

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

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against NICHOLAS MARTIN ROMER,  
a Minnesota Attorney,  
Registration No. 316337.  
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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. The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on February 13, 2002. Respondent currently resides in Franklin, Tennessee, and practices law in Tennessee, Minnesota, and in federal court.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

1. In 1985 through 1988 respondent was the plaintiff in a civil suit he brought regarding the collapse of a barn and his entitlement to the insurance proceeds paid as a result of the collapse. This suit was the subject of a Court of Appeals decision, *Romer v. Topel*, 414 N.W. 2d 787 (Minn. App. 1987).

2. In 1997 the IRS assessed against respondent a civil fraud penalty for tax years 1989, 1990 and 1991 in the total amount of amount of \$250,056.75.

3. On August 13, 1996, respondent signed a Plea Agreement and Sentencing Stipulation, pleading guilty to a criminal charge of violating 26 U.S.C. § 7203 for willfully failing to supply information on his 1991 federal income tax return by substantially understating the gross receipts of his accounting firm and failing to report the gross receipts or other income and deductions relating to his leasing and piloting of charter aircraft and to the sale of his airplane. In the plea agreement respondent admitted that the civil fraud penalty and interest applied to whatever additional tax he is deemed to owe after pursuing remaining civil remedies for the tax years 1989-1991.

4. On July 2, 1998, the United States Tax Court issued a Memorandum Opinion in *Romer v. Commissioner of Internal Revenue*, T.C. Memo. 1998-238 (1998). At issue in that proceeding was (1) whether respondent (petitioner in the tax court proceedings) was entitled to exclude from gross income certain per diem payments he received in 1993; (2) whether respondent's horse selling and leasing activity was an activity not engaged in for profit; (3) whether certain expenses paid by respondent in connection with his aviation activity were deductible as business expenses; and (4) whether respondent was entitled to Schedule A itemized deductions which exceeded his claimed standard deduction. The court ruled that respondent was entitled to exclude the per diem payments from his gross income; that he was not entitled to a business loss deduction with respect to his horse selling business; that the expenses paid in connection with his aviation activity were not deductible as business expenses; and that he was entitled to certain Schedule A itemized deductions. In other words, the court ruled in respondent's favor in two out of the four issues and in favor of the IRS in two out of the four issues.

5. On June 11, 2001, respondent signed an application for admission to the Bar of Minnesota without examination by Multistate Bar Examination score pursuant to Rule 7B of the Rules for Admission to the Bar (the application). Respondent had previously been admitted to practice in the State of Tennessee. Respondent submitted

the application to the Minnesota State Board of Law Examiners, which received the application on June 22, 2001.

6. In the application respondent indicated "Yes" to question 4.04 that asks, "Have you individually (or as an officer or director of a corporation, or as a member of a partnership) ever been accused of or charged with civil fraud, criminal fraud, misconduct, or dishonorable conduct in any legal, administrative, or military proceeding? Attach copies of records relevant to the incident(s). Provide a narrative statement describing the incident(s) or circumstances."

7. Nowhere in the application did respondent specifically and explicitly disclose the 1997 civil fraud assessment nor did he attach any documentation reflecting the civil fraud assessment. In his narrative response to question 4.04, respondent stated, "Please see the narrative explanation to question 4.01 above."

8. In response to question 4.01 on the application, which asks, "Have you ever in your entire life been charged with, arrested for, pleaded guilty to, or been convicted of a felony or gross misdemeanor or the equivalent?" respondent indicated "Yes." In his narrative response to question 4.01, respondent disclosed his 1996 criminal conviction and further stated, in part:

The charge was limited to one concept: failing to report gross receipts. . . . There is no element contained in the statute of dishonesty, fraud, deceit, or tax evasion.

\* \* \*

The statute [26 U.S.C. § 7203] does not carry any element of dishonesty, fraud, deceit, or tax evasion.

\* \* \*

The government did not allege fraud, dishonesty, or tax evasion because, if I had failed to report gross receipts, I had also failed to report corresponding expenses that negated any tax due from the activity. . . . A

fair representation of the issue would have been whether or not I should have reported the activity of another entity.

9. Respondent's narrative response to question 4.01 did not disclose his admission in the criminal plea agreement regarding the civil fraud assessment. To the contrary, respondent only attached to the application the first page of his 1996 Plea Agreement and Sentencing Stipulations, omitting subsequent pages including the second page which specifically admitted that the civil fraud penalties apply on any past due taxes for tax years 1989-1991<sup>1</sup>.

10. In response to question 4.05 of the application, which asks, "As an individual, have you ever been a party to or a witness in any legal proceeding? This includes any civil, criminal, administrative, family law or domestic abuse proceeding. Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances," respondent answered "Yes."

11. In his narrative response to question 4.05 respondent failed to disclose the *Romer v. Topel* litigation.

12. In his narrative response to question 4.05, respondent disclosed that he was the petitioner in two U.S. Tax Court cases. In discussing T.C. Memo 1998-238 (referenced above in paragraph 4), respondent misrepresented the holding of the court, stating:

The first [Tax Court case] was in 1998 where the IRS alleged I had excluded gross income from my 1993 income tax return. The Tax Court concluded that there was no basis for the governments' position and found in my favor. The IRS also alleged that excluding gross income on my 1993 return was the result of a conspiracy between the president of Romer & Company, Derf Bistodeau, and myself. The court concluded: 'Petitioner is entitled to exclude from his gross income . . . payments he received.' Further: 'We reject [the IRS's] conspiracy theory because he offered absolutely no evidence in support of the alleged tax

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<sup>1</sup> Respondent's apparent purpose in attaching to the application the first page of the plea agreement, together with the first page of a proposed, but not adopted, plea agreement tendered by the government was to illustrate his point that there was uncertainty even on the government's part as to who was obligated to report the gross income at issue in the criminal proceedings.

avoidance scheme.’ Because the tax treatment on my return was consistent with tax law, the IRS’ allegation of a conspiracy was a gross non-sequitur; there cannot be a conspiracy to abide by the law. *Romer v. Commissioner*, T.C. Memo. 1998-238. When the issues regarded civil tax law, I had equal footing with the IRS before the courts and dared challenge the IRS’ allegations and won.

In fact, as noted above, the issues involved in the Tax Court proceedings involved more than just the exclusion of gross income from his 1993 income tax return and the IRS prevailed on two of the four issues considered by the Tax Court.

13. In his narrative response to question 4.05, respondent disclosed a second Tax Court proceeding which was then pending. In regard to that proceeding, respondent stated:

I am the petitioner in a second case in U.S. Tax Court regarding my 1989 through 1991 income tax returns. The case was heard May 3, 1999 with the Tax Court not yet issuing a ruling as of this date. The case is *Romer v. Commissioner*, Docket No. 11646-97. The 1989 through 1991 tax years are the years the IRS concentrated on in my criminal prosecution. The issues are similar to those in the 1993 case—gross receipts excluded from my reported gross income. Consistent with the 1993 tax case explained immediately above, I expect the Tax Court to rule in my favor since I was again able to present my case based on tax law rather than defending myself against aggressive criminal prosecution.

14. Respondent’s narrative explanation as set forth above failed to disclose the assessment of the civil fraud penalties.

15. On May 23, 2001, respondent signed page 15 of the application directly below the following language:

I will inform the Minnesota Board of Law Examiners in writing of any changes or additions to answers which I have made on this application. I understand that this obligation shall continue until I am admitted to the practice of law in Minnesota, or until such time as my application is withdrawn or denied by the Minnesota Supreme Court.

I swear or affirm that the answers and statements on this application are complete, true and correct. I have not altered the wording on any

question. I acknowledge that any false, misleading or evasive response on the foregoing application may be grounds for the Board to deny my application for admission to the Minnesota Bar. I further acknowledge that I am aware that false or misleading answers discovered subsequent to my admission to the Minnesota Bar, may result in revocation of my license to practice law in Minnesota.

Under penalties of perjury, I declare that I have read the foregoing application and that the statements are true and complete to the best of my knowledge and belief.

16. Respondent, at the time he originally submitted the application, did not sign page 7 of the application. Immediately above the signature line on page 7 is the statement, "I swear or affirm that the answers to questions 4.01 through 4.37 and supplemental statements are complete, true and correct. I have not altered the wording of any question." Further, respondent had not complied with section 7.00 of the application which instructs applicants to handwrite the following statement:

THIS IS A CONTINUING APPLICATION. I WILL SUBMIT  
ADDITIONAL DOCUMENTS, RECORDS OR INFORMATION IF MY  
SITUATION CHANGES OR IF REQUESTED. I RECOGNIZE THAT THIS  
OBLIGATION CONTINUES UNTIL SUCH TIME AS I BECOME A  
MEMBER OF THE BAR OF MINNESOTA, OR UNTIL I WITHDRAW MY  
APPLICATION.

17. On July 6, 2001, while respondent's application was still pending, the United States Tax Court issued its Memorandum Findings of Fact and Opinion in *Romer v. Commissioner of Internal Revenue*, T.C. Memo. 2001-168 (Docket No. 11646-97). This was the second case referenced by respondent in his narrative response to application question 4.05 as set forth in paragraph 13 above.

18. In the July 6, 2001, Tax Court decision the court stated, in part:

For the reasons described below, we conclude that [the Commissioner of Internal Revenue] has established that [Romer] had underpayments for each of the years in issue and that he had fraudulent intent with respect thereto.

\* \* \*

The record is replete with evidence of [Romer's] fraudulent intent.

\* \* \*

As previously discussed, his explanations of his unreported income were implausible and unconvincing. We view petitioner's lack of credibility as circumstantial evidence of his fraudulent intent.

\* \* \*

In sum, [the Commissioner of Internal Revenue] has shown by clear and convincing evidence that [Romer] underreported his income in the subject years with the fraudulent intent of evading taxes. . . . Accordingly, [Romer] is liable for the fraud penalty under section 6663 for each of the years in issue based upon the underpayments to be determined in the Rule 155 computations.

19. Respondent did not provide the Board of Law Examiners with a copy of the Tax Court's July 6, 2001, decision nor did he in any other fashion notify them of the decision.

20. On July 12, 2001, the Board of Law Examiners wrote to respondent noting, among other things, that he had not signed the application at page 7 and had not provided the handwritten statement required by section 7.00 of the application. That letter requested that respondent do both of those things.

21. On July 17, 2001, respondent signed page 7 of the application and provided the handwritten statement required by section 7.00.

22. Based on his application to the Board of Law Examiners respondent was admitted to the practice of law in Minnesota on February 13, 2002. At no time prior to his admission did respondent provide the Board of Law Examiners with a copy of the Tax Court's July 6, 2001, decision or otherwise notify them of the decision.

23. Rule 5B(6) of the Rules for Admission to the Bar provides:

The applicant has a continuing obligation to update the application with respect to all matters inquired of on the application. This obligation continues during the pendency of the application, including the period when the matter is on appeal to the Board or the Court.

24. Respondent's conduct in failing to specifically and explicitly disclose the *Romer v. Topel* litigation and the 1997 IRS civil fraud assessment in his original application for admission to the Bar of Minnesota and his failure to supplement that application by providing the Board of Law Examiners with a copy of or notification of the July 6, 2001, Tax Court Memorandum Findings of Fact and Opinion in *Romer v. Commissioner of Internal Revenue*, T.C. Memo. 2001-168 (Docket No. 11646-97), violated Rule 8.1(a), Minnesota Rules of Professional Conduct, as that rule read in 2001.<sup>2</sup>

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: August 25, 2011.

  
MARTIN A. COLE  
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PROFESSIONAL RESPONSIBILITY  
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and

  
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<sup>2</sup> Rule 8.1(a), MRPC, as it read in 2001, encompassed the provisions of current Rule 8.1(a) and (b), MRPC.