

FILE NO. A-03-0107
STATE OF MINNESOTA
IN SUPREME COURT

In Re Petition for Disciplinary Action
against THOMAS JOSEPH WHITE,
a Minnesota Attorney,
Registration No. 222823.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION
FOR DISCIPLINE**

This matter was heard on January 9 and 15, 2004, by the Honorable John C. Lindstrom, Judge of District Court, Kandiyohi County, acting as Referee by appointment of the Minnesota Supreme Court. Timothy M. Burke appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (OLPR). Respondent Thomas Joseph White appeared *pro se*.

Respondent was admitted to practice law in the State of Minnesota on October 25, 1991. Respondent currently practices law in Edina, Minnesota.

The hearing was conducted on the Director's February 24, 2003, petition for disciplinary action and December 5, 2003, second amended and supplementary petition for disciplinary action. The Director presented the live testimony of Jerome Trevis, Patricia La Rue, Fannie Primm, Darlene Schultes, Paula Strom-Sell and the affidavit testimony of James Hilbert and David Sullivan. Respondent testified on his own behalf and presented the live testimony of Thomas Alberg. The parties were directed to submit proposed findings of fact, conclusions of law, a recommendation for appropriate discipline and a brief on or before February 6, 2004.

In his answers to the petitions, respondent admitted most of the factual allegations made by the Director, but denied any wrongdoing in the Schultes matter. At the start of the hearing, respondent stipulated to all of the factual allegations regarding the Primm matter, non-

cooperation with the Director's investigation, and financial matters alleged in the petition and amended petition.

Based upon the evidence and upon all of the files, records and proceedings, the Referee makes the following:

FINDINGS OF FACT

Lack of Diligence, Failure to Communicate, Misrepresentation, Conduct Prejudicial to the Administration of Justice

Primm Matter

1. In March 1996, Fannie Primm retained respondent to represent her in a discrimination claim against her condominium association. Respondent initially performed some services for Primm, but then did nothing for several months.
2. Months later, sometime in 1998, respondent told Primm that respondent had filed a discrimination lawsuit on Primm's behalf. This statement was false. Respondent did not commence a lawsuit on Primm's behalf until on or about April 12, 2002.
3. Beginning in approximately 1999, Primm began to question respondent about the status of the case. Respondent told Primm that all was going well on the case, all appropriate papers had been filed and respondent would call Primm with updates. These statements were false.
4. In late 1999, Primm asked attorney Jim Hilbert to communicate with respondent about the status of Primm's case. By letter dated October 12, 1999, Hilbert provided to respondent contact information for Primm and offered to forward written summaries or updates from respondent to. Respondent called Hilbert but took no other action on the matter.

5. In January 2000 respondent moved his office. Respondent failed to inform Primm of the move. Primm located respondent's new office address through an Internet search.
6. In November 2000, David Sullivan, an attorney in the same firm with Hilbert, spoke with respondent at Primm's request. Respondent told Sullivan that the matter was in discovery, the discovery cutoff was January 31, 2001, trial was scheduled for March 2001 and respondent had been sending monthly status letters to Primm. These statements were false.
7. By letter dated December 27, 2000, Sullivan requested respondent to send to Sullivan copies of the letters that respondent claimed to have sent to Primm in the preceding four months. Respondent failed to do so.
8. During a telephone conversation in mid June 2001, respondent told Sullivan he would send to Sullivan the correspondence and status letters previously requested in the Primm matter.
9. By letter dated June 29, 2001, Sullivan informed respondent that Sullivan had not received the correspondence and status letters and that respondent had made no attempts to contact Primm since Sullivan's December 27 letter.
10. During a telephone conversation in mid July 2001 respondent again told Sullivan he would send to Sullivan the correspondence and status letters pertaining to the Primm matter.
11. By letter dated July 24, 2001, Sullivan informed respondent that Sullivan had not received the requested documents.

12. Primm filed a complaint with OLPR in November 2001. On November 30, 2001, the Director mailed to respondent notice of investigation of Primm's complaint. Respondent failed to respond until May 2002.
13. On or about April 12, 2002, respondent commenced an action against her condominium association on Primm's behalf. The condominium association answered the complaint on May 2, 2002. Respondent did not review with Primm the complaint that respondent served on the defendant before service, nor did he send her copies of the complaint or answer. The first time Primm saw the complaint and answer to her lawsuit was in the Director' Office in April 2003.
14. On December 20, 2002, respondent attended a pre-hearing meeting regarding the charges of unprofessional conduct against respondent in this matter. An Assistant Director told respondent that Primm reported that she had not received copies of any pleadings with regard to her lawsuit. Respondent told the Assistant Director that respondent would mail the documents that day to Primm. Respondent failed to do so.
15. As of February 24, 2003, respondent had not provided to Primm a copy of either the complaint or the defendant's answer and had not communicated with Primm about the lawsuit since respondent commenced the lawsuit on Primm's behalf.
16. From April 12 2002 to at least January 9, 2004, respondent has not corresponded with Primm or opposing counsel, not spoken with opposing counsel (other than one or two telephone conversations around the time of the defendant's answer), made no motions, served no discovery, and done nothing else to bring Primm's claim to a conclusion.

Schultes Matter

17. In or about January 2000, Darlene Schultes retained respondent to act as co-counsel with attorney Jane Sundby in the representation of Schultes in fair housing disputes with Schultes' landlord. Respondent agreed to represent Schultes and others after making a presentation at a fair housing seminar in Moorhead, MN.
18. Schultes has a limited education and suffers from both physical and mental disabilities.
19. Throughout respondent's representation of Schultes, she called respondent frequently, sometimes two or three times per day.
20. Paula Strom-Sell is a paralegal hired by respondent who worked on this matter.
21. Respondent told HUD that respondent would prepare a conciliation proposal. In August 2000 respondent prepared and sent to HUD a conciliation proposal. Strom-Sell assisted in the preparation of that document.
22. In late 2000, respondent and Schultes discussed the value of Schultes' claim. Schultes wanted \$75,000 to settle her claims. Respondent stated that, if tried, it was unlikely that she would get a verdict for an amount greater than \$12,000. Schultes stated that she would be willing to settle for \$21,000.
23. In January 2001 Schultes terminated Sundby's representation, and respondent assumed sole representation of Schultes.
24. In early 2001 respondent negotiated an agreement with opposing counsel for settlement of the matter for the sum of \$18,000. Respondent recommended acceptance of the offer and told Schultes that respondent would withdraw from representation if Schultes did not agree.
25. Schultes agreed to accept the offer.

26. By letter dated February 20, 2001, respondent wrote to opposing counsel to accept the offer on Schultes' behalf.
27. Respondent thereafter told Schultes that the matter was settled and that Schultes would be receiving her money.
28. In July 2001 respondent provided to Schultes a settlement document to sign. Schultes signed the settlement agreement on July 11, 2001.
29. By letter dated July 24, 2001, opposing counsel wrote to respondent to say that there was no agreement.
30. By letter dated August 20, 2001, respondent requested Schultes to sign a withdrawal of Schultes' complaints with HUD. Schultes did so, and the complaints were withdrawn. At this time there was no fully executed settlement agreement.
31. By separate letter dated August 20, 2001, respondent told opposing counsel that respondent objected to certain settlement terms opposing counsel requested. Respondent expressly rejected opposing counsel's proposal, stated Schultes would not be making a counter-proposal and asserted that the parties "some time ago" had reached a full and final agreement.
32. Respondent told Schultes that respondent would commence an action for breach of the settlement.
33. Sometime between August 2001 and March 2002, Schultes moved to another city.
34. Respondent did not commence an action on Schultes' behalf until on or about May 3, 2002.
35. In late 2001 or early 2002, Strom-Sell requested respondent to provide the court file number and said she would get a copy of the complaint from the court. Respondent did

not provide the court file number. On multiple occasions respondent stated that he would send to Schultes or Strom-Sell a copy of the complaint, but did not do so.

36. In February 2002 respondent telephoned Strom-Sell and told her that he was putting the documents she requested in the mail.
37. On February 26, 2002, respondent telephoned Strom-Sell and Schultes and told each of them that he was sending paperwork to them. He later telephoned Strom-Sell and told her that paperwork was returned to him as undeliverable. Shortly thereafter, he sent a draft complaint to Strom-Sell which contained several errors.
38. On April 5, 2003, OLPR received a complaint form from Schultes. On April 8, 2002, OLPR mailed a notice of investigation of Schultes' complaint to respondent.
39. Upon receipt of Schultes' OLPR complaint, respondent contacted Strom-Sell. He was upset at the complaint. He told Strom-Sell that when Schultes saw how well respondent had represented and would continue to represent her, she would withdraw her complaint. Respondent told Strom-Sell that he would not contact Schultes about the complaint, but would continue to work on her claim. Respondent requested Strom-Sell to sign an affidavit on his behalf.
40. In early May 2002, respondent filed Schultes' discrimination lawsuit. On or about June 5, 2002, the Schultes discrimination case settled for \$18,000.

Trust Account Misappropriation and Misrepresentation

41. Respondent misappropriated funds from at least three clients: (a) F.H. and M.H., (b) LR.M. and L.M., and (c) L.D.

F.H. and M.H. Matter

42. F.H. and M.H., husband and wife, retained respondent to represent them as sellers in a real estate transaction. During the fall of 2002, F.H. and M.H. gave respondent checks totaling \$18,000. One check was the earnest money check from the purchaser in the amount of \$5,000. The other check was a check F.H. and M.H. purchased from their credit union in the amount of \$13,000. Respondent was to use the funds to pay loans at the closing.
43. Respondent deposited the \$13,000 check into his TCF business account. Respondent attempted to deposit the \$5,000 check into his TCF business account, but the deposit was refused because of an incorrect endorsement on the check.
44. The closing occurred in December 2002. Respondent attended the closing on behalf of F.H. and M.H. On December 11, 2002, respondent wrote a check drawn on his TCF business account in the amount of \$15,210.42 made payable to Bayview Title. Bayview then immediately paid the third party loans owed by F.H. and M.H. Respondent's check to Bayview did not clear because there were insufficient funds in Respondent's TCF business account.
45. After the check was returned, Bayview contacted respondent. Respondent stated that when he wrote the check, respondent had not yet received the funds from F.H. and M.H. as he had expected, which caused respondent's check to bounce. This statement was false because respondent received his clients' checks before he wrote the check to Bayview.

46. On December 18, 2002, Bayview again tried to negotiate respondent's check. On that day respondent's TCF business account had a balance of \$1,826.60. TCF again returned the check due to insufficient funds.
47. On December 23, 2002, Bayview tried to negotiate the check a third time. On that day respondent's TCF business account had a balance of \$991.22. TCF again returned the check due to insufficient funds.
48. Bayview thereafter requested respondent to make good on his check. Respondent made multiple false statements about why he did not make payment, including the following:
 - a. Respondent told Bayview that a check for the full amount was in the mail. After Bayview did not receive a check, Bayview contacted respondent, who said the check was returned to respondent as undeliverable. Bayview confirmed with respondent that respondent had sent the check to the correct address, and respondent said he would send the check again. Respondent did not do so.
 - b. Respondent stated that he would wire transfer to Bayview the full amount he was to pay. After Bayview did not receive the funds, Bayview contacted respondent, who said the bank did not accept his wire transfer instructions and he would personally deliver to Bayview a check for the full amount the next day.

Respondent did not do so.
49. After December 11, 2002, F.H. and M.H. made multiple requests to respondent to return the balance of their funds (\$2,789.58). Respondent failed to do so until sometime in January, 2003, when respondent disbursed \$2,789.58 to F.H. and M.H. This payment was by check drawn on respondent's TCF business account.

50. In May 2003, respondent made two \$5,000 payments to Bayview. After Bayview's further efforts to obtain full payment were unsuccessful, Bayview filed a complaint with the Director. As part of that investigation, respondent's deposition was scheduled for September 9, 2003. On that day respondent finally paid the remaining balance he owed to Bayview, \$5,210.42.

51. On September 9, September 19, October 2 and October 7, 2003, the Director requested respondent to provide all documents memorializing respondent's receipt or handling of funds he received from F.H. and M.H. Respondent provided no such documents.

LR.M. and L.M. Matter

52. Respondent represented LR.M. and L.M. in a real estate dispute matter.

53. On or about December 6, 2002, the opposing party sent to respondent a settlement check made payable to respondent in the amount of \$5,600. LR.M. and L.M. were to receive \$2,500 of the settlement.

54. Respondent failed to deposit the \$5,600 into a trust account. Instead, on December 10, 2002, respondent deposited the \$5,600 check into his TCF business account. Respondent thereafter used the funds for his own purposes. At no time were any of LR.M. and L.M.'s funds placed into a trust account.

55. On March 24, 2003, respondent transferred \$2,500 from his personal checking account to his Wells Fargo trust account. That same day, respondent issued a \$2,500 check from his Wells Fargo trust account to LR.M. and L.M.

L.D. Matter

56. Respondent represented L.D. in a real estate litigation matter. On or about May 16, 2003, the opposing party sent to respondent a settlement check made payable to respondent in

the amount of \$2,500. L.D. was to receive \$2,000 of the settlement amount. Respondent deposited \$2,000 into his Wells Fargo trust account and kept \$500 in cash.

57. On May 19, 2003, respondent wrote a Wells Fargo trust account check for \$2,000 to L.D.
58. Between May 23 and 29, 2003, respondent wrote three checks on the Wells Fargo trust account made payable to himself totaling \$2,000. This left a balance in the account of \$344.31. By June 26, 2003, the balance in the Wells Fargo trust account was \$4.31 and the \$2,000 check to L.D. had not yet cleared. Respondent thereby misappropriated L.D.'s funds.
59. On June 26, 2003, L.D. received the \$2,000 Wells Fargo trust account check. L.D. negotiated the check on July 14, 2003, after respondent apparently deposited personal funds into the trust account.

Misappropriation, Commingling of Funds, Trust Account Overdrafts, and Failure to Maintain Business and Trust Account Books and Records

60. The following tracing of funds was possible only through review of records subpoenaed from the respective banks.
61. On March 3, 2003, a \$3,000 overdraft occurred on respondent's Wells Fargo trust account. Pursuant to Minn. R. Prof. Conduct (MRPC) 1.15(j)-(o), on March 5, 2003, the Director received notice of the overdraft.
62. On March 6, 2003, the Director requested respondent to explain, and to provide various trust account books and records related to the overdraft.
63. By letter dated March 24, 2003, respondent stated that the check causing the overdraft was attached and that the overdraft was the result of "checks deposited for payment of legal services [which] were returned," but that the "[c]lient provided a check that was good."

64. A copy of the check causing the overdraft was not enclosed with respondent's March 24 letter. In addition, other than three bank statements, respondent failed to provide any of his initial trust account books and records that had been requested.
65. Respondent thereafter failed to respond to several follow-up requests for information and documents. Accordingly, on May 15, 2003, a formal disciplinary investigation was initiated. Respondent failed to respond to the notice of investigation and failed to cooperate with the Director's investigation of the overdraft.
66. The Director audited respondent's trust accounts for the period June 2002 through September 2003. Although respondent did not provide all requested documents, the Director's review of respondent's books and records revealed that respondent had at least five separate accounts during the review period: (1) the Wells Fargo trust account, (2) a trust account at TCF National Bank, (3) a business account at TCF, (4) a personal account at TCF and (5) a personal account at Highland Bank.
67. During the review period, respondent issued and deposited insufficient funds checks between his client trust accounts, business account and personal accounts in order to take advantage of bank check clearing practices and thereby create temporary loans.
- Examples of respondent's check kiting include the following:
- a. On February 18, 2003, respondent deposited a \$1,000 TCF business account check into his Wells Fargo trust account. On that same day, respondent deposited \$1,000 from his Wells Fargo trust account into his TCF business account. The TCF check was returned for insufficient funds.

- b. In March 2003 respondent deposited \$4,000 from his TCF business account into his Wells Fargo trust account. Respondent did not have \$4,000 in his TCF business account.
 - c. Also in March 2003 respondent deposited a Wells Fargo trust account check into his TCF business account. The check was returned for insufficient funds.
68. In September 2003 respondent's deposition concerning his accounting practices took place in the Director's Office. During the deposition, respondent testified that he moves money between accounts because he has "a real cash flow problem" and deposits funds into accounts based upon which account needs funds in order for checks to clear.
69. On multiple occasions respondent paid out of his trust account more funds than the recipient was entitled to. Examples include the following:
- a. Respondent represented M.C. in a class action litigation matter. In December 2002 respondent received a check in the amount of \$42,507.03 for earned attorneys' fees in the matter. Respondent deposited the funds into his TCF trust account and disbursed \$21,253.51 to co-counsel. This left a balance of earned fees of \$21,253.52. Respondent then disbursed \$24,000 from the trust account to himself, thereby disbursing to himself \$2,746.48 more than he had earned.
 - b. Respondent received a check in the amount of \$600 from client J.O. On June 12, 2003, respondent deposited \$400 from the check into his trust account and took \$200 in cash. Without depositing into the trust account any additional funds attributed to J.O., on June 19, 2003, respondent wrote a check drawn on his Wells Fargo trust account to J.O. in the amount of \$600. Respondent thereby disbursed to J.O. \$200 more than J.O. was entitled to from the trust account.

70. On multiple occasions during the review period (June 2002 to September 2003), respondent's Wells Fargo trust account did not have sufficient funds to cover aggregate client balances.
71. On multiple occasions respondent deposited personal funds into his trust accounts, including earned income, loans from third parties and transfers from his personal and business accounts. Examples include:
- a. On February 18, February 25, and March 3, 2003, respondent deposited funds from his TCF business account into his Wells Fargo trust account. These funds were not client funds but were personal funds.
 - b. In March 2003 respondent deposited into his Wells Fargo trust account a check in the amount of \$5,000 from client C.F. The funds were earned fees which should not have been placed into the trust account.
 - c. In June 2003 respondent deposited a check in the amount of \$650 from the Star Tribune into a trust account. The funds were not client funds but were personal funds.
 - d. In June 2003 respondent deposited two checks, each in the amount of \$7,500, from Riley's Construction Services, Ltd., into a trust account. The funds were not client funds but were proceeds from a loan made to respondent.
72. During respondent's deposition, he also testified that since 2001 he has not maintained checkbook registers, client subsidiary ledgers and reconciliation reports; has not performed reconciliations of his accounts; and has not routinely kept the accounts' cancelled checks, deposit slips, bank statements or any other documents relating to the receipt or disbursement of funds.

73. Respondent failed to maintain records to show his receipt or handling of funds respondent received from or on behalf of clients. Examples include:
- a. During the fall of 2002, F.H. and M.H. gave checks totaling \$18,000 to respondent. Respondent has no records to show when he received the funds or into which account respondent deposited the funds. During his deposition, respondent testified that he does not know how much he received from F.H. and M.H.
 - b. In December 2002 respondent received a \$5,600 settlement check in the L.R.M. and L.M. matter. Respondent has no records to show when he received the settlement check or into which account he deposited the money.
 - c. In May 2003 respondent received a settlement check on behalf of client R.H. in the amount of \$7,500. Pursuant to the retainer agreement, respondent disbursed \$2,500 to himself and \$4,825 to R.H. These disbursements totaled \$7,325. Respondent has no records to establish if, when or to whom respondent disbursed the remaining \$175.
74. On multiple occasions respondent failed to date checks and failed to annotate deposit slips and checks with the name of the client on whose behalf the funds were being transacted.
75. As detailed below, respondent issued checks from his Wells Fargo IOLTA account to Jennifer Holtgren, his secretary. Holtgren wrote checks payable to respondent's IOLTA account. None of these monies were payments due Holtgren as a client or settlement monies Holtgren owed to a client. Rather, they were either payroll or part of a scheme of

short-term loans between respondent and Holtgren. Respondent did not stop this practice until his counsel advised him to.

Date	From	To	Exhibit (page)	\$ Amount
6/30/03	Jennifer Holtgren	Klein & White Trust Acct.	Exh. 10 (p. 89)	1,200.00
7/7/03	Jennifer Holtgren	Trust Acct Klein & White	Exh. 10 (p. 95)	3,000.00
7/9/03	Jennifer Holtgren	Klein & White Trust Acct.	Exh. 10 (p. 97)	2,000.00
7/10/03	Jennifer Holtgren	Klein & White Trust	Exh. 10 (p. 99)	4,000.00
7/10/03	Klein & White Trust Account (Wells Fargo)	Jennifer Holtgren	Exh. 10 (p. 100)	2,000.00
7/11/03	Jennifer Holtgren	Klein & White Trust	Exh. 10 (p. 102)	4,100.00
7/11/03	Klein & White Trust Account (Wells Fargo)	Jennifer Holtgren	Exh. 10 (p. 104)	8,600.00
8/5/03	Jennifer Holtgren	Klein & White Trust	Exh. 10 (p. 124)	2,000.00
8/5/03	Klein & White Trust Account (Wells Fargo)	Jennifer Holtgren	Exh. 10 (p. 125)	2,000.00
8/7/03	Jennifer Holtgren	Klein & White (Deposited into Wells Fargo IOLTA)	Exh. 10 (p. 129)	2,400.00
8/8/03	Klein & White Trust Account (Wells Fargo)	Jennifer Holtgren	Exh. 10 (p. 132)	2,400.00
8/11/03	Jennifer Holtgren	Klein & White (Deposited into Wells Fargo IOLTA)	Exh. 10 (p. 133)	460.00

8/28/03	Jennifer Holtgren	Klein & White (Deposited into Wells Fargo IOLTA)	Exh. 10 (p. 135)	3,500.00
8/28/03	Klein & White Trust Account (Wells Fargo)	Jennifer Holtgren	Exh. 10 (p. 136)	5,500.00
9/2/03	Jennifer Holtgren	Klein & White Trust	Exh. 10 (p. 140)	5,500.00
9/3/03	Klein & White Trust Account (Wells Fargo)	Jennifer Holtgren	Exh. 10 (p. 142)	5,500.00
9/15/03	Jennifer Holtgren	Klein/White Trust	Exh. 10 (p. 146)	11,000.00

76. As detailed below, respondent issued checks from his IOLTA accounts payable to himself, not his business account. The routing information on many of the checks indicate that the funds were deposited into a personal, not business, account. During this same period, respondent also issued checks from his IOLTA accounts made payable to Klein & White's business account.

Date	From	To	Exhibit (page)	\$ Amount
undated	Klein & White IOLTA Account (TCF)	Tom White	Exh. 9 (p. 6)	400.00
undated	Klein & White IOLTA Account (TCF)	Tom White	Exh. 9 (p. 7)	3000.00
12/30/02	Klein & White IOLTA Account (TCF)	Tom White	Exh. 9 (p. 8)	3000.00
7/19/02	Klein & White Trust Account (Norwest)	Tom White	Exh 10 (p. 15)	100.00
3/11/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 37)	2700.00

3/14/03	Klein & White IOLTA Account (TCF)	Tom White	Exh. 9 (p. 12)	3000.00
3/25/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 42)	1100.00
4/11/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 48)	3015.20
5/7/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 55)	2500.00
5/12/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 59)	800.00
5/23/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 64)	500.00
5/24/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 65)	500.00
5/29/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 66)	1000.00
6/2/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 69)	300.00
6/3/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 70)	40.00
6/10/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 72)	200.00
6/12/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 76)	400.00
6/19/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 80)	8000.00
6/20/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 84)	4400.00

6/25/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 85)	2000.00
6/26/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 86)	7500.00
7/1/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 92)	5000.00
7/3/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 94)	3000.00
7/8/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 96)	2000.00
7/9/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 98)	4000.00
7/11/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 103)	2000.00
7/14/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 106)	300.00
7/17/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 108)	600.00
7/26/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 111)	500.00
8/2/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 120)	200.00
8/4/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 126)	900.00
8/6/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 127)	2000.00
8/6/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 128)	1045.00

8/29/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 137)	3500.00
9/9/03	Klein & White Trust Account (Wells Fargo)	Tom White	Exh. 10 (p. 144)	60.00

Non-Cooperation with the Director's Investigation

77. On November 30, 2001, notice of investigation of Primm's complaint was mailed to respondent's counsel. The notice requested respondent to provide his complete written response within 14 days of the notice.
78. On December 14, 2001, respondent telephoned the Director's Office and requested an extension to December 28, 2001, to deliver his response to the Primm complaint. An Assistant Director informed respondent that his request was acceptable.
79. On December 28, 2001, respondent telephoned the Director's Office and stated that he would provide his response to Primm's complaint the following week. Respondent failed to do so.
80. On January 7, 2002, respondent telephoned the Director's Office and stated that respondent had prepared his response to Primm's complaint, wanted someone else to review it, and would deliver the response on Wednesday, January 9, 2002. Respondent failed to do so.
81. By letter dated January 14, 2002, the Director informed respondent that the Director had not yet received respondent's response to Primm's complaint and requested respondent to provide his response at that time.
82. On January 22, 2002, respondent telephoned the Director's Office and told an Assistant Director that the prior day respondent had "polished up" his response to Primm's

complaint and that respondent would deliver that response to the Director the next day.
Respondent failed to do so.

83. By letters dated January 24 and 31 and February 8, 2002, the Director informed respondent that the Director had received from respondent no response to Primm's complaint and again requested respondent to provide his complete written response to Primm's complaint. Respondent failed to do so.
84. On the morning of February 11, 2002, respondent telephoned the Director's Office and told an Assistant Director that respondent would deliver his response to Primm's complaint the next morning. Respondent failed to do so.
85. On the morning of February 14, 2002, an Assistant Director telephoned respondent. Respondent stated that he would fax that morning his letter of response to Primm's complaint and deliver later that day the documents that related to his response. Respondent failed to do so.
86. On the afternoon of February 14, respondent telephoned the Director's Office and told an Assistant Director that respondent had given his response to Primm's complaint to someone to fax, apparently that person did not have the correct fax number for the Director's Office, and respondent would send his response and documents that night by Federal Express. Respondent failed to do so.
87. On the morning of February 19, 2002, respondent telephoned the Director's Office and told an Assistant Director that the Director would receive respondent's response to Primm's complaint the next day. Respondent failed to provide any response.
88. By letter dated February 21, 2002, and sent by certified mail return receipt requested and by first class mail, the Director informed respondent that the Director had received no

response from respondent to Primm's complaint, requested respondent to provide at that time his complete written response to Primm's complaint, and stated that if the Director's Office did not receive respondent's complete written response on or before February 28, 2002, the Assistant Director handling the matter intended to then recommend to the Director that the Director issue charges of unprofessional conduct against respondent seeking public discipline for, among other things, his continuing failure to respond to Primm's complaint. Respondent failed to respond.

89. By letter to respondent's counsel regarding client Kaler's complaint dated March 18, 2002, the Director requested respondent to provide no later than April 1, 2002, certain information and documents. Respondent failed to respond.
90. On April 8, 2002, the Director mailed to respondent notice of investigation of Schultes' complaint. The notice requested respondent to provide his complete written response and entire client file regarding his representation of Schultes within seven days of the notice. Respondent failed to respond.
91. On May 1, 2002, the Director served on respondent charges of unprofessional conduct. The charges requested respondent to attend a pre-hearing meeting on May 7, 2002. Respondent appeared for the pre-hearing meeting, provided the information and documents requested in the Director's March 18, 2002, letter regarding the Kaler matter and provided his responses to the complaints of Primm and Schultes.
92. On March 5, 2003, the Director received notice of an overdraft on respondent's client trust account. By letter dated March 6, 2003, the Director requested respondent to provide information and documentation to explain the overdraft. By letter dated March 24, 2003, respondent provided information and some of the requested documents.

93. By letter dated April 2, 2003, the Director informed respondent that the Director had not received all of the documents requested in the Director's March 6 letter regarding the trust account overdraft and requested respondent to provide within 10 days. When respondent failed to respond, another request was sent on April 29, 2003. Respondent still did not provide the requested documents.
94. On May 5, 2003, respondent was mailed the notice of investigation of the Daune Thomas complaint, requesting his written response within seven days.
95. In a May 6, 2003, telephone conversation, respondent acknowledged receipt of the Thomas complaint and stated that his client file was with someone else. Respondent did not, however, state that he would be unable to respond timely to Thomas' complaint. Respondent, however, then failed to respond.
96. On May 15, 2003, the Director mailed to respondent notice of investigation of the trust account overdraft matter.
97. On May 16, 2003, respondent spoke with an Assistant Director by telephone about the trust account overdraft. Respondent indicated he would deliver the requested trust account information on May 19, 2003. Respondent appeared at the Director's Office on May 19 but failed to deliver any of the requested trust account information.
98. On May 21, 2003, the Director again requested that respondent provide the information relating to the trust account overdraft. Respondent failed to do so.
99. On May 27, 2003, the Director again requested that respondent submit a written response to the Thomas complaint. Respondent failed to do so.

100. On May 29, 2003, respondent spoke with an Assistant Director by telephone. Respondent promised to deliver all of the information regarding the trust account matter and his response to the Thomas complaint on May 30, 2003. Respondent failed to do so.
101. On June 2, 2003, respondent spoke by telephone with an Assistant Director. Respondent stated that he would deliver his response to Thomas' complaint on June 2 or send his response by overnight mail. Respondent failed to do so.
102. On June 9, 2003, respondent spoke by telephone with an Assistant Director. Respondent stated that he would deliver the trust account information on June 10, 2003. Respondent failed to do so.
103. On June 11, 2003, respondent was again requested to provide the trust account information. The June 11 letter also advised respondent that if the information was not received by June 18, 2003, the Director intended to subpoena respondent's trust account bank records and assess the cost of obtaining the bank records to respondent. Respondent did not provide the trust account information.
104. On June 19, 2003, respondent was advised that he could avoid the cost of subpoenaing his bank records by executing and returning a bank authorization. Respondent failed to do so.
105. On June 26, 2003, the Director served respondent with a notice of deposition relating to a subpoena issued to respondent's bank to obtain respondent's trust account records.
106. On July 11, 2003, respondent spoke by telephone with an Assistant Director. Respondent asked if the deposition and subpoena could be avoided if respondent provided the requested trust account books and records. Respondent promised to deliver all of the

- documents regarding the trust account matter as well as his response to the Thomas complaint on the following Monday morning. Respondent failed to do so.
107. On July 15, 2003, respondent spoke by telephone with an Assistant Director. Respondent promised to deliver the trust account information and his response to the Thomas complaint the next afternoon. Respondent failed to do so.
 108. On July 30, 2003, respondent telephoned the Director's Office and promised to deliver the trust account information and the Thomas response the next day, between 11:30 a.m. and noon. Respondent failed to do so.
 109. On July 31, 2003, respondent spoke with an Assistant Director by telephone and again promised to deliver the requested information the next day.
 110. On August 4, 2003, respondent spoke by telephone with an Assistant Director. Respondent promised to deliver the trust account information and his response to the Thomas complaint the following day, between 11:30 a.m. and noon. Respondent failed to do so.
 111. On the morning of August 5, 2003, respondent spoke by telephone with an Assistant Director. Respondent promised to deliver later that day the trust account information and the Thomas response. Respondent failed to do so.
 112. On August 6, 2003, respondent again spoke by telephone with an Assistant Director. Respondent stated that the next day, he would deliver the trust account information and the Thomas response. Respondent failed to do so.
 113. On August 14, 2003, respondent provided his written response to the Thomas complaint, and some of the documents requested in the trust account matter.

114. On August 15, 2003, the Director requested respondent to provide a written explanation for the July 10, 11, and 17, 2003, overdrafts on respondent's Wells Fargo client trust account. Respondent failed to respond.
115. During respondent's September 9, 2003, deposition, respondent agreed to provide the Director with certain documents. The Director continued the deposition until September 16, 2003, to allow respondent to produce the documents.
116. On September 16, 2003, respondent appeared for the deposition but stated that he had forgotten the documents. Respondent promised to deliver the documents the next day, but failed to do so.
117. On September 19, 2003, respondent was again asked to provide the documents promised at the deposition. On September 29, 2003, respondent was requested to provide copies of court documents and correspondence in the Thomas matter. Respondent failed to respond.
118. On October 2 and 7, 2003, respondent was requested to provide the deposition documents and the Thomas documents. On October 15, 2003, respondent provided some, but not all, of the requested information and documents.

Failure to File and Pay Individual Income and Employer Withholding Taxes

119. During the Director's investigation of respondent's mishandling of client funds, the Director learned that respondent had failed to file tax returns timely and failed to pay taxes.
120. Respondent failed to timely file federal individual income tax returns for tax years 1997 through 2002.

121. Respondent failed to pay federal individual income taxes due and owing for tax years 1997 through 2002. As of November 7, 2003, respondent owed taxes, penalties and interest totaling at least \$93,682.56 as follows:

Tax Year	Amount Owed
1997	\$15,156.60
1998	\$21,008.21
1999	\$23,191.78
2000	\$ 2,545.97
2001	\$ 5,312.00
2002	\$26,468.00

122. Respondent failed to file federal employer withholding tax returns for all tax periods from April 1, 2000 to December 4, 2003, although required by law to do so.
123. Respondent failed to pay federal employer withholding taxes due and owing since the last quarter of 1999. Through November 7, 2003, respondent owed withholding taxes, penalties and interest totaling at least \$12,159.
124. Respondent failed to timely file Minnesota individual income tax returns for tax years 2001 and 2002, although required by law to do so.
125. Respondent failed to pay Minnesota individual income taxes due and owing for tax years 1999, 2001 and 2002. As of November 17, 2003, respondent owed \$6,735.24.
126. Respondent failed to timely file or pay Minnesota employer withholding tax returns for all tax periods from January 1, 2000, through December 31, 2002. Respondent filed these returns on October 3, 2003. Through December 12, 2003, respondent owed withholding taxes, penalties and interest totaling at least \$8,000.40.

Respondent's Mitigation Claims

Professional Activities and Personal History

127. In 1995, respondent helped to set up the Housing Discrimination Law Project at the Legal Aid Society of Minneapolis.
128. Respondent received the WCCO "Good Neighbor" award.
129. Respondent has specialized in real estate law and taught at several related continuing legal education courses and written newspaper articles on residential landlord-tenant law.
130. Respondent is a bright, personable individual who worked his way through law school, graduating with high honors. He is married to a lawyer (his law partner). They have two children, one of whom has been diagnosed with Asperger Syndrome.

Dysthymia

131. On September 3, 2003 respondent saw psychologist Thomas L. Alberg, Ph.D., for a psychological evaluation. Respondent did this at the request his counsel at the time.
132. Alberg administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2).
133. Based upon the results of the MMPI-2 and his consultations with respondent, Alberg diagnosed respondent with Dysthymic Disorder.
134. Dysthymic Disorder is a severe mood disorder frequently demonstrated by fatigue, procrastination, and poor decision making notwithstanding the cognitive ability to know what one is doing.
135. Respondent is in counseling with Alberg, who has made certain practical recommendations to respondent concerning his professional practices. Respondent's compliance with the recommendations has been inconsistent.
136. Respondent lacks insight into his condition.

137. Respondent's neglect of the Primm matter, failure to timely file tax returns, failure to maintain trust account books and records, and failure to cooperate with the Director's investigation is consistent with respondent's diagnosis of dysthymia.
138. Respondent's misappropriation of client funds is not caused by his dysthymia.
139. Improvement in respondent's conduct is highly questionable in light of his failure to comply with the referee's directive for filing of proposed findings and briefs at the close of the hearing.
140. Even with professional counseling, respondent's lack of diligence may recur, though with less frequency and severity.

Aggravation

Prior Disciplinary History

141. On August 24, 1994, respondent was issued an admonition for failing to advise opposing counsel of respondent's *ex parte* contact with a judge.
142. On December 16, 1999, respondent was issued an admonition for neglect of a legal matter and failing to communicate adequately with a client.
143. Respondent's current neglect is consistent with respondent's neglect for which he received an admonition previously.

Post-Hearing Misrepresentation and Lack of Diligence

144. At the close of the hearing, the referee ordered the parties to submit proposed findings and briefs by February 6, 2004. The parties were to submit their documents by mail or email. Respondent did not submit documents by February 26, 2004.
145. On February 9, 2004, respondent left a voice mail message for the referee's law clerk. In that message, he stated that he sent his brief and Proposed Findings of Fact, Conclusions

- of Law and Recommendation for Discipline by email to the referee on February 6, 2004. He further stated in his message that he had received an email message indicating that his email had been returned as undeliverable.
146. On February 9, 2004, the referee's law clerk sent an email to twhite@kleinandwhite.com, the address respondent provided in his voice mail message. In that message, the referee's law clerk provided the referee's email address. The referee did not receive an email message from respondent.
147. On February 10, 2004, the referee's law clerk telephoned respondent's office to confirm that respondent had received the email. Respondent stated that he had, and that he would send his documents by fax and email "shortly." The referee did not receive any documents or further communication from respondent.
148. On February 17, the referee's law clerk sent a letter to respondent's office seeking respondent's documents and providing the referee's mail and email addresses. Respondent did not respond to that letter.
149. Some or all of respondent's misconduct in each of the matters addressed above, including all of the misappropriation, occurred while he was under investigation, the subject of charges, or after the petition in this matter was filed.

CONCLUSIONS OF LAW

1. Respondent's misrepresentations, neglect and failure to communicate in the Primm matter violated Minn. R. Prof'l Conduct (MRPC) 1.3 (lack of diligence), 1.4 (failure to comply with client's reasonable requests for information), 4.1 (false statements of fact or law), and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (conduct that is prejudicial to the administration of justice).

2. Respondent's handling of the Schultes matter did not violate MRPC 1.2(a) (unauthorized settlement), 4.1 (false statements of fact or law), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) or 8.4(d) (conduct that is prejudicial to the administration of justice). Respondent did not attempt to coerce Schultes to withdraw a professional responsibility complaint against him.
3. Respondent's misappropriation and misrepresentations regarding misappropriation violated MRPC 1.15(a) (commingling of funds), and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The Director has not shown that this conduct violated MRPC 8.4(d) (conduct that is prejudicial to the administration of justice).
4. Respondent's additional trust account shortages, trust account misappropriation, commingling of funds, trust account overdrafts, failure to maintain account books and records, and misrepresentations violated MRPC 1.15(a) (commingling of funds), 1.15(c)(3) (failure to maintain records of client property), and 1.15(h) as further interpreted by Lawyers Professional Responsibility Board Opinion No. 9 (failure to maintain account books and records). This conduct also violated MRPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The Director has not demonstrated that this conduct violated MRPC 1.15(b) (failure to withdraw from trust earned fees and other non-client monies within a reasonable period of time and provide notice and accounting to clients).
5. Respondent's failure to cooperate with the Director's investigation is a violation of R. Lawyers Prof'l Responsibility (RLPR) 25 (duty of lawyer under investigation to cooperate with the investigation).

6. Respondent's failure to timely file and pay individual income and employer withholding taxes violated the Minnesota Supreme Court's decision in *In re Bunker*, 199 N.W.2d 628 (Minn. 1972). This conduct is also a violation of MRPC 8.4(d) (conduct that is prejudicial to the administration of justice).
7. Respondent's professional activities are not a mitigating factor. Those services are no more than many other members of the bar perform.
8. Evaluated in light of *In re Weyhrich*, 339 N.W. 2d (274, 279-9 (Minn. 1983), respondent has not established his dysthymia as a mitigating factor.
9. Respondent's prior discipline aggravates respondent's current misconduct.
10. Respondent's continuation of misconduct while under investigation and after the petition was filed aggravates his misconduct.

RECOMMENDATION FOR DISCIPLINE

1. Respondent be disbarred.
2. Respondent be ordered to comply with the requirements of RLPR 26.
3. Respondent be ordered to pay to the Director \$900 in costs, plus disbursements, pursuant to RLPR 24.

Dated:

February 24, 2004


JOHN C. LINDSTROM
SUPREME COURT REFEREE