FILE NO. A07-354

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against RICHARD D. VARRIANO, a Minnesota Attorney, Registration No. 131507.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION FOR DISCIPLINE**

The above-captioned matter came on for hearing before the undersigned referee, appointed by the Minnesota Supreme Court, on December 28, 2007, in the Minnesota Judicial Center, St. Paul, Minnesota. Patrick R. Burns, First Assistant Director, appeared for the Office of Lawyers Professional Responsibility (hereinafter the Director). Respondent Richard Varriano appeared, was present throughout the proceedings, and was represented by attorney Bruce Quick.

At the outset of the hearing the Director dismissed from the July 9, 2007, amended and supplementary petition for disciplinary action the allegations contained in the Fifth Count, paragraphs 54 through 59.

Testimony at hearing was taken from respondent. The Director offered into evidence 38 exhibits, numbered 1-36, 43, and 44. These exhibits were received into evidence. Respondent offered into evidence exhibits 1-7. These exhibits were received into evidence at trial. The record was kept open to receive Respondent's exhibit 8 after trial.

In his answer to the petition for disciplinary action, respondent admitted certain factual allegations made by the Director and denied others. The findings and conclusions made below are based upon respondent's admissions, the documentary evidence the parties submitted, the testimony of respondent, the demeanor and credibility of respondent as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony. If

respondent's answer admits a particular factual finding made below, then even though the Director may have provided additional evidence to establish the finding, no other citation will necessarily be made.

Based upon the evidence received, including credibility determinations where appropriate, and the arguments of the parties the undersigned now, by clear and convincing evidence, makes the following:

FINDINGS OF FACT

Introduction

1. Respondent was admitted to practice law in Minnesota in 1981 and in North Dakota in 1988. Respondent's office is located in Moorhead, Minnesota. (R. test.)

Trust Account Violations

2. At all times relevant, respondent has maintained trust account no. 095-0524816 at Wells Fargo Bank (hereinafter "trust account"). (Amended and supplementary petition for disciplinary action ("Pet.") ¶ 1; R. answer (ans.") ¶ 1.
3. 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. (Pet. ¶ 2; R. ans. ¶ 2; D. Ex. 1.) 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. (D. Ex. 2; R. test.)
4. 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.

(D. Ex. 3.)

5. 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." (D. Ex. 5.)

6. Respondent received the letters from the Director cautioning him against commingling of personal and client funds in his trust account and against using his trust account as a personal account. (R. test.) Respondent understood the direction given him in this regard but, as more fully set forth below, intentionally disregarded the advice. (R. test.)
7. 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. (Pet. ¶ 5; R. ans. ¶ 5; D. Ex. 6.)
8. 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." (D. Ex. 7)
9. 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 through January 2006. (R. test.; D. Exs. 19-21.)
10. 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 his own funds in his trust account. (Pet. ¶ 7; R. ans. ¶ 7; D. Exs. 19-21.)
11. In light of the outstanding tax liens against respondent referenced below, respondent's deposit and retention of client funds with his own funds in the trust account placed the client funds at risk of attachment or garnishment by the IRS.

Use of Trust Account to Avoid IRS Liens

12. Respondent has owed past due taxes and penalties to the IRS since 2002. (Pet. ¶ 9; R. ans. ¶

9; R. test.) 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. (D. Ex. 17). There has been a continuing garnishment by the IRS of respondent's business and personal accounts since 2002. (D. Exs. 16-18.)

13. On February 10, 2006, respondent wrote to the Director in response to a Notice of Investigation stating, in part, "I maintained this account [his trust account] for personal matters because of an IRS levy on my personal and business account." (D. Ex. 8.)

14. On August 26, 2006, in a letter in response to an inquiry from the Director regarding transactions in his trust account, respondent stated, in part, "I got a $77000 windfall and I tried to shelter it from the IRS levy." (D. Ex. 12.)

15. Respondent, by using his client trust account to shelter his personal funds from the IRS, knowingly and intentionally misrepresented the nature and status of that account in a continuing manner.

Use of Trust Account to Assist the Improper Negotiation and Disbursement of a Check Paid Over a Forged Endorsement

16. 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. (Pet. ¶ 11; R. ans. ¶ 11; D. Ex. 9.)

17. 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 social security check"). (Pet. ¶ 12, R. ans. ¶ 12; R. test.; D. Exs. 10 & 14.) K.H. represented to respondent that he had obtained the social security 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 social security check into, and disburse the proceeds from, his account. K.H. provided respondent with no proof of authority for him to act on H.S.'s behalf in negotiating and disbursing the social security

check. (R. test.; D. Ex. 11.)

18. K.H. has an extensive criminal history in both Minnesota and North Dakota. (D. Exs. 23 & 24; R. test.; Pet. ¶ 16, R. ans. ¶ 16.) Respondent, at the time he was approached by K.H. for assistance in negotiating the social security check, was aware of that criminal history. (R. test.) Respondent has represented K.H. in approximately fifteen criminal matters, including various theft charges. (D. Ex. 23; R. test.) Significantly, in November 2004, only five months prior to being approached for assistance in negotiating the social security check, respondent represented K.H. in a North Dakota criminal proceeding where K.H. pled guilty to theft by deception. (D. Ex. 24; R. test.) However, no evidence showed that K.H. had ever been convicted of a forgery charge.

19. Respondent did not know and had never met H.S. (R. test.; D. Ex. 11.) Respondent made no attempt to contact H.S. or in any other manner confirm with him K.H.'s representations and/or authority to act on his behalf. (R. test.; D. Ex. 11.) Nonetheless, on March 11, 2005, in accordance with K.H.'s request, respondent deposited the social security check into his trust account. (Pet. ¶ 12; R. ans. ¶ 12; R. test.; D. Exs. 19-12.)

20. Following his deposit of the social security check, respondent issued his trust account check no. 1950 for $3,600 payable to K.H., not H.S. That check cleared respondent's trust account on March 16, 2005. Respondent retained the $2,566 balance of the social security check in his trust account, eventually disbursing those funds in payment of his own personal and business expenses. Respondent disbursed no portion of the proceeds from the social security check to H.S. (Pet. ¶ 13; R. ans. ¶ 13; R. test.; D. Exs. 19-21.)

21. On July 27, 2005, H.S. signed a Treasury Department claim form alleging that his endorsement on the H.S. check had been forged. (D. Ex. 14.) The Treasury Department conducted an investigation and determined that forgery had been established. (D. Ex. 26.) No evidence was introduced at the present hearing regarding the identity of the person who forged the endorsement of H.S.

22. On June 6, 2006, based on the purported forgery of H.S.'s endorsement, 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. (Pet. ¶ 14; R. ans. ¶ 14; D. Exs. 10, 14 & 19-21; R. test.)

23. Respondent has not deposited funds to restore his trust account to a positive balance. (Pet. ¶ 15; R. ans. ¶ 15; R. test.)

24. Respondent's role in the above transaction, as an experienced attorney versed in criminal law is troubling. Although H.S. was the payee on the checks and had ostensibly endorsed it, Respondent kept some of the funds to repay K.H.'s debt to himself and paid the balance to K.H. At a minimum, his actions equaled negligence, or possibly even gross negligence. However, the identity of the forger has not been established. Indeed, the fact of forgery was never conclusively established in an adversarial proceeding. The charge against Respondent's trust account was initiated when H.S. signed a Treasury Department form alleging forgery. Thus, the circumstances of the forgery, if it occurred, the knowledge of K.H., and the extent of his relationship with H.S. were not in evidence. Respondent earned a college undergraduate degree in accounting. He had considerable experience with accounting procedures with the banking system. Most significantly, when all portions of the transaction were completed, Respondent owed his bank the entire amount of the check, and has thus lost the $3,600.00 he paid K.H. This was the foreseeable outcome of negotiating a check if it was forged, as a person with Respondent's education and experience would have likely known at the time. After weighing all factors, the Referee does not conclude that Respondent acted in an intentionally dishonest manner in the transaction by negotiating a check known or suspected by him to be forged.

Failure to Maintain Required Trust Account Books and Records

25. 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. (Pet. ¶ 17; R. ans. ¶ 17.)

Failure to Enter into Written Retainer Agreements and Provide Settlement Statements

26. Respondent represented V.V. in a personal injury action. Respondent had an oral contingent fee arrangement with V.V. (Pet. ¶ 21; R. ans. ¶ 21; R. test.)

27. 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. (Pet. ¶ 22; R. ans. ¶ 22; D. Exs. 19-22.)

28. Respondent did not, at any time, enter into a written contingent fee agreement with V.V. as required by Rule 1.5(c), MRPC. (Pet. ¶ 23; R. ans. ¶ 23; R. test.)

29. Although the Director alleged that respondent failed to provide V.V. with a written statement indicating the amount of the recovery, the remittance to V.V. or the method of its determination upon conclusion of the contingent fee matter, respondent produced at trial a copy of a September 14, 2004, letter addressed to Joseph Lemek. This letter contains handwritten notations that appear to outline the amount recovered on behalf of V.V. and how the amounts recovered were disbursed. These notations are made at the bottom of the letter, to the left of the date, "9-20-04." Respondent testified that he sent a copy of this letter, with the "9-20-04" notations to V.V. (R. Ex. 7; R. test.) The Referee finds that Respondent did appear to have provided V.V. with a written statement of the recovery.

30. Respondent represented G.H. in a personal injury action. Respondent had an oral contingent fee arrangement with G.H. (Pet. ¶ 24; R. ans. ¶ 24; R. test.)

31. 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. (Pet. ¶ 25; R. ans. ¶ 25; D. Exs. 19-22.)

33. Respondent did not, at any time, enter into a written contingent fee agreement with G.H. as required by Rule 1.5(c), MRPC. (Pet. ¶ 26; R. ans. ¶ 26; R. test.)

34. Upon conclusion of the contingent fee matter, 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 as required by Rule 1.5(c), MRPC. (R. test.)

35. Respondent represented C.T.B. in a personal injury action. Respondent had an oral contingent fee arrangement with C.T.B. (Pet. ¶ 27; R. ans. ¶ 27; R. test.)

36. 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. (Pet. ¶ 28; R. ans. ¶ 28; D. Exs. 19-22.)

37. Respondent did not, at any time, enter into a written contingent fee agreement with C.T.B. as required by Rule 1.5(c), MRPC. (Pet. ¶ 27; R. ans. ¶ 27; R. test.)

38. Upon conclusion of the contingent fee matter, 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 as required by Rule 1.5(c), MRPC. (R. test.)

39. In February 2005 respondent agreed to represent C.V. in defending against criminal charges. (Pet. ¶ 30; R. ans. ¶ 30; R. test.)

40. Respondent charged C.V. a $5,000 nonrefundable retainer for the representation. (Pet. ¶ 31; R. ans. ¶ 31; R. test.)

41. 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. as required by Rule 1.5(b), MRPC. (Pet. ¶ 32; R. ans. ¶ 32; R. test.)

Improperly Providing Financial Assistance to a Client

42. As discussed above, respondent has represented K.H. in several criminal matters, both in Minnesota and North Dakota. (Pet. ¶ 34; R. ans. ¶ 34; R. test.)

43. 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. (Pet. ¶ 35; R. ans. ¶ 35; D. Exs. 19-22; R. test.) 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. (R. test.)

44. On June 20, 2005, respondent's trust account check no. 2046, which respondent issued to K.H. for $100, cleared respondent's trust account. (Pet. ¶ 36; R. ans. ¶ 36; R. test.; D. Exs. 19-22.) Respondent issued this check as a loan to K.H. (R. test.; D. Ex. 12.) At the time, respondent was representing K.H. in at least one criminal matter. (D. Ex. 23; R. test.)

45. On June 21, 2005, respondent's trust account check no. 2037, which respondent issued to Kim Scherer for $500, cleared respondent's trust account. (Pet. ¶ 37, R. ans. ¶ 37; R. test.; D. Exs. 19-22.) 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. (R. test.; D. Ex. 12.)

46. 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. (Pet. ¶ 38; R. ans. ¶ 38; R. test.; D. Exs. 19-22.) 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. (R. test.; D. Ex. 12.)

47. The payments made by respondent to the Cass County State's Attorney and to Kim Scherer on behalf of K.H. constitute financial assistance to a client in connection with pending

litigation.

48. 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 as required by Rule 1.8(a), MRPC. (R. test.)

G.K. Matter

49. 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. (Pet. ¶ 41; R. ans. ¶ 41.)

50. Following the search, M.P. was charged with possession of a controlled substance. M.P. retained respondent to represent him. (Pet. ¶ 42; R. ans. ¶ 42; R. test.)

51. 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. (Pet. ¶ 43; R. ans. ¶ 43; R. test.; D. Ex. 28.)

52. 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. (D. Ex. 28.)

53. On July 7, 2003, 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. (R. test.; D. Exs. 29 & 34.)

54. Respondent subsequently contacted G.K. and asked her to sign an affidavit stating that she testified falsely at the June 25, 2003, hearing. (Pet. ¶ 46; R. ans. ¶ 46; R. test.; D. Ex. 36.) It was his intent to use such an affidavit in support of a motion asking the court to reconsider the July 7, 2003, order denying the motion to suppress. (R. test.)

55. On July 16, 2003, respondent mailed to G.K. an affidavit he had prepared for her signature. (D. Ex. 19.) 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. (D. Ex. 30.)

56. Respondent, in discussing the affidavit with G.K. prior to her signing it, told her that if she signed the affidavit 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. (Pet. ¶ 46; R. ans. ¶ 46; D. Ex. 36; R. test.)

57. Respondent's discussion with G.K. about the effects of signing and submitting the requested affidavit, the likelihood of being charged with perjury, and the likely penalty for perjury that would be imposed, constituted legal advice to G.K. given under circumstances in which a reasonable person would rely upon the advice. This, together with his promise to her to represent her in defending any perjury charges that might be brought, created an attorney-client relationship between respondent and G.K.

58. M.P.'s interest in obtaining the affidavit from G.K. for use in a motion to reconsider the July 7, 2003, order conflicted with G.K.'s interest in avoiding prosecution for perjury.

59. During the course of his discussions with G.K. regarding the affidavit, respondent did not ask for or obtain G.K.'s consent to the conflict of interest inherent in his providing her with legal advice regarding the affidavit while, at the same time, representing M.P. Respondent did not advise that G.K. obtain independent legal advice before signing the affidavit. (R. test.)

60. 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. (R. test.)

61. 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. (Pet. ¶ 48; R. ans. ¶ 48; D. Ex. 30.) The court denied M.P.'s motion to reconsider. (Pet. ¶ 49; R. ans. ¶ 49; D. Ex. 32.)

62. G.K. was subsequently charged with perjury. Respondent represented G.K. through trial in the matter. (Pet. ¶ 50; R. ans. ¶ 50; D. Exs. 33 & 34.)

63. On January 9, 2004, the court found G.K. guilty of perjury. (D. Ex. 34.)

64. G.K. appealed her conviction to the Minnesota Court of Appeals. The Court of Appeals

affirmed G.K.'s conviction. (D. Ex. 35.)

Reciprocal Discipline – North Dakota

65. 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. (D. Ex. 44.)

66. Pursuant to Rule 12(d), RLPR, the North Dakota adjudication that respondent committed the misconduct set forth above in paragraph 64 establishes the misconduct conclusively for purposes of these proceedings.

Aggravating and Mitigating Factors

67. 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. (D. Ex. 43.) This constitutes an aggravating factor.

68. Trust Account Violations

Aggravating factors include:

a. Respondent intentionally and repeatedly persisted in continuing to commingle personal and client funds in his trust account, and in using his trust account to deposit earned funds and issue checks in payment of his personal and business expenses. (Pet. ¶ 7; R. ans. ¶ 7; R. test.; D. Exs. 3-5 & 7.)

b. Respondent intentionally frustrated the legitimate IRS collection efforts by sheltering personal funds in his trust account.

Mitigating factors include:

a. No clients sustained financial losses due to the violations.

b. Respondent truthfully answered the Director's inquiries. Cooperation is required by Rule 25 and is generally not a mitigating factor. *In re Moulton*, 721 N.W.2d 900, 906 (Minn. 2006). However, many of Respondent's responses candidly exceeded cooperation, and were unrequested admissions detrimental to his interests.

69. Failure to use written contingent fee and settlement agreements

Aggravating factors include:

a. The violations were serial and part of Respondent's customary business procedures.

Mitigating factors include:

a. The violations did not result in any known client losses.

70. G.K. Matter

Aggravating factors include:

a. Respondent's legal advice to G.K. occurred when she was particularly vulnerable. G.K. was concerned that her son, Respondent's client, would be sentenced to prison unless she heeded Respondent's advice and signed the affidavit admitting perjury, and Respondent was angry with her. She was also concerned about possible civil forfeiture of her home.

b. The likely foreseeable consequence of following Respondent's legal advice to G.K. would be severely harmful to G.K. and irreversible, namely her prosecution for perjury.

c. The conflict was certain and clear, as was the expression of Respondent's advice. Respondent counters by referring to the language of the Court of Appeals in *State v. Kesselberg*, 2005 WL 624383 (Minn. Ct. App. 2005) (unpublished), the appeal by G.K. of her perjury conviction. The Court there found that Respondent did not commit misconduct or unprofessional error. However, those comments were directed to Respondent's conduct relative to her trial made while representing G.K. *after* her perjury prosecution began, and not the allegations in the pending matter that occurred *before* prosecution began.

CONCLUSIONS OF LAW

1. 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.

2. 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).
3. 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), 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).
4. Respondent's conduct in providing financial assistance in connection with pending litigation to his client, K.H., violated Rule 1.8(a) and (e), MRPC, as those rules read prior to October 1, 2005.
5. Respondent's conduct in providing legal advice to G.K. regarding her affidavit violated Rules 1.7(b), MRPC, as that rule read prior to October 1, 2005.
6. Respondent's conduct, as determined in the North Dakota disciplinary proceedings referenced above, 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.
7. Respondent's conduct in:
    a. Using his trust account to shelter his personal funds from attachment by the IRS violated Rules 1.15(a) and 8.4(c), MPRC.
    b. Using his trust account in the H.S./K.H. forged check incident did not constitute dishonesty by Respondent in violation of Rules 1.15(a) and 8.4(c), MPRC.

8. The attached Memorandum is made part hereof.

RECOMMENDATION FOR DISCIPLINE

1. That respondent Richard D. Varriano be indefinitely suspended from the practice of law, effective immediately upon the issuance of the Supreme Court's decision.
2. That he be eligible to apply for reinstatement after one year from the date of the Court's decision.
3. That the requirements of Rule 18 (a)-(c), RLPR, not be waived.
4. That respondent comply with the requirements of Rule 26, RLPR.
5. That respondent pay to the Director's Office $900 in costs and an amount in disbursements to be determined in compliance with Rule 24, RLPR.

Dated: January 29, 2008

B.W. Christopherson
Supreme Court Referee

MEMORANDUM

Attorney discipline proceedings are intended to protect the public from attorneys who are unable to properly discharge their duties. *In re Montpetit*, 528 N.W.2d 243, 246 (Minn. 1995). Attorney discipline proceedings are also intended to deter future attorney misconduct. *Id.* In determining the appropriate sanction, the court weighs the specific facts of the case in addition to any mitigating or aggravating circumstances. *In re Isaacs*, 451 N.W.2d 209, 211 (Minn. 1990). In doing so, the court considers the nature of the misconduct, the cumulative weight of the disciplinary rule violations, the potential harm to the public, and the harm to the legal profession. *In re Lochow*, 469 N.W.2d 91, 96 (Minn. 1991).

In determining the appropriate discipline, the court looks to cases involving similar misconduct as a guide in enforcing consistent discipline. *In re Disciplinary Action Against Jellinger*, 625 N.W.2d 143, 146 (Minn. 2001). Unfortunately, there are no prior cases with the exact combination of misconduct as the current case. Many of the cases cited by Varriano involved stipulations and they did not compare closely to the facts of this case.

Trust Account Violations

The court takes trust account violations seriously and will not hesitate to impose a disciplinary suspension to protect the public from attorneys who either intentionally or unintentionally fail to exercise care in handling client funds. *In re Haugen*, 543 N.W.2d 372, 375 (Minn. 1996). Varriano acknowledges that he regularly used his trust account to deposit earned funds that belonged to him and to pay personal and business expenses. He also used the trust account to deposit and disburse client funds. Thus, he commingled personal and client funds in the account. Commingling, particularly when coupled with other misconduct, constitutes misconduct warranting serious professional discipline even absent evidence of appropriation of

client funds. *In re Serstock*, 316 N.W.2d 559, 561 (Minn. 1982); *In re Montpetit*, 528 N.W.2d 243 (Minn. 1995) (commingling together with shortages in account and false certification that trust account books and records were properly maintained warranted four-month suspension).

Written Retainer Agreements

Varriano represented three clients in personal injury matters without written retainer agreements. In two of the matters, Varriano did not provide the written settlement statement required by Rule 1.5(c), MPRC. In *In re Disciplinary Action Against Stolpestad,* 485 N.W.2d 710 (Minn. 1992), the Minnesota Supreme Court affirmed a stipulation for a 30-day suspension and two year probationary period for an attorney who failed to provide clients with accountings upon withdrawal of retainer fees, and failing to provide clients with written fee agreements, along with other acts of misconduct, including neglecting client matter, failing to maintain proper trust account books and records, failing to promptly deposit retainer, and commingling attorney and client funds.

Improper Financial Assistance to Client

Varriano admitted he made payments from his own funds to pay restitution on behalf of a client in order to obtain dismissal of criminal charges. These payments constituted financial assistance provided to the client in connection with the criminal litigation. Varriano also admitted that he loaned the client $100. He did not provide the notices and obtain the consent required by Rule 1.8(a), MRPC. In *In re Appeal of Panel's Affirmance of Director of Professional Responsibility's Admonition in Panel Matter No. 87-22*, 425 N.W.2d 824 (Minn. 1988), the Minnesota Supreme Court determined that the attorney was properly admonished for loaning money to clients when he failed to disclose the potential conflict between his roles as attorney and creditor.

Conflict of Interest

Varriano formed an attorney-client relationship with a client's mother that was adverse to his client's interests. He did not discuss with the client's mother any conflict of interest that might have existed as a result as advising her about filing an affidavit perjuring her. He also did not seek the mother's consent to the conflict of interest. Varriano's responsibility to the mother in giving her legal advice as to whether to provide an affidavit that is likely to result in a charge of perjury was materially limited by his responsibility to the son to obtain evidence in support of his defense in his criminal matter. In *Matter of Discipline of Dillon*, 371 N.W.2d 548 (Minn. 1985), an attorney borrowed money from a client without disclosure of differing interests, which gave rise to an impermissible conflict of interest. The Court suspended Dillon for one year. Similar discipline was imposed in *Matter of Discipline of Perl*, 407 N.W.2d 678 (Minn. 1987) (paying referral fees to nonlawyer employees, solicitation of clients, and representing clients while having a conflict of interest warrant one-year suspension).

Reciprocal Discipline

Where an attorney has been publicly disciplined in another jurisdiction, the Court "may thereafter impose the identical discipline unless it appears that the discipline procedures in the other jurisdiction were unfair, or the imposition of the same discipline would be unjust or substantially different from discipline warranted in Minnesota." Rule 12(d), RLPR. Varriano was publicly reprimanded in North Dakota for charging a client fees under a non-refundable retainer agreement, failing to explain the terms of the engagement and fee, and failing to refund the unearned portion of the fee. This misconduct violates Rules 1.4, 1.5(a) and (b), 1.15 (a),(b), and (c), and 1.16(d), MRPC. Thus, this misconduct warrants a public reprimand. However, in connection with the additional misconduct present here, a more serious sanction is warranted.

Disciplinary History

An attorney's prior disciplinary history is relevant when determining sanctions. *In re Hartke*, 529 N.W.2d 678, 683 (Minn. 1995). The court expects a renewed commitment to comprehensive ethical and professional behavior after a disciplinary proceeding and where leniency has been shown once, the court is reluctant to do so again. *Haugen*, 543 N.W.2d at 375, citing *Isaacs*, 451 N.W.2d at 212. In the current case, Varriano's disciplinary history is an aggravating circumstance. He has been publicly reprimanded in the past 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. Although these violations are not similar to the current violations, they nonetheless indicate that Varriano did not have a renewed commitment to comprehensive ethical and professional behavior. Furthermore, Varriano intentionally disregarded the Director's advice regarding the improper use of his trust account as a personal account. This must be taken into account and is an aggravating factor.

Appropriate Discipline

Varriano has violated several provisions of the MRPC. He used his trust account to shield assets from the IRS. He violated the rules regarding maintaining trust accounts. He violated the rule requiring written retainer agreements and settlement statements. He improperly provided financial assistance to a client. Most importantly, he represented two clients concurrently who had conflicting interests. The cumulative weight and severity of multiple disciplinary rule violations may compel severe discipline even when a single act standing alone would not have warranted such discipline. *In re Oberhauser*, 679 N.W.2d 153, 160 (Minn. 2004). In light of the nature of Varriano's misconduct and the presence of aggravating factors, this Court recommends

that Varriano be suspended from the practice of law for one year and thereafter have two years of supervised probation.

BWC