

FILE NO. C9-00-163
STATE OF MINNESOTA
IN SUPREME COURT

In Re Petition for Disciplinary
Action against DAVID A. SINGER,
an Attorney at Law of the
State of Minnesota.

**REFEREE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDATIONS**

The above-entitled matter came before the Honorable Peter Hoff, Judge of District Court, designated to hear this matter as Referee by the Minnesota Supreme Court. Representing the Office of Lawyers Professional Responsibility was Candice M. Hojan, attorney at law. Representing Respondent, David Singer, was Mark W. Gehan, attorney at law. The matter was heard on May 2, 2000. The record was kept open to permit the submission of the deposition of Corby Benson, M.D. That deposition was taken on May 30, 2000, and was subsequently filed and submitted to Judge Hoff.

FINDINGS OF FACT

1. The respondent David A. Singer is licensed to practice law in the State of Minnesota since April of 1974. Respondent currently practices law in Crystal Bay, Minnesota.
2. Respondent's history of prior discipline is as follows:
 - (a) On November 15, 1990, respondent received an admonition for failing to adequately communicate with a client, in violation of Rule 1.4(a) and (b),

Minnesota Rules of Professional Conduct (MRPC).

- (b) On April 7, 1993, respondent received an admonition for neglect of a legal matter and failing to adequately communicate with a client, in violation of Rules 1.3 and 1.4, MRPC.

TRUST ACCOUNT MISAPPROPRIATION

3. Bobby Ward retained respondent in January 1994 to represent him in a personal injury action. On November 2, 1998, Ward filed a complaint against respondent with the Director's office. Ward's complaint focused on the lack of progress with his case and withholding of money while resolving no-fault claims. During investigation of the Ward complaint, on March 3, 1999, the Director requested that respondent provide his trust account records for the period from December 1, 1997 to February 25, 1999. This request was later expanded to include May 31, 1995 to March 31, 1999.
4. Upon providing the trust account records, respondent identified several instances of his inappropriate withdrawal of client funds from his trust account during the audit period in amounts ranging from \$150 to \$5,000. The total amount of unattributed withdrawals by respondent was over \$50,000. In addition, respondent identified all cases where he had earned fees in a personal injury matter but not taken the fees because he had already misappropriated funds from the trust account.
5. During the audit period, respondent engaged in a pattern of taking client funds out of the trust account for his own use. Respondent would then repay the trust account by deposit of another client's settlement before making payments on behalf of prior

settlements, so that his trust account did not become overdrawn. By this pattern of taking client funds, respondent regularly used client funds for periods of several days to several weeks or more. After giving respondent credit for all earned fees and deposit of over \$11,000 into the trust account in March 1999, the trust account substantially balanced at the end of the audit period, although a few minor disputes remained.

6. The respondent represented two other clients, McMahan and Esget, where funds were escrowed from settlements for claims against drivers to satisfy letters of protection for medical creditors pending the outcome of no-fault claims. In Ward, McMahan, and Esget, respondent improperly withdrew funds during the time they should have remained in escrow. The lawyers board does not claim any violation of the professional rules of conduct with regard to the progress of the cases or the propriety of holding funds in escrow pending the outcome of the no-fault claims for any of these cases.
7. In the case of McMahan, the matter was concluded and all final disbursements were made before the commencement of the audit by the lawyers board. In the case of Esget, all final disbursements were made in June of 1999, after a no-fault settlement was reached and the medical lien was satisfied.
8. As a result of respondent's taking of client funds, respondent's trust account was continuously short during the audit period, in amounts ranging from \$450 shortly after the audit began to over \$16,000. For the last 18 months of the audit period, respondent's misuse of client funds include, without limitation, the following:
 - (a) On August 28, 1995, respondent received \$22,500 on behalf of Client A,

identified at the referee hearing as respondent's Aunt Kool, as a settlement.

Medicare had a subrogation interest, the amount of which was in dispute.

Respondent placed these funds into his trust account pending resolution of the

Medicare dispute. On September 8, 1995, respondent paid \$8,872.89 to his former law firm as its fees. The remaining \$13,627.11 belonged to the client and/or

Medicare. On December 30, 1996, respondent paid the client \$9,172.76. The delay in distribution to the client was at her request. Respondent did not pay the balance to

Medicare until April 1999. While the Kool funds were in the trust account, respondent misappropriated funds, causing a shortage, but not causing an overdraft.

Respondent had the use of the Kool funds for over one year and of the Medicare portion of those funds for over three years. No portion of those funds belonged to the respondent.

- (b) On June 2, 1998, respondent deposited \$4,000 of a negotiated no-fault settlement for Client B (Esget) into the trust account. Respondent wrote check no. 1976 for \$500 from the trust account to himself as fees. The balance was to pay a doctor's lien owed by the client. Respondent then negotiated the lien with the doctor, but over the next two months used the funds intended to pay the doctor. Respondent did not repay these funds into the trust account during the audit period. In mid-1999, respondent paid the doctor with other funds in the trust account. Respondent had the use of this client's funds for over one year. The funds did not belong to the respondent and were to remain in the trust account until paid to the intended

monthly reconciliations.

MITIGATION AND AGGRAVATION

11. During the period of July 1997 through January 1998, respondent was treated for a severe circulatory disorder in his right leg that is a complication of diabetes. This significantly impaired his ability to maintain his law practice due to the medical necessity to remain off of his feet. Respondent turned down new cases during this period. Respondent also sought to reduce the number of personal injury referrals that he was receiving from another law firm because of his medical disabilities, which resulted in a further diminution of his client caseload. These actions affected the solvency of his law practice.
12. Respondent also sought treatment from a psychologist for symptoms of extreme fatigue and excessive drowsiness. This resulted in a diagnosis of sleep apnea in 1998.
13. In August 1999, respondent again sought treatment from a psychologist for symptoms of irritability, lack of focus and organization, and lack of concentration. Respondent was diagnosed with a generalized anxiety disorder and possible attention deficit that existed for at least six months prior to diagnosis. Respondent presented a medical history indicating the undiagnosed symptoms existed for a number of years. The medical history also revealed significant depression at the onset of treatment.
14. In November 1999, respondent was voluntarily hospitalized for a manic episode, resulting in a diagnosis of manic depressive disorder.
15. Dr. Corby Benson is a treating psychiatrist who has opined with reasonable medical

recipient.

- (c) On December 15, 1997, respondent received \$18,000 on behalf of Client C (Ward). On December 15, 1997, respondent wrote check no. 1666 to himself for \$4,000 for fees. On December 17, 1997, respondent paid the clients \$8,389.46. After applying a \$3,534.78 credit for the balance of his fees and costs, the balance of \$2,075.76 was to be held, pursuant to letters of protection, until the no-fault was completed. The no-fault insurer was non-responsive. Between December 17, 1997 and March 31, 1999 respondent used these funds for himself.
- (d) Respondent received \$12,000 for Client D (McMahon) on July 28, 1995. Respondent appropriately disbursed all but \$2,995.78 by August 11, 1995. The balance was not disbursed to a doctor until May 3, 1996. Respondent made unattributed withdrawals to himself during these nine months. Respondent made the disbursements to the doctor from other client funds that had been deposited

FAILURE TO MAINTAIN REQUIRED BOOKS AND RECORDS

9. Respondent certified on his annual attorney registration statements filed in 1996, 1997, and 1998 that he maintained the trust account books and records required by the MRPC and Lawyers Professional Responsibility Board Opinion 9.
10. Respondent provided the following records for his trust account: checkbook register, bank statements, canceled checks and duplicate deposit slips for the audit period. Respondent did not keep, and did not provide, contemporaneously prepared cash receipts or disbursement journals, client subsidiary ledgers, monthly trial balances or

certainty that the symptomology of respondent's anxiety disorder can include impaired judgment inclusive of impulsive decision-making. This impulsivity may be chronic and include judgments that disregard the consequences of improper decision-making. This is consistent with respondent's testimony that he rationalized his trust account shortfalls as loans.

16. Dr. Heidi Reuletter-Barnes is a treating psychologist who has opined with reasonable medical certainty that respondent's diagnosed disorders can account for mistakes and deficiencies in record keeping such as the record keeping requirements for trust accounts. Dr. Benson agreed with that opinion.
17. Respondent has been successfully treated with medication for his generalized anxiety disorder, manic depressive disorder, and possible attention deficit disorder.
18. Respondent has an excellent reputation as an advocate for his clients as evidenced by his "AV" Martindale-Hubbell rating and the testimony of Richard Beens. He has been at the forefront of advocacy on emerging issues before the appellate courts, including the case of Sigurdson v. Isanti County, 448 N.W.2d 62 (Minn. 1989); 386 N.W.2d 715 (Minn. 1986). Respondent has declined to charge clients additional fees for his appellate efforts. He has also authored Amicus briefs on behalf of The Minnesota Trial Lawyers Association.
19. The respondent has a commendable record of service to the community through his active participation on the board of directors of Hemophilia Foundation of Minnesota/Dakota's for ten years and service as President for five years. His service is

marked by the absence of any other lawyers on the board while the organization was subject to exposure as a defendant to a mass tort liability claim, and subject to prospective legislation extending the statute of limitations for such claims.

20. Respondent has expressed sincere remorse and shame for his professional derelictions, and has recognized that his actions placed client fiduciary funds at risk. Respondent repaid the trust account the misappropriated funds after the Director requested his books and records. His shame and recognition of potential harm to the public's respect of the legal profession is indicated by his declination of nomination to the board of directors for the Hemophilia Foundation and the ALS Foundation of Minnesota after the investigation of this matter was started.
21. The respondent has cooperated with the lawyers board during its audit and investigation.
22. Respondent's misconduct in this case is aggravated by his prior discipline, consisting of two private admonitions since his admission to the practice of law.

CONCLUSIONS OF LAW

1. Respondent's conduct in misappropriating client and/or third party funds violated Rules 1.15(a) and (b)(4) and 8.4(c), MRPC. There has been no showing that respondent violated Rule 8.4(b), MRPC.
2. Respondent's conduct in failing to maintain the required trust account books and records, while certifying to the Court on his annual attorney registration statements that he did so, violated Rules 1.15(c) and 8.4(c), MRPC, and LPRB Opinion 9.
3. The attached Memorandum is hereby made a part of this order.

RECOMMENDATION FOR DISCIPLINE

It is the recommendation of the undersigned to the Minnesota Supreme Court that the respondent be suspended from the practice of law for six (6) months. Thereafter, the respondent should be placed on supervised probation for two years subject to the following conditions:

1. Respondent shall abide by the Minnesota Rules of Professional Conduct.

Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation and promptly respond to the Director's correspondence by the due date. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct which may come to the Director's attention. Upon the Director's request, respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation.

2. Within two weeks of the date of this order, respondent shall retain a certified public accountant to review respondent's books and records and establish an accounting system to ensure that respondent is in compliance with the provisions of the Minnesota Rules of Professional Conduct and Lawyers Professional Responsibility Board Opinion No. 9. Within one month of this order, respondent shall provide to the Director written certification from the accountant that respondent's books and records are currently in compliance with the Minnesota Rules of Professional Conduct and Lawyers Professional Responsibility Board Opinion No. 9.

3. On the first day of each month respondent shall make all books and records pertaining to his trust account available to the certified public accountant and at least once per quarter the accountant shall submit to the Director's Office a letter verifying that monthly reconciliations have been made and that all trust account records have been maintained properly in accordance with the Minnesota Rules of Professional Conduct and Lawyers Professional Responsibility Board Opinion No. 9. The first such letter to the Director shall be due 90 days after the end of the six month suspension period, and shall include a review of respondent's trust account for that 90 day period. Thereafter, a report shall be due quarterly until the end of the probation.

It is recommended that respondent be required to continue his therapy and abide by his psychologist's or psychiatrist's course of treatment so long as his psychologist or psychiatrist feels such treatment is necessary.

It is recommended that the respondent pay to the LPRB \$900 in costs and disbursements pursuant to Rule 24, Rules on Lawyers Professional Responsibility.

Dated this ____ day of July, 2000.

Peter A. Hoff
Judge of District Court
Appointed by the Minnesota Supreme Court

MEMORANDUM

The purpose of attorney discipline is not to punish but to guard the administration of justice and to protect the legal profession and the public. In Re Heffernan, 351 N.W.2d 13 (Minn. 1984). The unique facts of each case must be considered to effectuate these purposes. While some cases of misappropriation of funds warrant disbarment, other cases with similar charges and different facts warrant lesser disciplinary action. See In Re Leon, 524 N.W.2d 723 (Minn. 1994) (attorney disbarred); In Re Heffernan, 351 N.W.2d 13 (attorney reprimanded, suspended for three months, and placed under supervision).

Aggravating factors in this case include respondent's prior discipline, consisting of two private admonitions. While each misappropriation by respondent was in the range of \$150 to \$5,000, the total amount misappropriated is significant, over \$50,000.

Mitigating factors include the fact that respondent's trust account was never overdrawn and none of respondent's clients were directly harmed by his misconduct. Respondent cooperated fully with the Director's investigation and repaid the funds owed to the trust account once the investigation began. Respondent presented evidence of his high reputation as an attorney through his Martindale-Hubbell "AV" rating and the testimony of Richard Beens. Respondent has a record of community service including pro bono legal work. Finally, respondent expressed sincere remorse and shame for his misconduct and recognized that his actions harm the legal profession and the public's perception of it.

Respondent admits that he does not meet the Weyhrich criteria for using

psychological disability as a mitigating factor.¹ However, it appears from respondent's testimony and the deposition of Dr. Benson that mental illness played some role in respondent's misconduct. Respondent's recognition of this illness and subsequent treatment through therapy and medication has helped to bring this illness under control. At the very least, this lessens the likelihood of future misconduct and therefore harm to the public and legal profession.

Taking all of the facts, including aggravating and mitigating factors, as a whole, the recommendation of a six month suspension followed by two years of supervised probation appears appropriate. The suspension serves to deter any further misconduct by the respondent and other members of the bar. The supervised probation will ensure that respondent's financial records are kept in accordance with the MRPC and Lawyers Professional Responsibility Board Opinion No. 9 and serve as a two year period in which proper record keeping will be incorporated into respondent's practice of law. It does not appear that disbarment or a lengthy suspension is appropriate in this case. Such action would effectively put respondent out of business. It appears that respondent will be a competent attorney in the future and benefit the public through his service.

¹ To use a psychological disability as a mitigating factor in an attorney discipline case the respondent attorney must prove a severe psychological problem, that the psychological problem was the cause of the misconduct, that he is undergoing treatment and is making progress to recover from the psychological problem which caused or contributed to the misconduct, that the recovery has arrested the misconduct, and that the misconduct is not apt to recur. In Re Weyhrich, 339 N.W.2d 274, 279 (Minn. 1983).