

FILE NO. A07-0354

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against RICHARD D. VARRIANO,  
a Minnesota Attorney,  
Registration No. 131507.  
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**AMENDED AND SUPPLEMENTARY  
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 amended and supplementary petition for disciplinary action pursuant to Rules 10(e) and 12(a), Rules on Lawyers Professional Responsibility (RLPR).

Respondent is currently the subject of a February 12, 2007, petition for disciplinary action. The Director has investigated further allegations of unprofessional conduct against respondent.

The Director alleges that respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Trust Account Violations

**Introduction**

1. At all times relevant, respondent has maintained trust account no. 095-0524816 at Wells Fargo Bank (hereinafter "trust account").
2. Pursuant to Rule 1.15(j) to (o), Minnesota Rules of Professional Conduct (MRPC), Wells Fargo Bank reported to the Director an April 7, 2004, overdraft on respondent's trust account. Respondent's responses to the Director's inquiries

regarding the overdraft revealed that respondent was depositing earned funds into his trust account and issuing trust account checks in direct payment of his own personal and business expenses.

3. On May 18, 2004, the Director advised respondent as follows:

A lawyer's use of a trust account for personal purposes and/or the commingling of a lawyer's own funds with client funds in the account is improper. You must immediately discontinue depositing your own funds in the account. Further, you must disburse earned fees from the account directly to yourself, not in payment of your own personal or business bills or expenses.

4. On September 17, 2004, the Director terminated the overdraft inquiry upon verifying that respondent had "discontinued your practice of depositing your own funds into your trust account and issuing trust account checks in payment of your own business and personal expenses . . . ." The Director reiterated, "please do not deposit any additional earned funds into your trust account or issue trust account checks to your own personal or business vendors or creditors."

#### **Continued Improper Use of a Trust Account and Commingling**

5. Respondent's trust account again became overdrawn on December 9, 2005, a fact that Wells Fargo Bank again reported to the Director pursuant to Rule 1.15(j) – (o), MRPC.

6. In response to the Director's inquiry regarding the overdraft, respondent stated, "All of the funds were earned fees; no client's funds were affected and no client funds were in the account."

7. The Director's subsequent review and audit of respondent's trust account revealed that, despite the Director's clear directive not to do so, respondent continued to deposit earned funds into his trust account and to issue trust account checks in direct

payment of his own personal and business expenses during the period from at least September 2004 to January 2006.

8. The Director's review and audit of respondent's trust account also revealed that during the periods September 27 to October 6, 2004, December 3 to 9, 2004, and January 21 to 31, 2005, respondent commingled client funds with substantial amounts of his own funds in his trust account.

### **Improper Use of Trust Account**

9. During a meeting with representatives of the Director on May 12, 2006, respondent stated that since at least 2002, he had not paid federal income taxes, beyond that which the State of Minnesota withheld from his public defender paychecks and remitted to the IRS, and that the IRS began to actively pursue collection of his unpaid taxes in 2005. The IRS has filed liens totaling \$17,919.86 with the Cass County Recorder's Office in North Dakota in an effort to collect the taxes owed.

10. Respondent further stated that he continued to deposit earned funds into his trust account and to issue trust account checks directly to business and personal creditors even after the Director directed him to discontinue those practices, because "the IRS was coming after" him and had attached another of his bank accounts. In other words, respondent was using his trust account to shelter his funds from attachment by the IRS.

### **Additional Improper Use of Trust Account**

11. Respondent's trust account again became overdrawn on June 14, 2006, a fact that Wells Fargo Bank again reported to the Director pursuant to Rule 1.15(j) - (o), MRPC.

12. The overdraft was the eventual result of the following series of events. On or about March 11, 2005, respondent's client, K.H., presented respondent with a \$6,166 check issued by the United States Department of the Treasury ("Treasury Department")

to H.S. for social security benefits ("the H.S. check"). K.H. represented to respondent that he had obtained the H.S. check from H.S., who did not have a bank account, did not have any form of identification and had no means of negotiating the check. K.H. requested that respondent deposit the H.S. check into, and disburse the proceeds from, his account. Respondent did not know and had never met H.S., and did not attempt to confirm with him K.H.'s representations. Nonetheless, on March 11, 2005, in accordance with K.H.'s request, respondent deposited the H.S. check into his trust account.

13. Following his deposit of the H.S. check, respondent issued his trust account check no. 1950 for \$3,600 payable to K.H., which check cleared respondent's trust account on March 16, 2005. Respondent retained the \$2,566 balance of the H.S. check in his trust account, eventually disbursing those funds in payment of his own personal and business expenses, as repayment of a loan respondent had previously given to K.H. *See* paragraph 35 below.

14. On an unknown date, H.S. signed a Treasury Department claim form alleging that his endorsement on the H.S. check had been forged. On June 6, 2006, based on H.S.'s claim, the Treasury Department directed Wells Fargo Bank to reclaim the \$6,166 that had comprised the H.S. check from respondent's trust account. Wells Fargo Bank reversed that deposit on June 14, 2006, causing the overdraft.

15. Respondent has not deposited funds to restore his trust account to a positive balance.

16. K.H. has an extensive criminal history in both Minnesota and North Dakota. Respondent had previously represented K.H. in several criminal matters, including a felony charge for escaping from custody in 1992, a non-traffic misdemeanor charge in 2001 for which K.H. was sentenced to 90 days in jail, and a misdemeanor charge for illegal use of license plates in 2004. In addition, on at least two occasions

prior to March 2005, K.H. had been found guilty of misdemeanor issuance of dishonored checks.

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

17. During the period from at least April 2004 to January 2006, respondent failed to maintain the trust account books and records required by Rule 1.15, MRPC, as interpreted by Lawyers Professional Responsibility Board (LPRB) Opinion No. 9 (in effect until October 1, 2005), and Appendix 1 (in effect on and after October 1, 2005). In particular, respondent failed to maintain client subsidiary ledgers, trial balances or reconciliations.

18. Respondent's conduct in depositing earned funds into his trust account, failing to promptly withdraw earned fees from his trust account, paying personal and business expenses from his trust account, and commingling client funds with earned funds in the account violated Rule 1.15(a) and (b), MRPC.

19. Respondent's conduct in using his trust account to shelter his funds from attachment by the IRS and misusing his trust account to process a forged social security check violated Rules 1.15(a) and 8.4(c), MRPC.

20. Respondent's conduct in failing to maintain proper trust account books and records violated Rule 1.15(h), MRPC, as interpreted by LPRB Opinion No. 9 (prior to October 1, 2005) and Appendix 1 (on and after October 1, 2005).

### SECOND COUNT

#### Failure to Enter into Written Retainer Agreements and Provide Settlement Statements

##### **Contingent Fee Agreements**

21. Respondent represented V.V. in a personal injury action. Respondent had an oral contingent fee arrangement with V.V.

22. Respondent received the sum of \$320,000 in settlement of V.V.'s claim and deposited those funds into his trust account on September 27, 2004. Of those funds,

respondent disbursed \$220,000 to V.V. by trust account check no. 1763 (which cleared respondent's trust account on October 6, 2004), and disbursed \$23,000 to Blue Cross Blue Shield by trust account check no. 1768 (which cleared respondent's trust account on October 5, 2004). Respondent retained in his trust account the \$77,000 balance as and for his fees in the matter, eventually disbursing those funds in their entirety in payment of his own personal and business expenses.

23. Respondent did not, at any time, enter into a written contingent fee agreement with V.V. Also, upon receipt of the settlement funds, respondent did not provide V.V. with a written statement indicating the amount of the recovery, the remittance to V.V. or the method of its determination.

24. Respondent represented G.H. in a personal injury action. Respondent had an oral contingent fee arrangement with G.H.

25. Respondent received the sum of \$12,500 in settlement of G.H.'s claim and deposited those funds into his trust account on December 3, 2004. Of those funds, respondent disbursed \$8,500 to G.H. by trust account check no. 1847 (which cleared respondent's trust account on December 9, 2004). Respondent retained in his trust account the \$4,000 balance as and for his fees in the matter, eventually disbursing those funds in their entirety in payment of his own personal and business expenses.

26. Respondent did not, at any time, enter into a written contingent fee agreement with G.H. Also, upon receipt of the settlement funds, respondent did not provide G.H. with a written statement indicating the amount of the recovery, the remittance to G.H. or the method of its determination.

27. Respondent represented C.T.B. in a personal injury action. Respondent had an oral contingent fee arrangement with C.T.B.

28. Respondent received the sum of \$50,000 in settlement of C.T.B.'s claim and deposited those funds into his trust account on January 21, 2005. Of those funds,

respondent disbursed \$38,000 to C.T.B. by trust account check no. 1872 (which cleared respondent's trust account on January 31, 2005). Respondent retained in his trust account the \$12,000 balance as and for his fees in the matter, eventually disbursing those funds in their entirety in payment of his own personal and business expenses.

29. Respondent did not, at any time, enter into a written contingent fee agreement with C.T.B. Also, upon receipt of the settlement funds, respondent did not provide C.T.B. with a written statement indicating the amount of the recovery, the remittance to C.T.B. or the method of its determination.

### **Advance Fee Retainers**

30. In February 2005 respondent agreed to represent C.V. in defending against criminal charges.

31. Respondent charged C.V. a \$5,000 nonrefundable retainer for the representation.

32. Although respondent considered C.V.'s payment to be earned upon receipt and nonrefundable, respondent did not enter into a written fee agreement with C.V. so providing.

33. Respondent's conduct in failing to enter into written contingent fee agreements, failing to provide his contingent fee clients with settlement statements, and charging a nonrefundable retainer in the absence of a written fee agreement violated Rules 1.5(b) and (c), and 1.15(a) and (b), MRPC, as those rules read prior to October 1, 2005, and as interpreted by LPRB Opinion 15 and *In re Lochow*, 469 N.W.2d 91, 98 (Minn. 1991).

## THIRD COUNT

### Improperly Providing Financial Assistance to a Client

34. As discussed above, respondent has represented K.H. in several criminal matters, both in Minnesota and North Dakota.

35. On October 25, 2004, respondent's trust account check no. 1825, which respondent issued to "Cass County [North Dakota] State's Attorney" for \$3,000, cleared respondent's trust account. Respondent issued this check on behalf of, and as a loan to, K.H., to enable K.H. to make restitution in a criminal proceeding in which respondent was representing him.

36. On June 20, 2005, respondent's trust account check no. 2046, which respondent issued to K.H. for \$100, cleared respondent's trust account. Respondent issued this check as a loan to K.H. At the time, respondent was representing K.H. in at least one criminal matter.

37. On June 21, 2005, respondent's trust account check no. 2037, which respondent issued to Kim Scherer for \$500, cleared respondent's trust account. Respondent issued this check on behalf of, and as a loan to K.H. At the time, respondent was representing K.H. in at least one criminal matter.

38. On June 30, 2005, respondent's trust account check no. 2062, which respondent issued to "Cass County [North Dakota] State's Attorney" for \$51.78, cleared respondent's trust account. Respondent issued this check on behalf of, and as a loan to K.H. to enable K.H. to make restitution in a criminal proceeding in which respondent was representing him.

39. With respect to each of his loans to K.H. as described above, respondent did not notify K.H. in writing that he should consider the assistance of independent counsel in the transaction, did not fully disclose the terms of the transaction to K.H. in writing and did not obtain K.H.'s written consent to the transaction.

40. Respondent's conduct in loaning funds to his client, K.H., violated Rule 1.8(a) and (e), MRPC, as those rules read prior to October 1, 2005.

FOURTH COUNT

G.K. Matter

41. On April 17, 2003, law enforcement personnel executed a search warrant at the home of G.K. in Ada, Minnesota, seeking drugs and related paraphernalia belonging to G.K.'s son, M.P.

42. Following the search, M.P. was charged with possession of a controlled substance. M.P. retained respondent to represent him.

43. Respondent filed a motion on M.P.'s behalf to suppress the evidence recovered in the search of G.K.'s home. The motion was heard at the omnibus hearing on June 25, 2003.

44. At the June 25, 2003, hearing, G.K. testified that M.P. did not maintain a residence at her home, required permission to stay there and did not have permission to stay on the day of the search. Based, at least in part, on G.K.'s testimony, the court denied respondent's motion to suppress, concluding that M.P. did not have standing to contest the legality of the search.

45. After the hearing, G.K. stated to respondent that she had testified falsely because she thought it would help her son.

46. Respondent subsequently contacted G.K. and asked her to sign an affidavit acknowledging the falsity of her testimony at the June 25, 2003, hearing. Respondent stated to G.K. that she could be charged with perjury, but that respondent would represent her regarding any such charges and that, given her age and absence of a criminal record, respondent was confident that the penalty would not be severe.

47. In the context of his discussions with G.K. regarding the affidavit, respondent did not inform G.K. that M.P.'s interests were adverse to her own or make clear to G.K. that he did not represent her regarding the affidavit.

48. On July 16, 2003, respondent mailed to G.K. an affidavit he had prepared for her signature. The affidavit stated that G.K.'s testimony at the June 25, 2003, hearing had been false and that, in fact, M.P. maintained a room at G.K.'s home and had total access to the home. G.K. signed the affidavit and returned it to respondent, who filed it with the court in support of M.P.'s motion to reconsider.

49. The court denied M.P.'s motion to reconsider.

50. G.K. was subsequently charged with perjury. Respondent represented G.K. through trial in the matter.

51. On January 9, 2004, the court found G.K. guilty of perjury.

52. G.K. appealed her conviction to the Minnesota Court of Appeals. The Court of Appeals affirmed G.K.'s conviction.

53. Respondent's conduct in his discussions with G.K. regarding the affidavit violated Rules 1.7(b) and 4.3(a), (b) and (c), MRPC, as those rules read prior to October 1, 2005.

#### FIFTH COUNT

##### False Statements in Disciplinary Investigation

54. On January 7, 2007, C.V. complained to the Director's Office alleging, amongst other things, that respondent neglected his case, failed to adequately communicate with him, and failed to enter into a written retainer agreement.

55. In responding to the complaint of C.V., respondent stated in a February 26, 2007, letter to the Director, "I spoke with [C.V.], by phone when he was serving time at the Cass Co. Jail, Fargo, ND."

56. On March 26, 2007, the Director wrote to respondent requesting additional information, including additional details regarding his alleged conversation with C.V.

57. On March 19, 2007, respondent wrote to the Director stating, "The conversations with [C.V.], from Cass Co. Jail would have been in Feb. 05."

58. Respondent's statements in his letters to the Director regarding his conversations with C.V. while C.V. was at the Cass County Jail were false. C.V. was, in fact, never incarcerated at the Cass County Jail and the conversations alleged by respondent did not take place.

59. Respondent's false statements made during the course of a disciplinary investigation violated Rules 4.1, 8.1(a), and 8.4(c), MRPC.

#### SIXTH COUNT

##### Reciprocal Discipline – North Dakota

60. In August 2006 respondent was publicly reprimanded in North Dakota for violating Rules 1.4, 1.5(a), 1.15(b), and 1.16(e) of the North Dakota Rules of Professional Conduct. Respondent's violations arose out of his improperly charging a client a nonrefundable retainer, failing to adequately explain to the client the terms of his engagement and the requirements of his fee agreement, and failing to refund to the client the unearned portion of the retainer charged.

61. Pursuant to Rule 12(d), RLPR, the North Dakota adjudication that respondent committed the misconduct set forth above in paragraph 60 establishes the misconduct conclusively for purposes of these proceedings.

62. Respondent's conduct in improperly charging a client a nonrefundable retainer, failing to adequately explain to the client the terms of his engagement and the requirements of his fee agreement, and failing to refund to the client the unearned portion of the retainer charged violated Rules 1.4, 1.5(a) and (b), 1.15(a), (b), and (c), and 1.16(d), MRPC, as those rules read prior to October 1, 2005.

#### DISCIPLINARY HISTORY

On December 18, 2002, respondent was publicly reprimanded for failing to comply with various federal statutes, rules and regulations regarding the handling of a criminal defendant's appeal, failing to abide by a court's order and failing to diligently

represent a client, resulting in respondent's reprimand and sanction by the United States Eighth Circuit Court of Appeals, in violation of Rules 1.3, 3.4(c) and 8.4(d), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court suspending respondent or imposing other 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: July 9, 2007.



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and



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This supplementary petition is approved for filing pursuant to Rule 10(e), RLPR, by the undersigned.

Dated: July 16, 2007.



KENT GERNANDER  
BOARD CHAIR, LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD