

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against RICHARD LEE SWANSON,
a Minnesota Attorney,
Registration No. 173423.

**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 April 22, 1986. Respondent currently practices law in Chaska, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

- A. On February 10, 2010, respondent was issued an admonition for failing to keep a client reasonably informed as to the status of his appeal and failing to comply with the client's reasonable requests for information in violation of Rule 1.4(a)(3) and (4), Minnesota Rules of Professional Conduct (MRPC).
- B. On February 14, 2006, respondent was publicly reprimanded and placed on two years of supervised probation for failing to timely file a client's appeal and failing to cooperate with the Director's investigation in violation of Rules 1.1, 1.3, and 8.1(b), MRPC, and Rule 25, RLPR.

- C. On May 19, 2005, respondent was issued an admonition for failing to file a motion on behalf of a client, failing to timely request a continuance of a hearing with which he had a scheduling conflict and failing to provide a client with an accounting in violation of Rules 1.3 and 1.4, MRPC.
- D. On December 11, 1996, respondent was issued an admonition for failing to competently file a notice of appeal and failing to pay a client a malpractice case settlement in violation of Rules 1.1 and 8.4(d), MRPC.
- E. On September 7, 1989, respondent was issued an admonition for advising a client to appear *pro se* at a hearing in violation of Rules 1.3 and 8.4(d), MRPC.
- F. On April 13, 1988, respondent was issued an admonition for failing to adequately communicate with a client in violation of Rule 1.4(a), MRPC.

FIRST COUNT

J.B. Matter

1. On May 20, 2011, J.B. hired respondent to represent her in a criminal matter. J.B. paid respondent a \$3,500 retainer.
2. J.B. understood that a hearing was scheduled for May 24, 2011. J.B. appeared for the hearing. Respondent did not appear. J.B. later learned from respondent that the date of the hearing had been changed, but that respondent had failed to inform J.B. of the change.
3. A second hearing in J.B.'s case was scheduled for June 21, 2011. J.B. appeared for hearing. Respondent did not appear. Instead, respondent had arranged for another lawyer not associated with his law office to appear with J.B. at the hearing.
4. Respondent failed to inform J.B. that he would not be appearing at the June 21, 2011, hearing and failed to obtain J.B.'s consent to the involvement of the other lawyer or to the disclosure of confidential information to the other lawyer.

5. At the June 21, 2011, hearing, the other lawyer stated that he was not familiar with J.B.'s case and was not in a position to do anything more than request a continuance. At the lawyer's request, the hearing in J.B.'s case was rescheduled for August 16, 2011.

6. J.B. appeared for the hearing on August 16, 2011. Respondent failed to appear.

7. During the period May through August 2011, J.B. made multiple attempts to contact respondent by telephone. Respondent did not respond.

8. On August 26, 2011, and again on August 27 and 28, 2011, J.B. emailed to respondent a letter by which she terminated his services and requested a refund. Respondent did not respond.

9. On August 29, 2011, J.B. sent the letter to respondent by certified mail. Respondent failed to claim the letter and it was returned to J.B.

10. On August 30, 2011, J.B. unexpectedly encountered respondent at a restaurant. J.B. initiated a discussion with respondent regarding his failure to respond to her calls and emails. Respondent agreed to refund J.B.'s \$3,500 retainer.

11. By September 2, 2011, J.B. had not received the refund and telephoned respondent. Respondent stated that he had mailed a refund check to J.B. Respondent's statement was false. He had not mailed a refund check to J.B.

12. On October 10, 2011, after J.B. submitted a complaint to the Director, respondent provided J.B. with a \$3,500 refund check.

13. Respondent's conduct in failing to appear at the first and third omnibus hearings in J.B.'s case, failing to adequately communicate with J.B., failing to obtain J.B.'s consent to the involvement of substitute counsel, and false statement regarding J.B.'s refund check violated Rules 1.1, 1.3, 1.4(a)(3), 1.6(a), 4.1, and 8.4(c) and (d), MRPC.

SECOND COUNT

A.P. Matter

14. In September 2010 A.P. retained respondent to represent him in a marriage dissolution matter. A.P. and his wife had no children, owned no real estate and had largely agreed on the terms of their divorce.

15. During the period October to December 2010, A.P. and respondent's office exchanged email communications by which A.P. provided information necessary to respondent's preparation of a petition for dissolution of marriage.

16. Respondent required A.P. to pay a \$1,200 retainer, which included the court's \$402 filing fee. By December 28, 2010, A.P. had fully paid these amounts to respondent. However, respondent did not complete work on the petition for dissolution of marriage until April 2011.

17. On April 7, 2011, respondent sent the summons and petition for dissolution of marriage to a process server for service on A.P.'s wife. On April 29, 2011, A.P.'s wife, who was not represented by counsel in the matter, responded to the petition.

18. During the period April to August 2011, respondent and A.P.'s wife exchanged communications regarding the terms of a stipulation. A.P.'s wife signed a stipulation on August 12, 2011.

19. On September 13, 2011, respondent filed with the court the summons, petition, stipulation and other documents, and paid the \$402 filing fee.

20. On October 11, 2011, the court clerk wrote to respondent noting deficiencies in the petition and in the other materials he filed. Specifically, respondent failed to include an affidavit of service, failed to apply his notary stamp to the verification signed by A.P. and failed to include in the stipulation a finding regarding real estate. The clerk requested respondent to correct these deficiencies by October 25, 2011. Respondent failed to do so.

21. On November 17, 2011, the clerk again wrote to respondent regarding correcting the deficiencies. The clerk requested respondent correct the deficiencies by December 2, 2011, or "your case will be submitted to the courtroom for review and possible dismissal." Respondent failed to correct the deficiencies by December 2.

22. Finally, on January 10, 2012, respondent corrected the deficiencies by submitting to the clerk additional and corrected documents.

23. On January 17, 2012, the court issued its notice of entry of judgment. Respondent did not provide A.P. with a copy of the notice until February 15, 2012.

24. Respondent's conduct in failing to diligently pursue the A.P. marriage dissolution matter violated Rule 1.3, MRPC.

THIRD COUNT

G.S. Matter

25. On December 30, 2009, G.S. retained respondent to represent him regarding potential criminal charges after a search warrant was executed on computers belonging to G.S.'s employer. G.S. paid respondent a \$3,000 retainer. G.S. paid respondent an additional \$3,000 retainer on January 19, 2010.

26. Respondent told G.S. that he would seek to determine the extent of G.S.'s involvement in the criminal investigation concerning his employer and to have G.S.'s name removed from that investigation.

27. During January 2010 respondent had several communications with representatives of the police and county attorney regarding the possibility of criminal charges against G.S.

28. On January 31, 2010, the county attorney informed respondent that information and evidence regarding the investigation was confidential and would not be disclosed. Respondent did not communicate this information to G.S.

29. During the period January to July 2010, G.S. periodically telephoned respondent regarding the criminal investigation. During this time, respondent was responsive to G.S.'s communications.

30. After July 2010 G.S. continued to telephone respondent regarding the criminal investigation. During this period respondent failed to return many of G.S.'s calls. At one point, G.S. personally visited respondent's office in an effort to speak with him. Respondent was not available and did not contact G.S.

31. In connection with the matter that gave rise to the search warrant, a report was made to G.S.'s professional licensing board and an investigation of G.S. commenced. Eventually G.S. was able to contact respondent who agreed to represent him in the professional licensing matter. On July 25, 2011, respondent represented G.S. at a hearing regarding his professional license. Immediately following the hearing, G.S. met with respondent and signed authorizations to enable respondent to obtain certain of G.S.'s medical records that were relevant to the investigation.

32. Approximately two weeks later, G.S. contacted respondent and asked whether he had received the medical records. Respondent stated that he had not yet received them. G.S. thereafter learned that respondent had not requested the records.

33. A second hearing in the professional licensing matter was scheduled for October 26, 2011. On September 25, 2011, G.S. met with respondent to prepare for the hearing. During this meeting G.S. learned respondent had not requested the medical records until approximately September 23, 2011.

34. At that time, G.S. decided to terminate respondent's representation. On October 3, 2011, G.S. wrote to respondent, informing him that he was terminating his representation and requesting his file and an itemized billing statement. G.S. also attempted to reach respondent by telephone. Respondent failed to respond to any of G.S.'s attempts to communicate with him.

35. On October 13, 2011, G.S.'s new attorney wrote to respondent and requested G.S.'s file and an itemized accounting of his retainers. Respondent failed to respond.

36. Respondent finally provided G.S. with his file on October 26, 2011, the day of the licensing board proceeding. Respondent did not provide an itemized accounting.

37. On November 2, 2011, G.S.'s new attorney wrote to respondent and requested an itemized billing statement and an accounting of G.S.'s retainers. Respondent failed to respond.

38. On November 18, 2011, G.S.'s new attorney wrote again to respondent to request the itemized billing and accounting. Respondent again failed to respond.

39. Finally, on July 13, 2013, after G.S. submitted a complaint to the Director, respondent refunded \$3,000 of the \$6,000 retainer. Respondent never provided G.S. with an itemized accounting of his retainers.

40. Respondent's conduct in failing to communicate with G.S. during the period July 2010 to June 2011, failing to timely request G.S.'s counseling records, failing to promptly provide G.S. with his file following termination of representation and failing to provide G.S. with an accounting of his retainers violated Rules 1.3, 1.4(a)(3) and (4), and 1.16(d), MRPC.

FOURTH COUNT

M.M. Matter

41. On December 6, 2012, M.M. met with respondent and hired him to represent her in a marriage dissolution matter. M.M. paid respondent a \$4,000 retainer. M.M. told respondent that her husband lived in Iowa and that they had a prenuptial agreement that had been prepared by an Iowa attorney. M.M. thereafter contacted the Iowa attorney's office and requested that they provide a copy of the prenuptial agreement to respondent.

42. A few days after M.M.'s meeting with respondent, respondent contacted her and stated that the petition for dissolution of marriage was completed and ready for her signature. Respondent stated that he had not yet reviewed the prenuptial agreement. M.M. thereafter visited respondent's office and signed the petition.

43. On December 27, 2012, M.M. determined not to proceed with the marriage dissolution and attempted to contact respondent. However, respondent's office was closed until after the New Year.

44. On January 2, 2013, M.M. telephoned respondent's office and spoke with a staff person. M.M. informed that individual that she had decided not to proceed with the divorce and asked that respondent refund the unearned portion of her retainer.

45. On January 4, 2013, respondent wrote to M.M. and confirmed that she had contacted his office and requested that the marriage dissolution not be further pursued. Respondent stated that the petition for dissolution of marriage had not yet been served on her husband. Respondent further stated that he had contacted the process server in Iowa and asked that the petition be returned to respondent. Respondent made no mention of M.M.'s retainer or a refund of any portion of that retainer.

46. After receiving respondent's January 4, 2013, letter, M.M. called respondent's office, leaving a message for him to call her regarding a refund of her retainer. Respondent failed to respond.

47. Thereafter, M.M. left telephone messages for respondent on January 28, February 6, February 15, February 21, February 25, March 8 and March 13, 2013. Respondent failed to return any of M.M.'s calls.

48. On approximately March 15, 2013, an individual identifying himself as a representative of respondent's office called M.M. The caller stated that respondent was reviewing M.M.'s file and would issue a refund check to her later that day. The caller further stated that M.M. could expect to receive the check early the next week, *i.e.*, the week of March 18. M.M. stated that respondent should send the check to her mother, D.S., since her mother had been the source of the funds used to pay the retainer. M.M. provided the caller with her mother's mailing address. M.M. also requested that respondent provide her with an accounting of her retainer.

49. Neither M.M. nor D.S. received a refund check from respondent during the week of March 18, 2013.

50. On March 25, 2013, M.M. called respondent's office, leaving a message for respondent to call her regarding her refund check. Respondent failed to return M.M.'s call.

51. On April 2, 2013, respondent mailed a refund check in the amount of \$2,000 to D.S. D.S. told M.M. of her receipt of the check on April 4. Respondent did not include an accounting of M.M.'s retainer.

52. On April 4, 2013, M.M. telephoned respondent, leaving a message for him to call her regarding the refund. In her message M.M. stated that she believed she was entitled to a refund of more than \$2,000.

53. Later on April 4, 2013, respondent returned M.M.'s call. Respondent stated that he would issue an additional refund check of \$1,000. M.M. again requested that respondent include an itemized billing statement.

54. On April 8, 2013, D.S. received an additional \$1,000 refund check from respondent. Respondent did not provide the requested itemized billing statement.

55. On April 8, 2013, D.S. presented respondent's refund checks to Wells Fargo Bank, where D.S. had one or more bank accounts and on which respondent's refund checks were drawn. At that time, Wells Fargo Bank informed D.S. that the balance in respondent's account was sufficient to cover only the \$1,000 check. D.S. cashed the \$1,000 check and deposited the proceeds into her account.

56. From April 8 to 15, 2013, D.S. continued to call or visit Wells Fargo Bank to ask whether there were sufficient funds in respondent's account to cover the \$2,000 check. Finally, on April 15, 2013, Wells Fargo Bank informed D.S. that the balance in respondent's account was sufficient to cover the \$2,000 check. D.S. cashed the check and deposited the proceeds into her account.

57. Respondent's conduct in failing to adequately communicate with M.M. regarding an accounting and refund of her retainer and failing to promptly refund the unearned portion of her retainer violated Rules 1.4(a)(4) and 1.16(d), MRPC.

FIFTH COUNT

Failure to Maintain Required Trust Account Books, Commingling and Failure to Deposit Client Funds in Trust

58. On February 1, 2013, respondent's Wells Fargo Bank trust account no. -4347 became overdrawn. Pursuant to Rule 1.15(j) through (o), MRPC, and its trust account overdraft notification agreement with the Director, the bank reported the overdraft to the Director.

59. On February 27, 2013, the Director wrote to respondent requesting a complete and documented explanation for the overdraft, and copies of respondent's December 2012 through February 2013 trust account bank statements, check register, client subsidiary ledgers, trial balances and reconciliations.

60. On March 22, 2013, respondent responded to the Director's letter. Respondent stated that the overdraft resulted from his "error in properly recording the balance in the trust account." Respondent enclosed copies of his December 2012 through February 2013 trust account bank statements, but did not enclose any of the other trust account materials that the Director had requested.

61. On March 26, 2013, the Director wrote to respondent and requested a more complete explanation for the cause of the overdraft and copies of his December 2012 through February 2013 trust account check register, client subsidiary ledgers, trial balances and reconciliations.

62. On April 11, 2013, respondent wrote to the Director and stated that he was unable to "offer any more of an explanation other than I neglected to keep a current balance in my checkbook for my trust account." Respondent enclosed one page of what appeared to be a check register and acknowledged that he had not maintained client subsidiary ledgers, trial balances, or reconciliations. Respondent further stated that he would be working with an accountant to "have in place client subsidiary ledgers, trial balance and reconciliations."

63. Based on respondent's inability to provide a meaningful explanation for the overdraft or to provide the requested trust account books, the Director converted the trust account overdraft inquiry into a formal disciplinary investigation. By notice of investigation dated April 30, 2013, and repeatedly during the six months that followed, the Director instructed respondent to reconstruct his April 2012 through April 2013 trust account books and records, and to provide those records, along with a more detailed explanation for the cause of the overdraft.

64. During the period May 9 to June 3, 2013, respondent requested extensions of time to respond to, and the Director wrote to respondent an additional letter regarding, the notice of investigation.

65. On June 7, 2013, respondent informed the Director that he had opened his trust account in October 2012 and provided the Director with copies of the bank statements and cancelled checks for the account for the period October 2012 to April 2013. Respondent stated that he would "provide verification of the balance and ledge [sic] sheet for each client within the next week."

66. During the period June 10 to August 29, 2013, respondent wrote to the Director explaining his delay in providing, and the Director wrote two additional letters to respondent requesting, a further response to the notice of investigation.

67. On September 16, 2013, respondent provided to the Director reports entitled "General Ledger," "Profit & Loss" and "Balance Sheet." Those reports failed to include the information required of a trust account check register, client subsidiary ledgers, trial balances or reconciliations.

68. On October 24, 2013, the Director met with respondent. At that time, respondent provided an annotated summary of the activity in his trust account during the period October 2012 to April 2013 (April being the last month during which there had been activity in the account). In the summary respondent identified the source of the deposits into his trust account.

69. Respondent's summary also established that the February 1, 2013, overdraft was caused by his issuance of a \$1,500 check to himself in disbursement of earned fees that he had previously disbursed. Respondent explained that his failure to maintain the required trust account books prevented him from recognizing that he had already disbursed the earned fees or that the balance in the account was not sufficient to cover the check.

70. During the October 24, 2013, meeting respondent did not provide the requested client subsidiary ledgers, trial balances or reconciliations, but stated that his accountant continued to work on those materials.

71. For the period from October 2012 to at least October 2013, respondent failed to maintain a compliant trust account check register, client subsidiary ledgers, trial balances and reconciliations.

72. Respondent's summary also demonstrated that it had been his practice to deposit both earned and unearned funds into his trust account and that he did not promptly withdraw the earned fees. As a result, during the period November 14-30, 2012, respondent's trust account contained both client funds and earned fees.

73. Unless they are specifically exempt, client funds received by a lawyer are to be held in trust. Under the Minnesota Rules of Professional Conduct in force through June 2011, such funds did not need to be held in trust if they were for "the advance payment of nonrefundable fees to secure a lawyer's availability for a specific period of time or a specific service" and that fact was "clearly communicated in a writing signed by the client." Rule 1.5(b), MRPC. Effective July 1, 2011, funds "received by a lawyer before legal services have been rendered are presumed to be unearned and shall be held in a trust account" unless the funds constitute a flat fee and the client has agreed "in advance in a written fee agreement signed by the client" that the "flat fee shall be considered to be the lawyer's property . . . subject to refund."

74. As noted in paragraph 25 above, G.S. paid respondent a \$3,000 retainer on December 30, 2009, and paid respondent an additional \$3,000 retainer on January 19, 2010.

75. G.S.'s December 30, 2009, retainer was paid pursuant to a written retainer agreement that complied with Rule 1.5(b), MRPC, and therefore, respondent did not need to hold those funds in trust. However, respondent did not have such written agreement concerning the funds paid by G.S. on January 19, 2010, and therefore, respondent should have deposited those funds in his trust account. He failed to do so.

76. As noted in paragraph 16 above, by December 28, 2010, A.P. had paid respondent a \$1,200 retainer, which included an advance on the court's \$402 filing fee. Respondent did not have the required written agreement with A.P. regarding those funds and therefore, respondent should have deposited the entire sum in his trust account. (Even with a written agreement, the \$402 filing fee advance should have been held in trust.) He failed to do so.

77. As noted in paragraph 1 above, on May 20, 2011, J.B. paid respondent a \$3,500 retainer. Respondent did not have the required written agreement with J.B. regarding those funds and therefore, respondent should have deposited them in his trust account. He failed to do so.

78. As noted in paragraph 41 above, on December 6, 2012, M.M. paid respondent a \$4,000 retainer. Respondent did not have the required written agreement with M.M. regarding those funds and therefore, respondent should have deposited the money in his trust account. He failed to do so.

79. Respondent's conduct in failing to maintain proper trust account books and records, resulting in an overdraft in his trust account, failure to promptly withdraw earned fees from his trust account and commingling of earned funds with client funds in his trust account violated Rule 1.15(a), (b), (c)(3) and (h), MRPC, as interpreted by Appendix 1 thereto.

80. Respondent's conduct in failing to deposit the G.S., A.P. or J.B. fee retainers into his trust account violated Rule 1.15(a) and (c)(5), MRPC, as that rule read prior to July 1, 2011.

81. Respondent's conduct in failing to deposit A.P.'s filing fee advance into his trust account violated Rules 1.15(a) and 8.4(b), MRPC.

82. Respondent's conduct in failing to deposit the M.M. fee retainer into his trust account violated Rules 1.5(b) and 1.15(c)(5), MRPC.

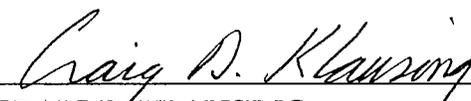
WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: September 11, 2014.



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