

FILE NO. A05-389

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary  
Action against GARY K. WOOD,  
a Minnesota Attorney,  
Registration No. 118722.

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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDATION  
AS TO DISCIPLINE**

The above-captioned matter came on for hearing before the undersigned referee, appointed by the Minnesota Supreme Court, on September 23, 2005, in the Minnesota Judicial Center, St. Paul, Minnesota. Martin Cole, First Assistant Director, appeared for the Office of Lawyers Professional Responsibility (hereinafter the Director).

Respondent Gary Wood appeared *pro se* and was present throughout the proceedings.

The Director called one live witness, David Espeland, to testify. Respondent testified in his own behalf. The parties submitted a stipulation as to the testimony of two additional witnesses, Shahram Vafaei-Makhsos and Enayat Vafaei-Makhsos, and Respondent made an offer of proof as to the testimony of David Wilson, which was accepted. The parties introduced 25 exhibits, which included the stipulation as to testimony identified above, and a "Statement of Uncontested Facts" offered by Respondent. The parties were permitted to submit proposed findings and written argument; they had previously submitted legal briefs to the Supreme Court, which were considered as well.

Based upon the evidence received, including credibility determinations where appropriate, and Respondent's admissions, the stipulation of the parties and the exhibits and briefs 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 on October 21, 1977. For most of his career, Respondent practiced primarily in the area of personal injury litigation. Respondent currently is employed by a law firm that operates under the trade name Advocacy Alliance LLC (now Wilson Zimmer LLC). The firm primarily practices in the area of immigration law; Respondent handles matters for the firm other than immigration matters that may arise out of the practice.

### David Espeland Matter

2. In January 1999 David Espeland first retained Respondent to represent him in civil matters arising out of Espeland's real estate and landlord holdings.

3. Respondent subsequently represented Espeland in several matters between 1999 and 2001, some of which involved issues pertaining to Espeland's personal business and others pertaining to matters on behalf of Cedar Associates, a business of which Espeland was a principal. Respondent also represented Espeland in the dissolution of Cedar Associates. Respondent did not differentiate between some or all of Respondent's personal matters and those of Cedar Associates, for recordkeeping or billing purposes. Espeland was not aware of this fact.

4. On July 16, 1999, Respondent and Espeland met at a bank after a closing at which Espeland received a large sum of money. Due to Respondent's financial problems, more specifically a foreclosure proceeding against Respondent's home, Respondent requested and Espeland agreed to loan to Respondent \$20,644.96.

5. Respondent drafted and signed a handwritten promissory note confirming his receipt of the funds and stating that the note was payable on demand with interest at the rate of ten percent, within 30 days if Respondent failed to diligently seek refinancing through an approved lender. The note also represented that the loan was to be secured by "all vehicles, account receivables, advanced case costs, fees, and the equity in the above described real estate."

6. In fact, Respondent was then the Petitioner in a previously filed Chapter 13 bankruptcy proceeding. This fact was not disclosed to Espeland. No security interest was perfected by Respondent.

7. Both Respondent and Espeland understood this transaction to be a short term loan (30 to 90 days), which would be repaid in full when Respondent secured refinancing on his home, and that Espeland was "guaranteed his money."

8. Respondent did not advise Espeland in person or in writing that he should seek independent counsel regarding the transaction or give Espeland sufficient opportunity to seek the advice of independent counsel. There was no independent written consent from Espeland.

9. Respondent did not secure refinancing that would allow him to pay the funds owed to Espeland within 90 days. Respondent did secure financing in September 2000, but states that this only covered the mortgage amount and that no equity was taken as cash. Thus, Respondent failed to pay any funds to Espeland at the time.

10. In April 2002 Espeland sent a written demand letter to Respondent seeking repayment on the loan. Respondent met with Espeland to explain his financial situation, but no payments were made. In 2003, Respondent transferred title of his home to his daughter, who refinanced the home at a lower interest rate but without additional principal being disbursed.

11. On April 2, 2004, Espeland filed a complaint against Respondent with the Director's Office.

12. On April 27, 2004, in response to Espeland's complaint, Respondent sent to the Director and Espeland an invoice illustrating that Respondent purportedly applied the amount of the loan from Espeland as a credit towards legal services provided by Respondent for Espeland but also for litigation matters concerning Cedar Associates. There was no prior agreement between Espeland and Respondent for repayment in this manner, and Espeland was not aware prior to April 2004 that Respondent was repaying against the amount owed to Espeland in this manner.

Further, Espeland was not solely authorized to approve repayment of a personal loan from billings to Cedar Associates.

13. Since April 2004, Respondent has made promises to Espeland to commence monthly payments in repayment of the loan, but to date has not in fact made any payments. The full amount of the loan principal plus interest remains due, subject to Respondent's offset claim, but has not been reduced to judgment. At the hearing, Respondent agreed that he waived any usury claim that might allow him to not repay the loan.

**Shahram Vafaei-Makhsos and Enayat Vafaei-Makhsos Matters**

14. Respondent represented Enayat Vafaei-Makhsos and his son Shahram (Mostafa) Vafaei-Makhsos in several matters. Respondent appears to have handled most of these matters properly.

15. In the latter half of 2001, Shahram asked Respondent to represent him regarding an escrow held by West Title Company. Respondent agreed to work on resolving the title issues so the escrow could be released.

16. Respondent failed to take any action on the West Title matter as agreed.

17. On February 14, 2002, Shahram called Respondent regarding his progress on the West Title matter. Respondent failed to return Shahram's call.

18. On September 6, 2002, Shahram called Respondent for a status update on the West Title matter. Respondent failed to return Shahram's call. Shahram then discharged Respondent on this matter.

19. Respondent represented Enayat Vafaei-Makhsos in an insurance claim arising from a fire that took place on one of Enayat's properties. There were discovery disputes in the matter, some of which involved requests for Enayat's tax returns. Respondent failed to inform Enayat there was a hearing on April 2, 2002, on opposing counsel's motion to compel answers to discovery. Respondent attended the hearing without his client. Respondent asserted at the present hearing that he did inform

Enayat of this motion hearing, but was unable to produce a purported letter to that effect, and this testimony is discounted.

20. On July 1, 2002, due to a failure to produce all documents requested in the first motion to compel, there was a hearing on opposing counsel's second motion to compel. Respondent and Enayat were in attendance. During the hearing Respondent stated:

I have to admit and I will admit to Your Honor that most of the documents that I've provided to [opposing counsel] could have been produced to him much sooner. I was neglectful in accomplishing that and I apologize for that. He certainly shouldn't have to file a motion to compel in order to produce records that I can produce.

Respondent alleges that he so admitted in order to distract the court from the fact that his client had not filed income tax returns sought to be discovered by opposing counsel.

21. There is no evidence that Respondent otherwise mishandled Enayat's legal matter.

#### **Non-Cooperation**

22. On June 6, 2003, the Director received a complaint against Respondent from Donald Ziebart alleging that Respondent failed to turn over to Ziebart a \$25,000 check from the sale of one of Ziebart's properties.

23. On June 9, 2003, the Director sent Respondent a notice of investigation regarding Ziebart's complaint. The notice requested Respondent to meet with the Director at the Director's Office on June 24, 2003, and requested Respondent submit a written response in the Ziebart matter prior to the June 24 meeting.

24. On June 24, 2003, Respondent met with the Director as scheduled but failed to provide a response to the Ziebart complaint prior to or during the June 24 meeting. The Director informed Respondent of his continuing obligation to provide a written response to the complaint and Respondent agreed to provide one.

25. On July 11, 2003, the Director wrote Respondent requesting a response to Ziebart's complaint within 10 days. Respondent failed to respond to the Director's July 11 letter.

26. On July 31, 2003, the Director wrote Respondent requesting he immediately provide a response to the Ziebart complaint. Respondent failed to respond to the Director's July 31 letter.

27. On August 21, 2003, the Director wrote Respondent requesting he immediately respond to the Ziebart complaint. Respondent failed to respond to the Director's August 21 letter.

28. On September 26, 2003, the Director wrote Respondent requesting he provide his response to the Ziebart complaint no later than October 3, 2003. The September 26 letter was sent by certified mail and also requested that Respondent meet with the Director on October 8, 2003.

29. On October 5, 2003, Respondent faxed to the Director a response to the Ziebart complaint.

30. On October 8, 2003, Respondent met with the Director. During this meeting Respondent agreed to provide additional documents and information including billing statements regarding the Ziebart matter by October 13, 2003. Respondent failed to provide the requested information and documents.

31. On October 16, 2003, the Director wrote Respondent requesting he immediately provide the information and documents requested during the October 8 meeting.

32. On October 30, 2003, Respondent provided the billing statements and documents previously requested by the Director. Respondent's billing statements indicated that he performed a substantial amount of work on behalf of Ziebart on a number of legal matters resulting in attorney's fees of approximately \$25,000. Although Ziebart believes Respondent's fee was excessive, the Director is unable to determine the

exact amount of fees Respondent is entitled to for his multiple representations of Ziebart, or the exact amount of any refund to which Ziebart may be entitled.

### **Aggravating and Mitigating Factors**

33. Respondent has been privately disciplined on six previous occasions:

a. On October 23, 1987, Respondent was issued an admonition for failing to pursue a workers' compensation matter and failing to respond to a client's telephone calls.

b. On September 13, 1996, Respondent was issued an admonition for client neglect and non-communication.

c. On March 28, 2000, Respondent entered into a stipulation for private probation for endorsing settlement checks without permission from his law firm; failing to maintain required trust account books and records; failing to provide an accounting for money withheld from a settlement; failing to diligently pursue a client matter; practicing law while on restricted status; failing to pay a professionally-incurred debt; and failing to cooperate in a disciplinary investigation.

d. On April 16, 2001, Respondent entered into a stipulation to extend his private probation for failing to pay a professionally-incurred debt.

e. On March 25, 2003, Respondent was issued an admonition for failing to diligently pursue a client matter.

f. On February 26, 2004, Respondent was issued an admonition for failing to diligently pursue a client matter and failing to communicate with his client.

34. Respondent has been an active participant in Lawyers Concerned for Lawyers (LCL), primarily attending due to issues of depression, not chemical dependency. Respondent acknowledges that any psychological problems are not causally connected to his misconduct in this present proceeding.

## CONCLUSIONS OF LAW

1. Respondent's conduct in the Espeland matter violated Rule 1.8(a), Minnesota Rules of Professional Conduct (MRPC). Respondent's conduct is aggravated by his failure to take reasonable steps to repay the loan.
2. Respondent's conduct in the Makhsoos matters violated Rules 1.3, 1.4, and 3.2, MRPC.
3. Respondent's non-cooperation with the Director's Office in the Ziebart matter violated Rule 8.1(a)(3), MRPC, and Rule 25, Rules on Lawyers Professional Responsibility (RLPR).
4. Respondent's conduct is aggravated by his prior disciplinary history.
5. Respondent presented no proven mitigation.
6. The Court has considered other cases involving uncounseled loans from clients, including In re Eisbach, 577 N.W.2d 479 (Minn. 1997), and In re Henderson, 464 N.W.2d 722 (Minn. 1991).

While the discipline in those cases did not rise to the level of suspension, the present case is significantly aggravated. First, Respondent tardily and without prior warning raised an offset claim to the loan liability. Secondly, two other disciplinary matters are contemporaneously found. Finally, Respondent has had six prior private disciplinary sanctions.

## RECOMMENDATIONS

1. That Respondent Gary K. Wood 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 six months from the date of the Court's decision.
3. That the requirements of Rule 18 (a)-(e), 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.

6. That as a condition for reinstatement, Respondent shall present a plan for repayment of the loan to Espeland, including a method to determine the amount due and owing. After any reinstatement, continued payments to Espeland should be required and monitored. In addition, Respondent should be monitored by another attorney.

Dated: October 3, 2005

  
B.W. CHRISTOPHERSON  
REFEREE