February 5, 2003, would have been only \$310.33.

76. Date: 02/05/03 -- Respondent issues AssocBk TA checks 6 and 7 to cover USBk BA check 5097. By the time USBk BA check no. 5097 was presented for payment on February 5, 2003, respondent had again created a "float" in the account to enable the check to clear.

77. Specifically, on February 5, 2003, respondent issued to himself AssocBk TA counter check nos. 6 and 7, both for \$2,500, and deposited them into his USBk BA. Respondent knew when he issued AssocBk TA counter check nos. 6 and 7 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 5, 2003, was only \$310.33.

78. When USBk BA check no. 5097 reached the account for payment on February 5, 2003, it appeared that the account had a balance of \$5,610.09 and the check cleared. In fact, however, if not for the "float" respondent had created with the deposit of AssocBk TA check nos. 6 and 7, the balance in respondent's USBk BA on February 5, 2003, would have been overdrawn.

79. Date: 02/06/03 -- Respondent issues USBk BA check 5099 to cover AssocBk TA checks 6 and 7. By the time AssocBk TA counter check nos. 6 and 7 were presented for payment on February 6, 2003, respondent had again created a "float" in the account to enable the checks to clear.

80. Specifically, on February 6, 2003, respondent issued to himself USBk BA check no. 5099 for \$5,100, and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check no. 5099 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 6, 2003, would have been overdrawn.

81. When AssocBk TA counter check nos. 6 and 7 were presented for payment on February 6, 2003, it appeared that the account had a balance of \$5,410.33 and the checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5099, the balance in respondent's AssocBk TA on February 6, 2003, would have been only \$410.33.⁶

82. Also on February 6, 2003, respondent issued to himself USBk BA check no. 5101 for \$1,000 and deposited it into his USBk PA. Respondent knew when he issued USBk BA check no. 5101 that the account did not contain sufficient funds. If not for the kited deposits, the balance in respondent's USBk BA on February 6, 2003, would have been overdrawn.

83. Date: 02/06/03 -- Respondent issues AssocBk TA check 8 to cover USBk BA check 5098. By the time USBk BA check nos. 5098 and 5101 were presented for payment

⁶ By the time USBk BA check no. 5099 reached the account for payment on February 7, 2003, respondent had deposited into that account what are believed to be actual earned funds of an amount sufficient to cover the check and it legitimately cleared the account.

on February 6, 2003, respondent had again created a "float" in the account to enable the checks to clear.

84. Specifically, on February 6, 2003, respondent issued to himself AssocBk TA counter check no. 8 for \$4,400, and deposited it into his USBk BA. Respondent knew when he issued AssocBk TA counter check no. 8 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 6, 2003, was only \$410.33.

85. When USBk BA check nos. 5098 and 5101 were presented for payment on February 6, 2003, it appeared that the account had a balance of \$5,010.09 and the checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of AssocBk TA check no. 8, the balance in respondent's USBk BA on February 6, 2003, would have been overdrawn.

86. Date: 02/07/03 -- Respondent issues USBk BA check 5104 to cover AssocBk TA check 8. By the time AssocBk TA counter check no. 8 was presented for payment on February 7, 2003, respondent had again created a "float" in the account to enable the check to clear.

87. Specifically, on February 7, 2003, respondent issued to himself USBk BA check no. 5104 for \$4,500 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check no. 5104 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 7, 2003, would have been overdrawn.

88. When AssocBk TA counter check no. 8 was presented for payment on February 7, 2003, it appeared that the account had a balance of \$4,910.33 and the check cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5104, the balance in respondent's AssocBk TA on February 7, 2003, would have been only \$510.33.

89. Date: 02/10/03 -- Respondent issues AssocBk TA check 10 to cover USBk BA check 5104. By the time USBk BA check no. 5104 was presented for payment on

February 10, 2003, respondent had again created a "float" in the account to enable the check to clear.

90. Specifically, on February 10, 2003, respondent issued to himself AssocBk TA counter check no. 10 for \$6,000 and deposited it into his USBk BA. Respondent knew when he issued AssocBk TA counter check no. 10 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 10, 2003, was only \$410.33.

91. When USBk BA check no. 5104 was presented for payment on February 10, 2003, it appeared that the account had a balance of \$7,937.59 and the check cleared. In fact, however, if not for the "float" respondent had created with the deposit of AssocBk TA check no. 10, the balance in respondent's USBk BA on February 10, 2003, would have been overdrawn.

92. Also on February 10, 2003, respondent issued to himself AssocBk TA counter check no. 9 for \$4,000 and deposited it into his USBk PA. Respondent knew when he issued AssocBk TA counter check no. 9 that the account did not contain sufficient funds. As noted, the balance in respondent AssocBk TA on February 10, 2003, was only \$410.33. The deposit of AssocBk TA counter check no. 9 into respondent's USBk PA was necessary to cover checks that were presented for payment on February 10, 2003.

93. Date: 02/11/03 -- Respondent issues USBk BA check 5111 to cover AssocBk TA checks 9 and 10. By the time AssocBk TA counter check nos. 9 and 10 were presented for payment on February 11, 2003, respondent had again created a "float" in the account to enable the checks to clear.

94. Specifically, on February 11, 2003, respondent issued to himself USBk BA check no. 5111 for \$10,000 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check no. 5111 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 11, 2003, would have been overdrawn.

95. When AssocBk TA counter check nos. 9 and 10 were presented for payment on February 11, 2003, it appeared that the account had a balance of \$10,410.33 and the checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5111, the balance in respondent's AssocBk TA on February 11, 2003, would have been only \$410.33.

96. Also on February 11, 2003, respondent issued to himself USBk BA check no. 5110 for \$2,000 and deposited it into his USBk PA. Respondent knew when he issued USBk BA check no. 5110 that the account did not contain sufficient funds. As noted, if not for the kited deposits, the balance in respondent's USBk BA on February 11, 2003, would have been overdrawn.

97. Date: 02/12/03 -- Respondent issues AssocBk TA checks 11 and 12 to cover USBk BA check 5111. By the time USBk BA check no. 5111 was presented for payment on February 12, 2003, respondent had again created a "float" in the account to enable the check to clear.

98. Specifically, on February 12, 2003, respondent issued to himself AssocBk TA counter check nos. 11 and 12, in the amounts of \$7,000 and \$8,000, respectively and deposited them into his USBk BA. Respondent knew when he issued AssocBk TA counter check nos. 11 and 12 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 12, 2003, was only \$410.33.

99. When USBk BA check no. 5111 was presented for payment on February 12, 2003, it appeared that the account had a balance of \$15,587.59 and the check cleared. In fact, however, if not for the "float" respondent had created with the deposit of AssocBk TA check nos. 11 and 12, the balance in respondent's USBk BA on February 12, 2003, would have been overdrawn.

100. Date: 02/13/03 -- Respondent issues USBk BA check 5117 to cover AssocBk TA checks 11 and 12. By the time AssocBk TA counter check nos. 11 and 12 were

presented for payment on February 13, 2003, respondent had again created a "float" in the account to enable the checks to clear.

101. Specifically, on February 13, 2003, respondent issued to himself USBk BA check no. 5117 for \$15,000 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check no. 5117 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 13, 2003, would have been overdrawn.

102. When AssocBk TA counter check nos. 11 and 12 were presented for payment on February 13, 2003, it appeared that the account had a balance of \$15,410.33 and the checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5117, the balance in respondent's AssocBk TA on February 13, 2003, would have been only \$410.33.

103. Date: 02/14/03 -- Respondent issues AssocBk TA checks 13, 14 and 15 to cover USBk BA check 5117. By the time USBk BA check no. 5117 was presented for payment on February 14, 2003, respondent had again created a "float" in the account to enable the check to clear.

104. Specifically, on February 14, 2003, respondent issued to himself AssocBk TA counter check nos. 13, 14 and 15, in the amounts of \$3,500, \$4,000 and \$7,500, respectively, and deposited them into his USBk BA. Respondent knew when he issued AssocBk TA counter check nos. 13, 14 and 15 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 14, 2003, was only \$110.33.

105. When USBk BA check no. 5117 was presented for payment on February 14, 2003, it appeared that the account had a balance of \$19,578.59 and the check cleared. In fact, however, if not for the "float" respondent had created with the deposit of AssocBk TA check nos. 13, 14 and 15, the balance in respondent's USBk BA on February 14, 2003, would have been overdrawn.

106. Date: 02/18/03 -- Respondent issues USBk BA check 5118 to cover AssocBk TA checks 13, 14 and 15. By the time AssocBk TA counter check nos. 13, 14 and 15 were presented for payment on February 18, 2003, respondent had again created a "float" in the account to enable the checks to clear.

107. Specifically, on February 18, 2003, respondent issued to himself USBk BA check no. 5118 for \$17,000 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check no. 5118 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 18, 2003, would have been overdrawn.

108. When AssocBk TA counter check nos. 13, 14 and 15 were presented for payment on February 18, 2003, it appeared that the account had a balance of \$17,110.33 and the checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5118 and prior kited deposits, the balance in respondent's AssocBk TA on February 18, 2003, would have been overdrawn.

109. Also on February 18, 2003, respondent issued to himself AssocBk TA counter check no. 16 for \$2,000 and deposited it into his USBk PA. Respondent knew when he issued AssocBk TA counter check no. 16 that the account did not contain sufficient funds. As noted, if not for the kited deposits, the balance in respondent's AssocBk TA on February 18, 2003, would have been overdrawn. The deposit of AssocBk TA counter check no. 16 into respondent's USBk PA was necessary to cover checks that were presented for payment on February 18, 2003.

110. Date: 02/19/03 -- Respondent issues AssocBk TA checks 17 and 18 to cover USBk BA check 5118. By the time USBk BA check no. 5118 was presented for payment on February 19, 2003, respondent had again created a "float" in the account to enable the check to clear.

111. Specifically, on February 19, 2003, respondent issued to himself AssocBk TA counter check nos. 17 and 18 in the amounts of \$8,000 and \$9,000, respectively, and deposited them into his USBk BA. Respondent knew when he issued AssocBk TA

counter check nos. 17 and 18 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 19, 2003, was only \$110.33.

112. When USBk BA check no. 5118 was presented for payment on February 19, 2003, it appeared that the account had a balance of \$19,120.59 and the check cleared. In fact, however, if not for the "float" respondent had created with the deposit of AssocBk TA check nos. 17 and 18, the balance in respondent's USBk BA on February 19, 2003, would have been overdrawn.

113. Date: 02/20/03 -- Respondent issues USBk BA check 5119 to cover AssocBk TA checks 17 and 18. By the time AssocBk TA counter check nos. 17 and 18 were presented for payment on February 20, 2003, respondent had again created a "float" in the account to enable the checks to clear.

114. Specifically, on February 20, 2003, respondent issued to himself USBk BA check no. 5119 for \$17,500 and deposited it into his AssocBk TA. Respondent knew when he issued USBk BA check no. 5119 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's USBk BA on February 20, 2003, would have been overdrawn.

115. When AssocBk TA counter check nos. 17 and 18 were presented for payment on February 20, 2003, it appeared that the account had a balance of \$17,610.33 and the checks cleared. In fact, however, if not for the "float" respondent had created with the deposit of USBk BA check no. 5119, the balance in respondent's AssocBk TA on February 20, 2003, would have been only \$610.33.

116. Date: 02/21/03 -- Respondent issues AssocBk TA checks 20 and 21 in an effort to cover USBk BA check 5119. On February 21, 2003, respondent issued AssocBk TA counter check nos. 20 and 21, both in the amount of \$9,000, and deposited them into his USBk BA. Respondent knew when he issued AssocBk TA counter check nos. 20 and 21 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 21, 2003, was only \$610.33.

117. On information and belief, respondent intended the deposit of AssocBk BA counter check nos. 20 and 21 to cover USBk BA check no. 5119. However, USBk BA check no. 5119 was presented for payment on February 21, 2003, but AssocBk TA counter check nos. 20 and 21 were not credited to respondent's USBk BA until February 24, 2003. As a result, the USBk BA balance was not sufficient to cover check no. 5119, and US Bank reversed payment of the check on February 26, 2003. (The \$17,500 deposit to respondent's AssocBk TA, for which USBk BA check no. 5119 had served as the source, was likewise reversed on February 27, 2003.)

118. Also on February 21, 2003, respondent issued to himself AssocBk TA counter check no. 19 for \$1,500 and deposited it into his USBk PA. Respondent knew when he issued AssocBk TA counter check no. 19 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 21, 2003, was only \$610.33. The deposit of AssocBk TA counter check no. 19 into respondent's USBk PA was necessary to cover checks that reached the account for payment on February 21, 2003.

119. Date: 02/24/03 -- Respondent issues USBk TA check 1003 to cover AssocBk TA checks 19, 20 and 21. By the time AssocBk TA counter check nos. 19, 20 and 21 were presented for payment on February 24, 2003, respondent had again created a "float" in the account to enable the checks to clear.

120. Specifically, on February 24, 2003, respondent issued to himself USBk TA check no. 1003 for \$20,000 and deposited it into his AssocBk TA. Respondent knew when he issued USBk TA check no. 1003 that the account did not contain sufficient funds. In fact, the balance in respondent's USBk TA on February 24, 2003, was only \$21.97.

121. When AssocBk TA counter check nos. 19, 20 and 21 were presented for payment on February 24, 2003, it appeared that the account had a balance of \$20,610.33 and the checks cleared. In fact, however, if not for the "float" respondent had created

with the deposit of USBk TA check no. 1003, the balance in respondent's AssocBk TA on February 24, 2003, would have been only \$110.33.

122. Date: 02/25/03 -- Respondent issues AssocBk TA check 22 in an effort to cover USBk TA check 1003. On February 25, 2003, respondent issued AssocBk TA counter check no. 22 for \$20,000 and deposited it into his USBk TA. Respondent knew when he issued AssocBk TA counter check no. 22 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk TA on February 25, 2003, was only \$110.33.

123. On information and belief, respondent intended the deposit of AssocBk TA counter check no. 22 to cover USBk TA check no. 1003. However, although USBk TA check no. 1003 was presented for payment on February 25, 2003, AssocBk TA counter check no. 22 was not credited to respondent's USBk TA until February 26, 2003. Because the USBk TA balance was insufficient to pay check no. 1003 when it was presented, US Bank returned it for insufficient funds. (The \$20,000 deposit to respondent's AssocBk TA, for which USBk TA check no. 1003 had served as the source, was likewise reversed on February 28, 2003.)

124. Date: 02/26/03 -- Respondent issues USBk TA check 1001 to cover AssocBk check 22. On February 26, 2003, respondent issued USBk TA check no. 1001 for \$17,500 and deposited it into his AssocBk TA. Respondent knew when he issued USBk TA check no. 1001 that the account did not contain sufficient funds. In fact, the balance in respondent's USBk TA on February 26, 2003, was only \$21.97. Also on February 26, 2003, respondent deposited Dr. Kreps' \$20,000 earnest money into his AssocBk TA.

125. Respondent's AssocBk TA counter check no. 22 was presented for payment on February 26, 2003. As a result of the deposits of USBk TA check no. 1001 and/or Dr. Kreps' funds, AssocBk TA counter check no. 22 was initially able to clear the account. However, US Bank eventually refused payment on USBk TA check no. 1001

and the \$17,500 deposit to respondent's AssocBk TA on which it was based was reversed on March 6, 2003. The resulting balance in respondent's AssocBk TA was a negative \$16,601.67.

126. On February 28, 2003, AssocBk TA counter check 22 was returned unpaid and, on March 3, 2003, the deposit into respondent's USBk TA for which AssocBk TA counter check no. 22 had served as the source was reversed.

127. During the period January 21 to February 26, 2003, approximately \$21,000 in checks/withdrawals respondent issued to himself or on his own behalf were paid with kited funds from respondent's AssocBk TA, USBk BA and USBk PA, as follows:

<u>AssocBk TA</u>		
February 10, 2003	Check payable to "Cash"	\$ 100.00
February 14, 2003	Check payable to "Cash"	\$ 300.00
February 26, 2003	Check payable to "Cash"	\$ 200.00
Total		<u>\$ 600.00</u>
<u>USBk BA</u>		
February 3, 2003	Checks to creditors	\$4,312.90
February 3, 2003	Check payable to "Cash"	\$ 100.00
February 4, 2003	Checks to creditors	\$ 420.00
February 4, 2003	Check payable to "Cash"	\$ 100.00
February 6, 2003	Check to creditor	\$ 500.00
February 13, 2003	Check to creditor	\$ 500.00
February 13, 2003	Check payable to "Cash"	\$ 200.00
February 14, 2003	Check to creditor	\$ 9.00
February 18, 2003	Check to creditor	\$ 849.00
February 18, 2003	Check payable to "Cash"	\$ 100.00
February 18, 2003	Cash withdrawal	\$1,500.00
February 20, 2003	Check payable to "Cash"	\$ 200.00
February 20, 2003	Cash withdrawal	\$ 400.00
February 26, 2003	Cash withdrawal	<u>\$ 200.00</u>
Total		<u>\$9,390.90</u>

USBk PA		
January 31, 2003	Cash withdrawals	\$ 200.00
January 31, 2003	Checks to creditors	\$ 153.29
February 3, 2003	Checks to creditors	\$ 23.80
February 4, 2003	Check to creditor	\$ 17.20
February 5, 2003	Cash withdrawal	\$ 200.00
February 6, 2003	Checks to creditors	\$ 177.00
February 7, 2003	Checks to creditors	\$ 190.18
February 10, 2003	Checks to creditors/"Cash"	\$5,245.19
February 11, 2003	Checks to creditors	\$ 593.63
February 12, 2003	Checks to creditors	\$ 299.31
February 13, 2003	Transfers to unknown A/C	\$ 500.00
February 13, 2003	Checks to creditors	\$1,504.23
February 14, 2003	Check to creditor	\$ 60.00
February 18, 2003	Checks to creditors/"Cash"	\$ 919.54
February 19, 2003	Check to "Cash"	\$ 100.00
February 19, 2003	Check to creditor	\$ 226.17
February 20, 2003	Check to creditor	\$ 9.00
February 21, 2003	Cash withdrawal	\$ 148.00
February 21, 2003	Checks to creditors	<u>\$ 594.38</u>
Total		\$11,160.92

E. Pattern of Check-Kiting Involving AssocBk BA/FNB PA/FNB BA

128. During the period from at least May 23 to June 2, 2003, respondent engaged in a pattern of dishonest and fraudulent check "kiting" involving his AssocBk BA, FNB PA and FNB BA. Specifically, respondent repeatedly issued NSF checks on these accounts and then deposited them into another of the accounts, creating the temporary appearance of a substantial balance. Checks that respondent had issued to himself or to his personal creditors would then clear against these artificial balances, or "floats."

129. Respondent's check-kiting included, but was not limited to, the series of transactions described below. (These transactions are illustrated in Attachment B to these amended and supplemental charges of unprofessional conduct.)

130. Date: 05/23/03 -- Respondent issues AssocBk BA check 5007. On May 23, 2003, respondent issued to himself AssocBk BA check no. 5007 for \$1,000. Respondent knew when he issued AssocBk BA check 5007 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk BA on May 23, 2003, was only \$187.11.

131. Also on May 23, 2003, respondent deposited AssocBk BA check no. 5007 into his FNB PA by ATM. At that time, respondent also transferred the sum of \$500 from his FNB BA into his FNB PA. This deposit and transfer eliminated an overdrawn balance in respondent's FNB PA.

132. Date: 05/27/03 -- Respondent issues FNB BA check 1049 to cover AssocBk BA check 5007. By the time check no. 5007 reached respondent's AssocBk BA for payment on May 28, 2003, respondent had created a "float" in the account, *i.e.*, the appearance of a balance not supported by actual funds, to enable the check to clear.

133. Specifically, on May 27, 2003, respondent issued to himself FNB BA check no. 1049 for \$1,000 and deposited it into his AssocBk BA. Respondent knew when he issued FNB BA check 1049 that the account did not contain sufficient funds. In fact, the balance in respondent's FNB BA on May 27, 2003, was overdrawn.

134. When AssocBk BA check 5007 was presented for payment on May 28, 2003, it appeared that the account had a balance of \$1,187.11 and the check cleared. In fact, however, if not for the "float" respondent created with the deposit of FNB BA check no. 1049, the balance in respondent's AssocBk BA on May 28, 2003, would have been only \$187.11.

135. Date: 05/27/03 -- Respondent issues AssocBk BA check 5008. On May 27, 2003, respondent also issued to himself AssocBk BA check no. 5008 for \$4,000. Respondent knew when he issued AssocBk BA check 5008 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's AssocBk BA on May 27, 2003, would have been only \$187.11.

136. Also on May 27, 2003, respondent deposited AssocBk BA check no. 5008 into his FNB PA by ATM. This deposit was necessary to enable respondent's FNB PA check 1005, which respondent issued in furtherance of his check-kiting scheme and which reached the account for payment on May 28, 2003, to clear. *See*, paragraph 138, below.

137. Date: 05/28/03 -- Respondent issues FNB PA check 1005 to cover FNB BA check 1049. By the time FNB BA check no. 1049 was presented for payment on May 28, 2003, respondent had again created a "float" in the account to enable the check to clear.

138. Specifically, on May 28, 2003, respondent issued to himself FNB PA check no. 1005 for \$4,000 and deposited it into his FNB BA. (FNB PA check no. 1005 also cleared the account on May 28, 2003). Respondent knew when he issued FNB PA check 1005 that the account did not contain sufficient funds. In fact, if not for the kited deposits, the balance in respondent's FNB PA on May 27, 2003, would have been only \$335.76.

139. When FNB BA check 1049 reached the account for payment on May 28, 2003, it appeared that the account had a balance of \$1,435.85 and the check cleared. In fact, however, if not for the "float" respondent created with the deposit of FNB PA check no. 1005, the balance in respondent's FNB BA on May 28, 2003, would have been overdrawn.

140. Date: 05/29/03 -- Respondent issues FNB BA check 1050 to cover AssocBk BA check 5008. By the time AssocBk BA check no. 5008 was presented for payment on May 29, 2003, respondent had again created a "float" in the account to enable the check to clear.

141. Specifically, on May 29, 2003, respondent issued to himself FNB BA check no. 1050 in the amount of \$4,500 and deposited it into his AssocBk BA. Respondent knew when he issued FNB BA check 1050 that the account did not contain sufficient

funds. In fact, if not for the kited deposits, the balance in respondent's FNB BA on May 29, 2003, would have been overdrawn.

142. When AssocBk BA check 5008 was presented for payment on May 29, 2003, it appeared that the account had a balance of \$4,687.11 and the check cleared. In fact, however, if not for the "float" respondent created with the deposit of FNB BA check no. 1050, the actual balance in respondent's AssocBk BA on May 29, 2003, would have been only \$687.11.

143. Date: 05/30/03 -- Respondent issues AssocBk BA check 5055 in an effort to cover FNB BA check 1050. On May 30, 2003, respondent issued AssocBk BA check no. 5055 for \$5,700 and deposited it into his FNB BA. Respondent knew when he issued AssocBk BA check no. 5055 that the account did not contain sufficient funds. In fact, the balance in respondent's AssocBk BA on May 30, 2003, was only \$687.11.

144. On information and belief, respondent intended the deposit of AssocBk BA check no. 5055 to cover FNB BA check no. 1050. However, although FNB BA check no. 1050 was presented for payment on May 30, 2003, and AssocBk BA check no. 5055 was not credited to respondent's FNB BA until June 2, 2003. Because the FNB BA balance was insufficient to pay check no. 1050 when it was presented, FNB returned it for insufficient funds on June 2.

145. Likewise, the May 29, 2003, deposit into respondent's AssocBk BA for which FNB BA check no. 1050 served as the source was reversed on June 11, 2003, and the \$5,700 deposit into respondent's FNB BA for which AssocBk BA check no. 5055 served as the source was reversed on June 9, 2003.

146. During the period May 27 through June 6, 2003, respondent disbursed \$1,659.49 in kited funds to himself or for his personal benefit by way of the following ATM withdrawals and personal disbursements from his FNB PA:⁷

⁷ Respondent issued at least one other FNB PA check during the period May 27 to June 6, 2003, but it was returned for insufficient funds.

May 27, 2003	ATM withdrawal	\$ 41.50
May 28, 2003	ATM withdrawal	\$ 41.50
May 28, 2003	ATM withdrawal	\$166.00
May 30, 2003	New Hope for Hair	\$ 43.00
May 30, 2003	Rush Creek Golf Club	\$ 50.67
June 2, 2003	ATM withdrawal	\$ 20.00
June 2, 2003	ATM withdrawal	\$ 86.00
June 2, 2003	ATM withdrawal	\$101.50
June 3, 2003	ATM withdrawal	\$ 41.50
June 3, 2003	ATM withdrawal	\$106.00
June 4, 2003	Check #1032 to "Cash"	\$600.00
June 4, 2003	ATM withdrawal	\$ 41.50
June 5, 2003	Harry's	\$ 19.55
June 5, 2003	Vector Internet/VISI	\$ 36.90
June 5, 2003	ATM withdrawal	\$101.50
June 5, 2003	Value Drug Center	\$147.00
June 6, 2003	Harry's	\$ 5.00
June 6, 2003	Cub Foods	\$ 10.37

147. During the period May 27 to June 4, 2003, respondent disbursed \$4,965.30 in kited funds to himself or for his personal benefit by way of the following FNB BA checks⁸:

May 27, 2003	Check no. 1031	City of Minneapolis	\$9.00
May 27, 2003	Check no. 1044	J. Mulvahill	\$3,000.00
May 27, 2003	Check no. 1045	Hollywood Video	\$70.92
May 27, 2003	Check no. 1033	PDQ	\$33.00
May 28, 2003	Check no. 1035	Sir Speedy	\$64.26
May 28, 2003	Check no. 1036	City of Minneapolis	\$4.50
May 28, 2003	Check no. 1041	Dan Kelly's Bar	\$16.00
May 28, 2003	Check no. 1046	Best Buy	\$244.93
May 28, 2003	Check no. 1047	Starbuck's	\$4.69
May 29, 2003	Check no. 1040	City of Minneapolis	\$9.00
May 30, 2003	Check no. 1043	City of Minneapolis	\$9.00
June 2, 2003		Cash withdrawal	\$100.00
June 4, 2003	Check no. 1032	Cash	\$1,400.00

⁸ Respondent issued several additional FNB BA checks during the period May 27 to June 4, 2003, but they were returned for insufficient funds.

148. By or about early June 2003, after (a) all the insufficient funds checks respondent issued as part of his AssocBk BA/FNB PA check-kiting scheme had been reversed, and (b) all the checks respondent issued to himself and to personal creditors against the kited funds had either cleared or been reversed, the balances in respondent's AssocBk BA, FNB PA and FNB BA were all negative, as follows:

AssocBk BA	(\$3,820.89)
FNB BA	(\$ 602.88)
FNB PA	(\$ 411.23)

149. On June 9, 2003, respondent deposited \$6,000 in funds he misappropriated from Gill Corporation into his FNB BA, thus eliminating the negative balance in the account. *See*, paragraph 7, above.

150. On June 10, 2003, respondent deposited a sufficient amount of cash into his FNB PA to eliminate the negative balance in that account.

151. During the period June 9 to November 21, 2003, the balance in respondent's AssocBk BA was substantially overdrawn. On November 21, 2003, Associated Bank finally closed the account with a negative \$4,202.64 balance. On information and belief, respondent has not made restitution to Associated Bank for this negative account balance.

F. Knowing Issuance of Worthless Checks on the FNB BA

152. During the period from March 28 to at least December 31, 2003, respondent knowingly issued NSF checks on his FNB BA.

153. Among the NSF checks respondent issued on his FNB BA were those listed in the table below. The listed checks reached the account for payment at a time when the account balance was overdrawn. FNB presented most of these checks for payment on more than one occasion; nonetheless, it eventually refused payment on most, if not all, of the checks.

<u>CHECK #</u>	<u>PAYEE</u>	<u>DATE OF ISSUANCE</u>	<u>CK AMT</u>
1086	City of Minneapolis	07/23/03	\$ 9.00
1087	City of Minneapolis	07/24/03	\$ 9.00
1088	Dan Kelly's Bar & Grill	07/28/03	\$ 24.00
1089	City of Minneapolis	07/28/03	\$ 9.00
1090	Harry's	07/28/03	\$ 10.00
1118	James Mulvahill	07/23/03	\$1,000.00
1119	Dan Kelly's Bar & Grill	07/23/03	\$ 20.00
1120	Harry's	07/23/03	\$ 15.00
1121	James Mulvahill	07/25/03	\$2,000.00
1122	Dan Kelly's Bar & Grill	07/25/03	\$ 15.00
1123	City of Minneapolis	07/25/03	\$ 4.50
1125	Louann's Restaurant	07/29/03	\$ 10.00
1126	City of Minneapolis	7/29/03	\$ 9.00
1127	James Mulvahill	07/30/03	\$2,000.00
1128	City of Minneapolis	07/30/03	\$ 9.00
1129	James Mulvahill	07/30/03	\$ 500.00
1130	US Bank	08/01/03	\$1,000.00
1131	Jean Mulvahill	08/01/03	\$1,000.00
1133	Standard Parking	08/04/03	\$ 70.00
1134	City of Minneapolis	08/05/03	\$ 9.00
1135	City of Minneapolis	08/06/03	\$ 9.00
1136	City of Minneapolis	08/07/03	\$ 9.00
1137	Men's Warehouse	08/08/03	\$ 39.98
1138	City of Minneapolis	08/08/03	\$ 9.00
1139	Unknown	Unknown	\$ 30.00
1140	Cellars Wines	Unknown	\$ 38.11
1141	Papa Murphy's	08/08/03	\$ 13.98
1142	Hollywood Video	08/08/03	\$ 21.25
1143	City of Minneapolis	08/11/03	\$ 9.00
1144	Holiday	08/11/03	\$ 20.00
1145	Lyon's Tap	08/11/03	\$ 40.00
1146	Harry's	08/11/03	\$ 20.00
1147	Harry's	08/11/03	\$ 35.00

154. As a result of respondent's issuance of the above worthless checks, and the related NSF charges assessed by the bank, the balance in respondent's FNB BA was

continuously overdrawn, in amounts ranging from \$342.88 to \$3,218.68, during the period July 25 to September 25, 2003.

155. Respondent's misappropriation of funds from Gill Corporation, Dr. Kreps and 701 Corporation violated Rules 1.15, 8.4(c) and (d), MRPC.

156. Respondent's conduct in making false statements to Vanderheyden and Kreps to conceal his misappropriation violated Rules 1.4, 4.1 and 8.4(c) and (d), MRPC.

157. Respondent's conduct in kiting checks among his various bank accounts violated Rules 8.4(c) and (d), MRPC.

158. Respondent's failure to deposit the Kreps' advance fee into a trust account and to properly account for it violated Rule 1.15, MRPC, Lawyers Professional Responsibility Board Opinion No. 15, and the Supreme Court's holding in *In re Lochow*, 469 N.W.2d 91 (Minn. 1991).

159. Respondent's knowing issuance of dishonored checks on his FNB BA violated Rules 8.4(c) and (d), 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: May 21, 2004.


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