

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against DAVID MAX VAN SICKLE,
a Minnesota Attorney,
Registration No. 292783.

**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 October 13, 1999. Respondent currently practices law in Roseville, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Willhite Matter

1. In 1996 Cheryl and Donald Collins commissioned a survey of their property which indicated that their property extended approximately 30 feet onto the Willhites' land. In 1997 the Willhites hired attorney Steven Bolton to bring a quiet title action (case C1-97-682) against the Collinses asserting ownership of the disputed land by adverse possession. To support this claim, they commissioned their own survey which confirmed the findings of the survey done by the Collinses. On March 1, 2000, the district court ruled that the Willhites had no interest in the disputed land and ordered them to remove all personal property from the land.

2. The Willhites appealed the decision but the Minnesota Court of Appeals affirmed and the Minnesota Supreme Court denied review.

3. In March 2002 the Willhites retained attorney Dwain Fagerlund to bring a motion to vacate the state court judgment based upon a new survey done by AMI Surveyors & Mappers indicating that the two previous surveys were flawed.

4. By order in case C1-97-682, dated April 12, 2002, the state court denied the motion to vacate saying, "The time for finding mistakes has passed, to revisit this matter would burden the Defendants with unnecessary costs, undermine the principal of finality of judgment and would be an inefficient use of the Courts time." The court also held the Willhites in contempt of the March 1, 2001, order for failing to remove encroaching structures from the Collinses' property. The Willhites did not appeal the April 12, 2002, order.

5. On August 10, 2002, respondent began representing the Willhites.

6. On October 1, 2002, respondent executed a summons and a complaint entitled, "Action to Determine Boundary Lines" naming the Collinses, Terry and Diane Glinnon, and Does 1 through 10 as defendants. This matter was assigned court file number C8-02-1117.

7. The action initiated by respondent in C8-02-1117 sought to have the Willhites' and Collinses' boundary line set in accord with the survey done by Roger Mustonen of AMI Surveyors & Mappers. This would have the practical effect of locating the boundary between the Willhite and Collins properties differently than it was determined to be in the March 1, 2000, order in C1-97-682. This, despite the clear rulings of the court in C1-97-682 that such boundaries had already been judicially determined and that the issue would not be revisited.

8. Respondent appeared on behalf of the Willhites at an October 4, 2002, hearing in case C1-97-682, regarding the Collinses' compliance or lack of compliance

with the court's April 12, 2002, order to remove their sewer system from the property.

During that hearing Judge Haas said:

Finally, please don't miscalculate by thinking that you have a solution by some registration proceeding, because my off-hand suspicion is that it is not going to remedy your problem. The law of this case has been established, it has been appealed, it has been affirmed. It is over with. . . . My suspicion is it is not going to be opened again by whatever filings you may attempt. Please don't miscalculate thinking that will solve your problem because it won't.

I realize and I can understand that an error could have occurred. For the sake of argument I will say it has, it doesn't matter, folks, the law of this case has been established. If there was an error that needs to be shown you need to have shown it at a proper time. It wasn't. The law of the case is established.

* * *

Mr. Van Sickle, is there anyway I could make anything more clear or is there any area here that is unclear to you or your clients?

* * *

MR. VAN SICKLE: We are clear, Your Honor, thank you.

9. Despite the warning from the court at the October 4 hearing respondent, that same day, filed the summons and action to determine boundary lines with the court and, on October 10, 2002, filed a First Amended Complaint; Action to Determine Boundary Lines in C8-02-1117.

10. On January 6, 2003, Stephen Baker, attorney for the Collinses in C8-02-1117, wrote to respondent asking him to dismiss the case against his clients with prejudice because "[t]he boundary between the Willhite property and that of the Collins' has been judicially established. Res judicata and/or collateral estoppel will prevent your clients, as a matter of law, from claiming otherwise".

11. On April 8, 2003, the court issued an order in C1-97-682, which, amongst other things, denied a motion brought to vacate the court's judgment in that matter.

The court, in its memorandum, stated:

As to Plaintiffs' request to vacate the judgment based on Mr. Mustonen's survey, the Court incorporates the relevant portions of its Order and

Memorandum dated April 12, 2002. Plaintiffs had sufficient time before trial and during the appeals process to uncover new information. Further, Mr. Mustonen's report is not conclusive.

12. On June 26, 2003, the court issued an amended order in case C8-02-1117 denying respondent's motion to compel discovery and *sua sponte*, dismissing the case with prejudice against the Collinses. The court held that collateral estoppel and res judicata barred the matter as to the Collinses. The court awarded costs and disbursements to the Collinses. The Willhites did not appeal this order.

13. On July 21, 2003, respondent filed a motion for declaratory judgment in C8-02-1117.

14. In an October 30, 2003, order in case C8-02-1117, Judge John Smith ruled on the motion for declaratory judgment, stating in part:

This Court ruled that, regardless of the survey, the surveyor or the location of the section quarter corners, the common boundary line between the property owned by Plaintiffs and the property owned by Defendants Collins had been determined in Court File No. C1-97-682. Nothing in this Court's order or orders in this case changes or alters the common boundary as previously determined in any way. Any attempts to re-litigate, interfere with or otherwise alter that previous determination will result in severe sanctions against the offending party.

15. On March 23, 2004, the Collinses' attorney brought a motion for an award of sanctions in C8-02-1117.

16. On April 12, 2004, Judge Smith entered an order awarding costs and attorney fees in the total amount of \$1,440 against respondent in case no. C8-02-1117, stating:

Parties should not be subjected to repeated litigation over matters that have been finally adjudicated. The attorney for a party is the gatekeeper to prevent such abuses. The Court finds that Mr. Van Sickle did not act as the gatekeeper in this case on behalf of his clients. The Court finds that Mr. Van Sickle violated Minn. Stat. § 549.211, Subd. 2, and therefore, sanctions are appropriate.

17. In May 2004 respondent withdrew from representing the Willhites in case C1-97-682 but continued to represent them in other matters related to the boundary dispute including a lawsuit brought on behalf of the Willhites against Cass County (CX-03-1243) and another lawsuit brought against Cass County and Schellack Engineering (the company who did the first survey on behalf of the Willhites) in the fall of 2002 (case no. C0-03-05).

18. On October 21, 2003, in case CX-03-1243, respondent faxed to the Cass County auditor a motion for *ex parte* relief against Cass County seeking an order directing them to issue a building permit to the Willhites for construction of a septic system on their property. One of the requirements of the final order in C1-97-682 was that the Willhites remove their septic system from the Collinses' property. Respondent sought to have the motion heard the next day. Respondent had not, before bringing the motion, initiated a lawsuit, commenced an action by filing the matter with the court and paying a filing fee, or given adequate notice to the county. The court declined to hear respondent's motion.

19. On October 31, 2003, respondent renewed his request for an *ex parte* motion in matter number CX-03-1243, this time including a summons and complaint for declaratory judgment. Respondent scheduled his motion for hearing on November 3, 2003.

20. On November 3, 2003, a hearing was held on the motion for an *ex parte* order in CX-03-1243. Respondent did not attend that hearing, but an associate, Howard Lazarus, attended on behalf of the Willhites. At that hearing it became clear that the relief sought by respondent was an order directing the issuance of a building permit to permit the construction of a septic system by the Willhites that would, in part, be built on land owned by the Collinses as determined in C1-97-682. The court denied the motion for *ex parte* relief and stated, in part:

Wait a minute. Let's correct the record right now about that. I just made an order in this case relating to the boundary on the opposite side of the Collins' property. The Collins-Willhite boundary was established by Judge Haas' order sometime ago and the survey does not change that. So if this is an application for a permit to put a system on the property that belongs to the Collinses, then you're not going to be successful in this action.

21. On April 5, 2004, case number CX-03-1243 was ordered dismissed without prejudice for failure to make proper service.

22. On October 8, 2004, respondent commenced a federal lawsuit on behalf of the Willhites against Collinses, et al., based upon claims under 42 U.S.C. §§ 1983 and 1985 and several purportedly supplementary state tort claims all arising out of and based upon the assertion that the survey relied upon the state court in establishing the Willhite/Collins boundary in C1-97-682 was erroneous. Respondent's requested relief included a request that the federal court order Cass County to recognize and enforce the surveys conducted by Roger Mustonen of AMI Surveyors & Mappers.

23. On July 29, 2005, Federal Magistrate Judge Raymond Erickson reprimanded respondent for his conduct during the deposition of one of the defendants. The court found: "While we find the conduct of Plaintiffs' counsel [respondent] to fall below the standards expected of Federal practitioners, in this District, we limit our sanction to a Reprimand." The reprimand was based on the following conduct:

As to the deposition of Freeman, we have now completed our review of the transcript of that deposition, and have substantial concern about the knowledge of Plaintiffs' counsel [respondent] concerning the Federal Rules applicable to the taking of depositions. Most evident is counsel's misperception that, if he notes a discovery deposition, he "owns" the deposition, and can control its course and scope. . . .

Secondly, Plaintiffs' counsel has no apparent understanding that he may not phase the discovery so as to only benefit his clients. He appears to believe that, if he notices a deposition, then the questioning will proceed

until the time he has selected for the next deposition, even if counsel for the Defendants have not completed their examination of the deponent. . . .

We also have substantial concern that Plaintiffs' counsel misapprehends the purpose of objections during the course of a discovery deposition. . . . With regularity, Plaintiffs' counsel posed questions to the witness which were vague, oblique and abstruse.

We are particularly troubled by counsel for the Plaintiffs' discourtesies to both the witness, and to opposing counsel.

24. On August 24, 2005, Judge James Rosenbaum granted the defendants' motion for summary judgment and issued an order to show cause why respondent should not be sanctioned. *Willhite v. Collins*, 385 F. Supp. 2d 926 (D. Minn. 2005). In his order, Judge Rosenbaum stated:

This case represents an entirely improper effort to resuscitate a long-decided Minnesota state court dispute.

* * *

Notwithstanding these conclusive determinations [in state court], the Willhites now come to federal court attempting to exhume their dead claims by alleging a deprivation of constitutional rights under 42 U.S.C. § 1983. Whether framed as state or federal claims, their facts and allegations are for all intents and purposes identical to those litigated in the Minnesota state court cases.

* * *

Even if this Court had jurisdiction, this case presents the quintessential example of collateral estoppel. . . . The boundary line issue has been litigated, litigated, and re-litigated in state court.

25. On November 21, 2005, Judge Rosenbaum issued an order suspending respondent's admission to practice in the United States District Court, District of Minnesota, until he paid a monetary sanction of 50 percent of the attorneys' fees incurred by each defendant in the federal case who was also a party to any of the several related state court actions and offered proof that he had taken and passed a law school course in federal jurisdiction. The court stated:

Mr. Van Sickle filed this case in federal court, when no competent lawyer could reasonably believe there was a colorable or legally-supportable

claim. In doing so, he has caused each defendant to incur significant attorneys' fees and costs, and such conduct is deserving of sanction.

26. On August 21, 2006, the United States Eighth Circuit Court of Appeals affirmed the district court's finding of misconduct and the imposition of monetary sanctions but remanded for further proceedings as to respondent's suspension from practice and the requirement that he take and pass a course in federal jurisdiction. The Court of Appeals stated, in part, "we agree that sanctions are warranted in this case" and "[t]he amount of the monetary sanction in this case is substantial, but not unwarranted. . . . [W]e believe a large award is necessary to deter Van Sickle from similar misconduct."

27. Respondent has not paid the monetary sanctions imposed.

28. Respondent's conduct in the repeated filing of lawsuits in the Willhite matter that lacked a good faith basis in law or fact violated Rules 1.1, 3.1, and 8.4(d) Minnesota Rules of Professional Conduct (MRPC).

SECOND COUNT

Garthe Matter

29. Respondent represented Debra Garthe in an action against Principal Life Insurance Company (Principal). Respondent agreed to represent Garthe in that matter for a flat fee of \$250 plus expenses. That matter was settled and Principal issued a settlement check payable to respondent and Garthe in the amount of \$12,775.54.

30. On June 4, 2002, respondent wrote to Garthe telling her he expected the settlement check by June 7 and enclosing a schedule of costs and fees reflecting a balance owed of \$969.47.

31. On June 28, 2002, respondent wrote to Garthe noting that he was in possession of the Principal settlement check, requesting payment of \$348.47 in costs, and stating, "Please send me your personal check or money order for the costs, \$348.47. When those funds have cleared I will endorse the settlement check and mail it to you."

As of the date of respondent's letter, it was undisputed that Garthe was entitled to at least \$12,427.07 from the Principal settlement funds.

32. On July 17, 2002, Garthe complained to the Office of Lawyers Professional Responsibility about respondent, making various allegations of misconduct, including misconduct in his handling of the Principal settlement funds.

33. On July 26, 2002, at respondent's request, Principal issued two replacement checks: one in the amount of \$423.47 representing amounts claimed owed to respondent and another in the amount of \$12,352.07 representing amounts owed to Garthe.

34. On August 6, 2002, respondent wrote to Garthe stating:

Principal Insurance provided two replacement checks; for \$12,352.07, and \$423.47. Please endorse the \$423.47 check and return it to me as full satisfaction of all claims between us. I will waive the difference [between costs claimed owed by respondent of \$447.47 and the \$423.47], and return the draft for \$12,352.07 endorsed to you, and we can consider all matters between us terminated.

35. Garthe disputed respondent's entitlement to the full \$423.47 and declined to endorse and return the check to respondent.

36. Respondent did not promptly pay to Garthe the \$12,352.07 represented by the Principal settlement check in his possession despite the fact that he claimed no entitlement to those funds.

37. On March 13, 2003, the Director wrote to respondent noting the provisions of Rule 1.15(c), MRPC, stating, "That check [for \$12,352.07] constitutes funds which all agree belong to Ms. Garthe and should not be held as 'ransom' to resolve the fee dispute which you have regarding the other check."

38. On March 15, 2003, respondent replied to the letter from the Director acknowledging that the funds belonged to Garthe and enclosing the \$12,352.07 check to the Director for forwarding to Garthe.

39. On May 12, 2003, Garthe wrote to respondent noting receipt of the \$12,352.07 check and informing him the bank would not cash the check because it was no longer valid. Garthe asked respondent to obtain a new check from Principal.

40. On May 29, 2003, respondent wrote to Garthe noting receipt of her May 12 letter and refusing to ask Principal to reissue the check.

41. Principal eventually, upon request of the Director, reissued the check to Garthe.

42. Respondent's conduct in failing to disburse to his client Garthe that portion of her settlement funds that was undisputedly hers violated Rule 1.15(b), MRPC, as that rule read prior to October 1, 2005.

THIRD COUNT

Trust Account Violations

Improper Commingling of Personal and Client Funds in Trust Account

43. Respondent is a solo practitioner. At all times relevant, respondent maintained TCF Financial Corporation lawyer trust account no. 9851823039 (trust account). Respondent is solely responsible for the maintenance of his trust account books and records.

44. On October 7, 2002, pursuant to Rule 1.15(j) through (o), MRPC, the Director received notice from TCF of an October 3, 2002, overdraft on respondent's trust account. Documents provided by respondent in response to the Director's inquiry regarding the overdraft indicated that, among other things, he was using his trust account to pay business and personal expenses. The Director opened a disciplinary file and requested respondent provide additional information and records.

45. Respondent provided the Director with various trust account books and records for three periods of time: January 30, 2000, through June 16, 2000; December 18, 2000, through March 18, 2002; and August 16, 2002, through November 16, 2004.

46. The Director reviewed the trust account books and records provided by respondent and identified numerous trust account transactions paying respondent's personal and business expenses. Those include:

- a. On April 9 and April 10, 2001, respondent wrote ten checks numbered 5000 through 5009 totaling \$807.44 from his trust account to pay personal and/or business expenses (Qwest, AAA, MBNA, Office Max, etc.).
- b. From August 17, 2002, through December 3, 2002, respondent wrote at least 42 trust account checks to pay personal or business expenses (food, auto fuel, insurance, phone or respondent's family law attorney, among others) in amounts ranging from \$10 to \$500.
- c. From August 28, 2002, through January 31, 2003, respondent wrote over 30 checks payable to "cash" in amounts ranging between \$50 and \$1,500.

47. At the times respondent was utilizing his trust account for the deposit and disbursement of his personal funds, he also held client funds in the account.

Trust Account Shortages and Deficiencies

January through October 2001.

48. Respondent provided for the Director's review bank statements for the trust account and reconciliations for the period of December 18, 2000, through March 18, 2002.

49. As of January 17, 2001, respondent held in his trust account \$831.62 on behalf of his clients Cybelink and Yang. From January 17 through March 7, 2001, respondent did not disburse any funds on behalf of Cybelink and Yang.

50. Between March 7 and March 30, 2001, respondent made ATM withdrawals from the account that totaled, together with associated fees, \$188. These ATM withdrawals are not attributed by respondent to any client and were made for respondent's personal benefit.

51. Respondent deposited no funds into the account to support the ATM withdrawals. The funds withdrawn by ATM were funds that belonged to respondent's clients Cybelink and Yang. Respondent's withdrawals of these funds constitute misappropriation.

52. Respondent cured the shortage created by the ATM withdrawals by depositing \$37,701.44 to the account on April 10, 2001. Respondent attributed \$37,000 of the deposit to an unidentified client and the balance consisted of respondent's own funds.

53. As of April 10, 2001, respondent should have been holding \$37,831.62 in the account on behalf of clients (Cybelink - \$487.50, Yang - \$344.12, and \$37,000 on behalf of the unidentified client). The ending balance in the account on April 10 was \$38,345.06, reflecting the client funds plus \$513.44 in respondent's own funds in the account (negative \$188 + \$701.44).

54. Between April 10 through 16, 2001, the bank paid checks nos. 5000-5009 drawn on the trust account (*see* paragraph 44 above). All of these checks were issued in payment of respondent's personal or business expenses. The payment of these checks, totaling \$807.44, resulted in a shortage of \$294 in client funds that should have been held in the account (4/10 balance of \$38,345.06 - \$807.44 = balance of \$37,537.62 on 4/16; client funds totaling \$37,831.62 should be in account - 4/16 balance of \$37,537.62 = \$294 shortage). Respondent's disbursement from the account of \$294 of client funds for his own benefit constitutes misappropriation.

55. In April 2001, Arthur D'Amario retained respondent to represent him in a habeas petition proceeding. At that time, D'Amario was incarcerated in the Federal Correctional Facility in Rochester, Minnesota. Respondent charged and D'Amario paid a flat, nonrefundable fee of \$2,500 for representation in the habeas proceedings. No portion of this fee was deposited into a trust account.

56. D'Amario also separately retained respondent to represent him in a medical malpractice claim against psychiatrists who had evaluated and treated him while at the Rochester facility. No separate written retainer agreement was entered into in regard to this representation and respondent did not communicate to D'Amario his intent to charge a fee or the basis or rate of that fee until October 18, 2001.

57. Respondent frequently communicated with D'Amario through an intermediary, Frank Feiner.

58. On May 15, 2001, respondent told Feiner that he had located a psychiatrist to evaluate D'Amario and that the psychiatrist required an \$1,800 fee payable in advance.

59. On May 24, 2001, Feiner wrote to respondent asking, "Can you check with FMC Rochester to see if the \$1800 transfer [D'Amario] authorized be sent to you to pay Dr. Gratzner was indeed sent?"

60. On June 7, 2001, Feiner wrote to respondent to inform him "that [D'Amario's] brother Jeff has arranged to have Dr. Gratzner's fee sent to you."

61. On June 25, 2001, respondent deposited into his trust account the \$1,800 provided by D'Amario to pay the psychiatrist.

62. On June 21, 2001, prior to depositing D'Amario's funds in his trust account, respondent issued and paid to himself check no. 5019 drawn on the trust account payable to himself in the amount of \$450. Respondent attributed this check as payment to himself in the D'Amario malpractice matter. D'Amario had not authorized this payment to respondent. Respondent did not provide D'Amario with notification of the time, amount and purpose of the withdrawal from the trust account represented by check no. 5019 or an accounting of D'Amario's remaining funds held in trust as required by Rule 1.15(b), MRPC.

63. On August 6, 2001, respondent issued and paid to attorney Maureen Williams check no. 5023 drawn on the trust account in the amount of \$225 as payment

for legal research on the malpractice matter. D'Amario had not authorized this payment to Williams.

64. By letter dated October 15, 2001, D'Amario told respondent he no longer wished to pursue any litigation against the federal government and asked for a refund of all but \$500 of the \$4,300 he had given respondent.

65. On October 18, 2001, respondent issued and paid to himself check nos. 5028, 5029 and 5030 drawn on the trust account payable to himself in the total amount of \$600.10. Respondent attributed these checks as payment to himself in the D'Amario malpractice matter. D'Amario had not authorized these payments to respondent. On the same date, respondent sent D'Amario a check for \$525 and a letter and an invoice showing that he had taken \$1,275 for "miscellaneous legal work and expenses" from the \$1,800 paid by D'Amario for the psychiatric evaluation.

66. Respondent's unauthorized disbursement to himself and Williams of \$1,275 of the \$1,800 entrusted to him by D'Amario for purposes other than those specified by D'Amario and his failure to return the full \$1,800 to D'Amario constitutes misappropriation.

August 2002 through November 2004.

67. At the Director's request, respondent provided trust account books and records for the period of August 16, 2002, through November 16, 2004 (audit period). The Director audited respondent's trust account for this period.

68. Based upon respondent's records it was impossible to determine whether he had sufficient funds in the account throughout the audit period to cover amounts that were to have been held in trust on behalf of clients. Respondent's check register and client subsidiary ledgers improperly reflected transfers of funds between clients, contained inexplicable entries not supported by transactions reflected in the bank statements, attributed as client expenditures many disbursements made directly from the account that were clearly payments of respondent's personal or business expenses,

reflected payments made to cash and/or payments made by ATM withdrawals; failed to reflect transactions that appear on the bank statements; and reflected numerous instances where respondent had disbursed funds from the account on behalf of a client in excess of the funds held in the account on that client's behalf.

69. Examples include, but are not limited to:

a. The bank statement for the account reflects a deposit of \$2,789.28 on September 9, 2002. This deposit does not appear on respondent's check register or on any client subsidiary ledger produced by respondent.

Respondent's check register and his subsidiary ledger for his client Willhite do reflect a deposit of \$2,189.28 on September 17, 2002. Such a deposit is not reflected on the bank statement and the \$600.00 difference is not otherwise accounted for.

b. Respondent's Cybelink subsidiary ledger reflects transfers from that sub account to the sub accounts of his clients Fly, Kasaga, Harris and Oduniyi without any indication of the purpose of the transfers or that the matters are related.

c. Respondent's Davis subsidiary ledger reflects a deposit of \$50 to the account on March 25, 2004. No such deposit appears on the bank statement.

d. Respondent's Fly subsidiary ledger reflects payments to payees that appear to be expenditures for respondent's personal and business expenses, such as: DV -Mailboxes - \$20.69; DV - Midas - \$35.00; DV - Walgreens - \$33.24; and DV- Office Max - \$31.94.

e. Respondent's Siem subsidiary ledger reflects an entry for August 16, 2002, designated as a payment from the account in the amount of \$2,834.76 and labeled by respondent as "8/16 Adjustment." The bank statement does not reflect an August 16 debit to the account of \$2,834.76 and there is

otherwise no explanation in the records provided by respondent for the adjustment.

70. Despite the difficulty in determining from respondent's records exactly what funds he was to have been holding in trust on behalf of what clients at any given time, it does appear that there were overall shortages in the account. For example, on August 16, 2002, respondent's bank statement balance was \$1,363.07. As of that date, respondent's subsidiary ledgers indicated he should have been holding at least \$1,598.83 in the account on behalf of four clients (Cybelink - \$6.83, Kasaga - \$100.00, Siem - \$699.84¹, Willhite - \$749.16, and Wilson - \$43.00). Thus, as of August 16, 2002, respondent's trust account was short \$235.76.

April through August 2006.

71. On August 15, 2006, pursuant to Rule 1.15(j) through (o), MRPC, the Director received notice of an August 10, 2006, overdraft on respondent's trust account at Wells Fargo Bank, N.A., account no. 2352-650543.

72. Between August 9 and August 14, 2006, respondent disbursed seven insufficiently funded trust account checks totaling \$757.14. All of these checks were for respondent's personal or business expenses. Wells Fargo Bank assessed respondent \$231 in overdraft fees.

73. Based on records provided by respondent, the Director determined that prior to respondent's disbursements of August 9 - 14, 2006, respondent's trust account was already short \$566.52. In two client matters, respondent had disbursed trust account funds exceeding the funds he had on deposit for those clients (Connor, \$341.54 and Willhite, \$224.98). The shortage in the Willhite subsidiary ledger had existed since

¹ The August 16, 2002, balance for Siem appears to actually have been \$3,552.50. Respondent's ledger reflects a \$699.84 balance by deducting from the balance a \$17.90 payment to Superamerica, which appears to be a personal expense, and \$2,834.76 designated as an "Adjustment." A \$3,552.50 balance for Siem would result in a \$3,088.42 shortage on August 16.

at least April 2006. The Connor subsidiary ledger had shortages in December 2005 and May 2006.

74. As of August 18, 2006, the total shortage in respondent's trust account was \$1,832.77 (\$566.52 [Connor and Willhite shortages] plus \$1,034.25 [respondent's personal expenses] plus \$231 [overdraft fees]). Respondent deposited \$1,000 into his trust account on August 18, 2006, to partially cure the shortage. Respondent's trust account remained \$831.77 short.

Electronic Transfers from Trust Account

75. Pursuant to Rule 1.15, MRPC, as interpreted by Appendix 1 thereto (formerly Lawyers Professional Responsibility Board (LPRB) Opinion No. 9), lawyers are required to disburse all trust funds by check, except where payment by check would be economically imprudent or when exigent circumstances require a wire transfer.

76. Beginning with a March 4, 2003, transfer withdrawal of \$5,363.12 and continuing through at least November 1, 2004, when respondent transferred \$1,500 by telephone, respondent made at least 68 automated telephone transfers out of his trust account into account no. 1852119388 in amounts ranging from \$250 to \$5,363.12.

77. No exigent circumstances existed to justify respondent's electronic withdrawals.

78. Beginning with an October 8, 2002, ATM withdrawal of \$15.01 at a SuperAmerica in Roseville, Minnesota, respondent used ATMs to withdraw funds from his trust account at least 22 times between October 8, 2002, and November 16, 2004. Respondent's ATM withdrawals ranged in amount from \$10 to \$260. Respondent incurred additional bank fees due to his ATM use.

Failure to Keep the Required Trust Account Books and Records

79. For the period of January 30, 2000, through June 16, 2000, respondent provided trust account books and records consisting of bank statements and cancelled checks.

80. During this period respondent failed to maintain a check register, subsidiary ledgers, monthly subsidiary ledger trial balances, monthly reconciliations of the checkbook balance, subsidiary ledger trial balance total and the adjusted bank statement balance, duplicate deposit slips and other bank records as required by Rule 1.15, MRPC, as interpreted by LPRB Opinion 9, now Appendix 1 to the MRPC.

81. Due to respondent's failure to maintain the required records, the Director was unable to accurately attribute ownership of the funds respondent held in his trust account between January 30, 2000, through June 16, 2000.

82. For the period of December 18, 2000, through March 18, 2002, respondent provided trust account books and records consisting of bank statements, canceled checks and monthly subsidiary ledger trial balances.

83. Respondent failed to maintain a trust account check register, subsidiary ledgers, monthly reconciliations of the checkbook balance, subsidiary ledger trial balance total and the adjusted bank statement balance, duplicate deposit slips and other bank records as required by Rule 1.15, MRPC, as interpreted by LPRB Opinion 9, now Appendix 1 to the MRPC.

84. For the period of August 16, 2002, through November 16, 2004, respondent provided partial bank statements, a check register, client subsidiary ledgers and a personal subsidiary ledger for the period August 16, 2002, through November 16, 2004.

85. In spite of requests from the Director, respondent failed to provide any bank statements for the periods of: May 17, 2003, through June 16, 2003; July 18, 2003, through August 16, 2003; and August 17, 2003, through September 16, 2003. Respondent also failed to provide the other required trust account books for these months.

86. For the period of August 16, 2002, through November 16, 2004, respondent failed to maintain monthly subsidiary ledger trial balances, monthly

reconciliations of the checkbook balance, subsidiary ledger trial balance total and the adjusted bank statement balance, duplicate deposit slips and other bank records as required by Rule 1.15, MRPC, as interpreted by LPRB Opinion 9, now Appendix 1 to the MRPC.

87. Respondent falsely certified to the Minnesota Supreme Court that he kept the required trust account books and records from 2002 through 2006.

88. Respondent's conduct in commingling client and personal funds in his trust accounts, misappropriating client funds from his trust account to pay for his personal expenses, misappropriating the funds entrusted to him on behalf of his client D'Amario, failing to keep required trust account books and records, repeatedly issuing checks drawn on the trust account when there were insufficient funds in the account to support the checks, improperly transferring funds from his trust account by electronic transfer and ATM, and falsely certifying to the Minnesota Supreme Court that he maintained the required trust account books and records violated Rules 1.15(a), (b), (c), and (h), as interpreted by LPRB Opinion 9 and Appendix 1 to the MRPC, and 8.4(c), MRPC.

FOURTH COUNT

California Discipline

89. On January 24, 2007, the Supreme Court of California ordered that respondent's California license to practice law be suspended for one year, that the execution of the suspension be stayed, and that he be placed on probation for two years subject to conditions of probation including restitution and three months actual suspension.

90. Respondent's California suspension arose out of respondent, in a single client matter, charging and collecting an unconscionable fee, entering into an improper business transaction, failing to provide written disclosure of a financial interest in the

subject matter of the representation, and intentionally or recklessly failing to represent the client competently.

91. Pursuant to Rule 12(d), RLPR, the California adjudication that respondent committed the misconduct set forth above in paragraph 89 establishes the misconduct conclusively for the purposes of these proceedings.

92. Respondent's conduct, as evidenced by the suspension of his California license to practice law, in charging and collecting an unconscionable fee, entering into an improper business transaction, failing to provide written disclosure of a financial interest in the subject matter of the representation, and intentionally or recklessly failing to represent the client competently violated Rules 1.1, 1.5, and 1.8(a), 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: December 20, 2007.



MARTIN A. COLE
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
Attorney No. 148416
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218
(651) 296-3952

and



PATRICK R. BURNS
FIRST ASSISTANT DIRECTOR
Attorney No. 134004