

FILE NO. \_\_\_\_\_

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against MARK DAVID PITZELE,  
a Minnesota Attorney,  
Registration No. 235507.  
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**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 (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on May 7, 1993. Respondent currently practices law in St. Louis Park, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Misappropriation of Client Funds

**Mark Pitzele, P.A., Trust Account**

1. At all times relevant, respondent has maintained trust account number 316224 at Anchor Bank, West St. Paul, N.A. (hereinafter, "trust account").
2. Respondent is a sole practitioner and his practice is almost exclusively limited to the collection of consumer debts. Respondent uses his trust account to process the many collection deposits he receives on behalf of his clients.

3. On April 5, 2005, respondent's trust account became overdrawn. The overdraft was reported to the Director pursuant to Rule 1.15(j)-(o), Minnesota Rules of Professional Conduct (MRPC). On April 11, 2005, the Director inquired of respondent regarding the cause of the overdraft.

4. Respondent's counsel responded to the Director's inquiry on April 28, 2005. Among the enclosures to counsel's response was a letter dated April 28, 2005, from respondent to the Director. In his letter, respondent stated the following:

In hindsight, however, I must now admit that my records were not as good as they should have been. As I looked into why the trust account was out of balance, I was quite frankly shocked to find that the account had become very short of funds. While I have always paid my clients every penny owed them, I now realize that over the years that I have been in practice that the trust account had in effect become out of balance due to my poor bookkeeping and lack of accounting ability. . . .

\* \* \*

Based upon my review of the records following receipt of your letter, I have calculated that my trust account was short in the approximate amount of \$235,000.

5. In fact, during the period from at least February 2004 through March 2005, respondent consistently paid himself attorney's fees in amounts greater than that to which his client collection summaries indicated he was entitled.

6. Respondent's payments of excess attorney's fees to himself totaled at least \$200,000 and constituted the single largest cause of the shortage in respondent's trust account.

7. Respondent's payments of excess attorney's fees to himself constituted misappropriation of client funds.

8. In April 2005, respondent deposited personal funds into his trust account to fully eliminate the shortage in the account.

9. At all times relevant, respondent has maintained and printed on a regular basis individual client collection statements reflecting all amounts respondent collected for clients, the portion of the collections to which the client was entitled and the portion of the collections to which respondent was entitled in the form of attorney's fees and costs. Respondent also maintained a comprehensive trust account checkbook register.

**Pitzele & Rephen, P.A., Trust Account**

10. Respondent was a partner in the law firm known as Pitzele & Rephen, P.A. (hereinafter, "P&R"). Bradley Rephen, a lawyer licensed in New York, was also a partner in the firm. P&R was located and operated in Minnesota. It provided consumer collection legal services for third-party creditors. Respondent was responsible for the day-to-day operations of P&R.

11. P&R opened a trust account. Respondent was responsible for depositing funds collected on behalf of P&R clients into the trust account, disbursing collections to clients and to P&R and the overall management of the trust account.

12. Respondent made at least three unauthorized withdrawals, totaling \$32,000, from the P&R trust account for his own personal purposes. The dates and amounts of those withdrawals are as follows: \$14,000 on March 9, 2005; \$10,000 on April 4, 2005; and \$8,000 on April 6, 2005.

13. By April 18, 2005, the balance in the P&R trust account was at least \$86,000 short of covering client obligations. On that date, it was necessary for respondent to transfer \$86,091.64 from his operating account to the P&R trust account in order to cover a wire transfer of that amount to a P&R client.

14. Respondent's conduct in misappropriating funds from his trust account and the P&R trust account violated Rule 8.4(c), MRPC.

## SECOND COUNT

### Failure to Pay Employer Withholding Taxes

15. At all times relevant, respondent has been the sole shareholder and owner of Mark Pitzele, P.A. (hereinafter, "law firm"). Respondent has employed personnel to assist in the operation of his law firm. Respondent is required to file employer withholding tax returns.

16. Respondent did not timely file federal employer withholding tax returns, or pay the taxes due thereon, for the fourth quarter of 2005 through the third quarter of 2006. Respondent currently owes more than \$80,000 to the Internal Revenue Service.

17. Respondent did not timely file state employer withholding tax returns, or pay the taxes due thereon, for the fourth quarter of 2005 through the third quarter of 2006. The amount of respondent's outstanding state employer withholding tax obligation is unknown.

18. Respondent's failure to timely file state and federal quarterly employee withholding returns and to timely pay state and federal employer withholding taxes violated Rule 8.4(d), MRPC.

## THIRD COUNT

### Failure to Maintain Required Trust Account Books and Records

19. During the period through at least April 2005, respondent failed to maintain his trust account books and records in the manner required by Rule 1.15, MRPC, and Lawyers Professional Responsibility Board (LPRB) Opinion No. 9 (now Appendix 1 to the MRPC). In particular, respondent failed to prepare the required trial balances and reconciliations.

20. During his sworn statement on July 20, 2006, respondent stated that he had obtained new trust account software, was actively working with an accountant regarding the implementation of that software and would soon "completely eliminate myself from the [trust account] scenario, except for oversight with the accountants."

21. During his sworn statement, respondent also stated that he continued to experience severe and ongoing financial difficulties and had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), for which he was receiving medication and treatment. Respondent gave no indication that his ADHD was interfering with his ability to practice law or to properly maintain his trust account.

22. Pursuant to Rule 1.15 (j)-(o), MRPC, the Director received notices of December 6, 12 and 28, 2006, and January 2, 2007, overdrafts in respondent's trust account. The notices reflect that the bank returned at least six checks issued on respondent's trust account for insufficient funds.

23. On January 5, 2007, in response to the Director's inquiries regarding the overdrafts, respondent stated:

The recent bounced checks in the Trust Account are the result of negligent record keeping in the account. . . . I am continuing to work on getting the situation fixed.

\* \* \*

I have had some personal issues which have affected my ability to keep accurate records for the account. My ADHD seriously inhibits my ability to handle these types of tasks. I should have gotten help long ago to handle these types of issues and I did not. The main reason I was not able to accomplish this was my perilous financial situation.

24. Respondent's response indicates that, contrary to his statements during his sworn statement, he did not, in fact, formally secure the assistance of an accountant and continued to fail to maintain his trust account books and records in the manner required by Rule 1.15, MRPC, and Appendix 1 thereto, which failure resulted in additional shortages and overdrafts in the account.

25. Respondent's failure to maintain the required trust account books and records violated Rule 1.15, MRPC, as further explained by LPRB Opinion No. 9 (for periods prior to October 1, 2005), and Appendix 1 (for periods on and after October 1, 2005).

26. Respondent's false statements during his July 20, 2006, sworn statement violated Rule 8.4(c), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court suspending or disbaring respondent, 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: January 19, 2007.



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