

RECEIVED

JUL 27 2007

OFFICE OF LAWYERS
PROF. RESP.

COPY

FILE NO. A07-259

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against DAVID A. OVERBOE,
a Minnesota Attorney,
Registration No. 83318.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION
FOR DISCIPLINE

The above-captioned matter was heard on June 22, 2007, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. Timothy M. Burke appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Respondent David A. Overboe appeared *pro se* and was personally present throughout the proceedings. The hearing was conducted on the Director's January 26, 2007, petition for disciplinary action. The Director presented the evidence of witness Lynda J. Nelson. Mr. Overboe testified at the hearing. Both parties submitted exhibits. The parties were directed to submit on or before July 13, 2007, proposed findings of fact, conclusions of law, a recommendation for appropriate discipline and a brief. The referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court no later than July 26, 2007.

In his answer to the petition for disciplinary action, respondent admitted certain factual allegations made by the Director, denied others, and denied any rule violations. The findings and conclusions made below are based upon respondent's admissions, the documentary evidence the parties submitted, the testimony presented, the testimony of respondent, the demeanor and credibility of respondent and the other witness as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony. If respondent's answer admits a particular factual finding

made below, then even though the Director may have provided additional evidence to establish the finding, no other citation will necessarily be made.

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

FINDINGS OF FACT

1. Respondent was admitted to practice law in the State of Minnesota on June 13, 1980 (R. test.).

Deceptive Use of a Trust Account

2. On May 22, 1990, a judgment of approximately \$1,400,000 was entered against respondent in the United States District Court for the District of North Dakota. (Petition for disciplinary action ("Pet.") ¶1; R. answer ("ans.") ¶1.) The judgment arose from a failed farm cooperative in which respondent had been involved. At all times material respondent has not paid the judgment (Pet. ¶1; R. ans. ¶1; R. test.).

3. On October 25, 2000, respondent opened account no. 04294850 at Western State Bank (hereinafter "WSB trust account"). Respondent titled the account, "Overboe Trust Account." (Pet. ¶2; R. ans. ¶2.)

4. Respondent did not use the WSB trust account as a fiduciary account in his capacity as a lawyer. Rather, respondent deposited his own earned funds into the account and disbursed those funds to himself or to others on his behalf. (Pet. ¶3, R. ans. ¶3.)

5. Respondent's acknowledged purpose in opening and using the WSB trust account in this manner was to protect his (and his wife's) funds from attachment by the judgment creditor (Pet. ¶4; R. ans. ¶4; R. test.). In an August 12, 2004, letter to the Director, respondent stated:

Approximately 15 years ago a judgment was taken against me for 1 and ½ million dollars as a result of my investing \$6,000.00 in a farmer cooperative. It is necessary for me to be careful about transferring funds between my wife and me. It is also important that I not keep a great deal

of money in my own account, because the law firm that obtained the Judgment is right next door to me.

(Ex. 6, p. 1; Pet. ¶4; R. ans. ¶4.)

Misrepresentations to, and Non-Cooperation With, the Director's Office

6. Pursuant to Rule 1.15(j) – (o), Minnesota Rules of Professional Conduct (MRPC), the Director received notice of a March 7, 2004, overdraft in respondent's Wells Fargo Bank IOLTA account no. 072-0339071 (hereinafter "IOLTA account"), an account that respondent also titled "Overboe Trust Account." (Pet. ¶6; R. ans. ¶6.)¹

7. On March 19, 2004, the Director wrote to respondent regarding the overdraft on his IOLTA account. The Director enclosed a copy of the overdraft notice and requested "a written documented explanation for **this** overdraft" (emphasis added). (Ex. 1; Pet. ¶7, R. ans. ¶7.)

8. In his March 29, 2004, response, respondent stated as follows:

The check was written to transfer funds to my family farm account, which account is in the name of my wife, Debora R. Overboe.

At the time the check was written I believed that there was [sic] sufficient funds **in the account** to cover the \$8,000.00 check. I wrote the check without checking. The check was written on March 15th, 2004. On March 16th I checked to see if there were sufficient funds to cover the check and found that there was [sic] not. I promptly deposited two checks totaling \$9,500.00 in the account on March 16th, 2004.

(Emphasis added.) (Ex. 2, p. 1; Pet. ¶8; R. ans. ¶8.)

9. In that March 29, 2004, letter respondent also stated, "There were no client funds in the [IOLTA] account at the time that check was issued." (Ex. 2, p.1.)

10. On May 3, 2004, the Director wrote to respondent. Among other things, the Director asked respondent to (a) explain the basis for his belief that his IOLTA

¹ On March 17, 2004, respondent deposited \$9,500 of his own funds into the IOLTA account, creating a \$9,985.67 balance in the account. On March 19, 2004, respondent closed the IOLTA account, converted the \$9,985.67 balance into a cashier's check and deposited the cashier's check into the WSB trust account. (Pet. ¶6, n.1; R. ans. ¶6.)

account contained funds sufficient to cover the \$8,000 check since only approximately \$500 was in the account on that date, and (b) identify and provide records for the account into which he transferred the balance from his IOLTA account, i.e., the WSB trust account. (Ex. 3; Pet. ¶9; R. ans. ¶9.) The Director also asked respondent to identify to whom the \$515.57 balance in the account belonged and advised respondent that he should keep \$200 or less of his own funds in the IOLTA account. (Ex. 3, p. 1.)

11. In his May 14, 2004, response, respondent stated:

The \$8,000 check was supposed to be drawn on a different account. I was going to deposit the funds in that account to cover the check when I realized the check has [sic] been drawn on this account. I made the deposit out of personal funds to cover the check.

* * *

The cashier's check was deposited in a checking account belonging to my wife Debra R. Overboe.

Respondent did not specifically identify or provide the requested records for the WSB trust account. (Ex. 4.)

12. In that May 14, 2004, letter respondent also stated, "The \$515.57 balance in the [IOLTA] trust account was my funds . . ." (Ex. 4, p. 1.)

13. On August 2, 2004, the Director specifically asked respondent to identify the account on which he intended to issue the \$8,000 check (Pet. ¶13; R. ans. ¶13; Ex. 5).

14. In his August 12, 2004, response, respondent, for the first time, identified the WSB trust account and stated:

The purpose of this account is not for client funds. The purpose for this account is for transactions between my wife and me.

(Pet. ¶14; R. ans. ¶14; Ex. 6.)

15. Respondent's statement was false. During the period from at least March 2003 to January 2004, all deposits into respondent's WSB trust account were comprised

entirely of funds received by respondent (Ex. 15). No funds received by respondent's wife were deposited into the account (Ex. 15).

16. In a September 9, 2004, letter, the Director asked respondent to explain why he designated the WSB trust account as a trust account (Pet. ¶16; R. ans. ¶16; Ex. 7, p. 2). In his September 28, 2004, response, respondent stated:

The account at Western State Bank was opened to handle funds between my wife and me. I handle her business affairs. I did not want her funds levied on and tied up in court for months because of a Judgment against me. A joint account would not have worked.

(Pet. ¶16; R. ans. ¶16; Ex. 8, p. 1.)

17. Respondent's statement was false. During the period from at least March 2003 to January 2004, all deposits into respondent's WSB trust account were comprised entirely of funds received by respondent. No funds received by respondent's wife were deposited into the account. (Ex. 15.)

18. In that September 28, 2004, letter, respondent also stated:

The funds in the Wells Fargo [IOLTA] Trust Account on December 31, 2003 in the amount of \$1,515.67 belonged to me. \$1,000.00 was paid to me on February 16, 2004 leaving a balance of \$515.67.

(Ex. 8, p. 1.)

19. In a December 29, 2004, letter to the Director's Office, respondent again stated, "There were no client funds in the [IOLTA] account on May 30th, 2003." (Ex. 9, p. 1.)

20. In an October 4, 2005, letter to the Director's Office, respondent reiterated that in his March 29, 2004, letter to the Director's Office (Ex. 2), "I indicated that there were no client funds in the [IOLTA] account at the time of the overdraft and I indicated in that letter that there had not been client funds in the account since 2003." (Ex. 12, p. 1.)

21. During the hearing before the referee respondent testified, and offered an exhibit (Ex. 109) purporting to establish, that all of the funds in his IOLTA account in March and April 2003 belonged to his wife, as a client. These statements in respondent's testimony and exhibit are inconsistent with respondent's prior statements to the Director that there were no client funds in respondent's IOLTA account at this time (Ex. 2, p. 1; Ex. 4, p. 1; Ex. 8, p. 1; Ex. 12, p. 1) and are false. Respondent did not make these claims until long after the overdraft on his Wells Fargo IOLTA account occurred and long after the Director advised him that he had an excessive amount of client funds in the Wells Fargo IOLTA account (Ex. 3, p. 1).

Commingling and Other Trust Account Improprieties

22. On April 16, 2003, the balance in respondent's Wells Fargo IOLTA account (before the deposit referenced in ¶24, above) was \$1,129.67 (Pet. ¶19; R. ans. ¶19). This entire balance was comprised of earned funds to which respondent, and not a client or third party, was entitled (Ex. 2, p. 1; Ex. 4, p. 1; Ex. 8, p. 1; Ex. 9, p. 1; Ex. 12, p. 1; Ex. 19, p. 1).

23. On April 16, 2003, respondent deposited \$77,675 into his IOLTA account on behalf of a client (Ex. 16, p. 11; Ex. 19, p. 1). Some portion of these client funds remained in respondent's trust account during the period April 16 to May 6, 2003 (Ex. 19, p. 1). During that entire period, respondent also maintained an approximately \$1,100 balance of his own funds in the IOLTA account, thus commingling his funds with client funds (Ex. 19, p. 1).

24. On July 25, 2003, respondent deposited \$200 into his IOLTA account on behalf of a client (Ex. 16, p. 11; Ex. 19, p. 1; *see also* Pet. ¶21; R. ans. ¶21). These client funds remained in respondent's trust account during the period July 25 to August 20, 2003 (Ex. 19, p. 1). During that entire period, respondent also maintained an approximately \$1,100 balance of his own funds in the IOLTA account, thus commingling his funds with client funds (Ex. 19, p. 1).

25. In light of the outstanding judgment against respondent referenced in paragraph 2, above, respondent's deposit and retention of client funds with his own funds in the trust account may have placed the client funds at risk of attachment or garnishment by the judgment creditor. See, *Matter of Anonymous*, 698 N.E.2d 808 (Ind. 1998); *Attorney Grievance Commission v. Webster*, 705 A.2d 1135 (Md. 1998); *People v. Shidler*, 901 P.2d 477 (Colo. 1995); *Vaughn v. State Bar of California*, 6 Cal. 847, 494 P.2d 1257 (Cal. 1972).

26. On October 6, 2003, respondent deposited \$4,500 of his own money into the IOLTA account. Respondent intended to donate these funds to a Vietnam War memorial. (Pet. ¶23; R. ans. ¶23; Ex. 19, p. 1.)

27. During the period from at least April 16, 2003, to March 17, 2004, respondent maintained a balance of his own funds in his IOLTA account that exceeded the amount permitted by Rule 1.15(a), MRPC (Ex. 19).

Aggravating Factors and Mitigation

28. Respondent has a disciplinary history as follows:

a. On March 26, 1987, the North Dakota Supreme Court publicly reprimanded respondent and suspended him for six months for practicing law under a misleading firm name, misusing funds in his client trust account and issuing a dishonored check on another account to cover an overdraft in his trust account. *In re Overboe*, 403 N.W.2d 1 (N.D. 1987) (Ex. 20).

b. On January 13, 1988, the North Dakota Supreme Court suspended respondent for 90 days for entering into a business transaction with a client involving the purchase of land, commencing a forcible detainer action against the client, failing to inform the court that the client claimed an ownership interest in the land, and recording a mortgage against other property the client was purchasing on a contract for deed, as a means of securing a debt he claimed he

was owed by the contract vendor. *In re Overboe*, 417 N.W.2d 853 (N.D. 1988) (Ex. 21).

29. Respondent has committed multiple acts of professional misconduct over an extended period of time.

30. Respondent's prior discipline includes discipline for dishonesty and for misusing funds in a client trust account (Ex. 20). This is similar to respondent's current misconduct.

31. Respondent has refused to acknowledge the wrongful nature of his misconduct. Respondent exhibited no recognition or remorse for his misconduct. To the contrary, respondent testified that he saw "nothing wrong" with putting his own funds (intended to be donated as a gift) into the IOLTA account. Respondent offered no evidence or assurance that misconduct similar to that described in these findings will not be avoided in the future.

32. The combination of respondent's current misconduct, history of misconduct and refusal to acknowledge his conduct shows that respondent is not amenable to probation at this time.

33. Respondent testified that he often does not deposit checks from clients for unearned retainers into his IOLTA account. Respondent testified that, instead, he holds the checks in a desk drawer until he has earned the fee. This violates Rule 1.15(a), MRPC. Respondent testified he does this to save on "bookwork."

34. Respondent made false statements during the hearing before the referee (*see* ¶23, above).

35. That no clients were harmed by Respondent's conduct.

CONCLUSIONS OF LAW

1. Respondent's titling of the WSB account as a "trust account" and using the account to shield his funds from attachment by a judgment creditor violated Rule 8.4(c), MRPC.

2. Respondent's misrepresentations to the Director concerning the cause of the overdraft in his IOLTA account and the purpose of the WSB trust account, and non-cooperation with the Director's investigation violated Rules 8.1(a)(3) and 8.4(c), MRPC, as effective before October 1, 2005, and Rule 25, Rules on Lawyers Professional Responsibility (RLPR).

3. Respondent's commingling of his own funds with client funds in his IOLTA account and retaining personal funds in his IOLTA account violated Rule 1.15(a), MRPC.

4. Respondent's disciplinary history, which includes multiple disciplines, suspensions and discipline for similar misconduct, aggravates respondent's current misconduct.

5. Respondent refused to acknowledge the wrongful nature of his misconduct, exhibited no recognition or remorse for his misconduct, and failed to offer any evidence or assurance that similar misconduct will not be avoided in the future. This aggravates his misconduct.

6. Respondent fails to deposit client checks that should be deposited into his IOLTA account. This aggravates his misconduct.

RECOMMENDATION FOR DISCIPLINE

Respondent David A. Overboe has committed multiple acts of professional misconduct. In multiple respects, his current misconduct is similar to misconduct for which he was previously suspended from the practice of law in North Dakota. A lengthy suspension is the appropriate sanction because of the foregoing and the other

aggravating factors, and because of the absence of any mitigation of the sanction for respondent's misconduct. Accordingly, the undersigned recommends:

1. That respondent, David A. Overboe, be suspended from the practice of law in the State of Minnesota, ineligible to apply for reinstatement for a minimum of One (1) year.

2. That respondent, David A. Overboe, pay to the Director \$900 in costs, plus disbursements, pursuant to Rule 24, RLPR.

3. That respondent, David A. Overboe, comply with the requirements of Rule 26, RLPR.

4. After a minimum of One (1) year of suspension has elapsed, respondent may petition for reinstatement pursuant to Rule 18, RLPR, if he can demonstrate by clear and convincing evidence that:

a. He has paid \$900 in costs, plus disbursements pursuant to Rule 24, RLPR;

b. He has complied with the requirements of Rule 26, RLPR;

c. He has successfully completed and obtained a passing grade on the multi-state professional responsibility examination within one year from the date of the Supreme Court's suspension pursuant to Rule 18(e), RLPR;

d. He has satisfied all continuing legal education requirements pursuant to Rule 18(e), RLPR; and

e. He is fit to practice law and his past misconduct is not likely to recur.

Dated: July 25, 2007.



DAVID E. CHRISTENSEN
SUPREME COURT REFEREE