FILE NO. A19-1049

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against PERRY A. BERG, a Minnesota Attorney, Registration No. 0135999.

REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION FOR DISCIPLINE, AND MEMORANDUM

The above-entitled matter came before the Honorable Gail Chang Bohr acting as Referee by appointment of the Minnesota Supreme Court filed September 16, 2019 for hearing on January 7, 2020.

Keshini Ratnayake, Senior Assistant Director, appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Eric T. Cooperstein appeared on behalf of Perry Berg (Respondent), who was personally present throughout the proceedings.

The hearing was conducted on the Director's Petition for Disciplinary Action ("petition"), dated July 8, 2019 and filed with the Minnesota Supreme Court on July 9, 2019. The Director's exhibits 1-41 were received into evidence. Respondent's exhibits 51-57 were received into evidence.

The Director presented testimony from Joseph A. Sampson and Respondent. Respondent testified on his own behalf and presented the testimony of William Tuttle, William Hoversten, and Steven Johnson as character witnesses.

The parties were directed to simultaneously submit proposed findings of fact, conclusions of law, recommendation for appropriate discipline, and a brief, on or before

January 17, 2020. The parties agreed to forego reply briefs. The Referee's findings of fact, conclusions of law, and recommendation were due to the Supreme Court on January 31, 2020. An extended deadline was requested by the Referee because of family emergencies and the new date is February 28, 2020.

In his answer to the petition and during his testimony, Respondent admitted certain factual allegations and rule violations and denied others. The findings and conclusions made below are based upon Respondent's admissions, the documentary evidence that the parties submitted, the testimony presented, the demeanor and credibility of Respondent and the other witnesses as determined by the undersigned, and the reasonable inferences to be drawn from the documents and testimony.

Based upon the testimony, exhibits, arguments of counsel, briefs, and all the files and records herein, the undersigned Referee makes the following:

FINDINGS OF FACT

1. Respondent graduated from William Mitchell College of Law in 1982 and was admitted to practice law in Minnesota on May 7, 1982. Respondent has spent his entire legal career practicing law in Waseca, Minnesota. Respondent's practice includes representing clients predominantly in bankruptcy, collections, and family law matters.

2. Complainant Joseph Sampson (Sampson) was the owner and president of Sampson's Dairy Foods, Inc. (SDF), a dairy-hauling business that operated in southern Minnesota. Kemps LLC (Kemps) provided dairy products to Sampson for distribution. Sampson had distributed for Kemps for about 36 years and then stopped for a period of time. Sampson started distributing again for Kemps in December 2011.

3. In May 2012, on the recommendation of another Waseca law firm, Sampson met with Respondent to review his assets and liabilities to determine whether filing bankruptcy was a feasible option. Based on Sampson's own valuation of his real estate and equipment holdings at the time, Respondent advised Sampson that bankruptcy was not a viable remedy for him because the value of his assets well-exceeded the amount of his liabilities and more than likely the bankruptcy trustee would sell off the assets to satisfy those liabilities.

4. Sampson had several follow-up calls with Respondent in 2013. Respondent billed Sampson $500 for their consultations, which Sampson paid. (Ex. 2).

5. On September 19, 2014, Kemps sued Sampson and SDF to collect over $300,000 that Kemps claimed they were owed. (Ex. 3). Kemps joined Americana Community Bank (Americana) as a defendant because Americana held a security interest in certain SDF assets. With the lawsuit, Kemps filed expedited motion for claim and delivery seeking immediate possession of certain property of Sampson and of SDF. (Ex. 4). The expedited motion hearing was scheduled for September 24, 2014.

6. Sampson contacted Respondent to assist him with the lawsuit. Sampson alleged that the company had engaged in unfair business practices that cost him more than $2 million. (Sampson testimony). Respondent advised Sampson that the counterclaim was compulsory and was required to be brought as part of his lawsuit with Kemps. (Ex. 16). Sampson testified that he believed Kemps had stopped a potential buyer of Sampson's business from completing the sale which significantly cost Sampson.

7. Respondent advised Sampson he would not represent him in the counterclaim

but he would draft the counterclaim to preserve the issue for him. (Ex. 16). Respondent referred Sampson to several attorneys who all declined to represent him. (Exs. 1, 9). Respondent appeared in court with Sampson on September 24, 2014. Attorneys for Kemps, Americana Bank, and Sampson discussed to whom SDF's accounts receivable belonged and what debts the funds could be used to pay, including potentially Respondent's attorney fees. The attorneys agreed that, pending the result of the litigation, an escrow account should be created to hold the receivables collected by SDF and the proceeds of any property sold by SDF.

8. The Court approved the parties' agreement and issued its Order for Claim and Delivery on September 26, 2014. The Order directed that "Proceeds of all of Sampson's Dairy's accounts receivable relating to Produce and/or Products that Sampson's Dairy sold after June 26, 2014 may be collected by Sampson's Dairy and shall be deposited into the trust account of Patton Hoversten & Berg P.A. and held pending further order of this Court or agreement between Sampson's Dairy, Kemps, and Americana Community Bank." (Ex. 6).

9. Respondent opened an escrow account with Bremer Bank in the name of his law firm on behalf of Sampson Dairy Foods, Inc. (Ex. 7). An initial deposit of $14,831.36 was made on September 30, 2014. Additional deposits were made in October and November, bringing the balance to $40,144.13. (*Id.* at 51).

10. Sampson did not have the funds needed to pay ongoing litigation costs and Respondent's law firm was unwilling to represent Sampson regarding his counterclaims on a contingency basis. Respondent testified that Sampson did not provide Respondent with any documentation regarding his claims and did not have any witnesses who could support his allegations. Respondent informed Sampson that Respondent believed that Sampson's

counterclaim would be difficult to prove because it would be hard to establish that Kemps stopped the sale of Sampson's business.

11. Respondent agreed to prepare and file an Answer on Sampson's behalf so that Sampson would not be in default. He agreed to include the counterclaims to preserve them and Sampson would have additional time to retain another law firm. Sampson did not retain another lawyer to represent him on the counterclaims. Respondent continued representing Sampson and SDF in the lawsuit.

12. On October 27, 2014, Respondent drafted and served an Answer and Counterclaim. (Ex. 10). In its civil complaint, Kemps identified SDF as a wholesale product dealer. (Ex.. 3, p. 3, para. 2). Sampson asserted that SDF operated under a retail license. In the Answer, Respondent denied that SDF was a wholesale product dealer. (Ex. 10, p. 2, para. 3; ex.51 at 3). A wholesale product dealer has different regulations and remedies from a retail dealer under the Minnesota Department of Agriculture license.

13. No evidence was presented that the district court issued any orders determining that SDF was a wholesale product dealer nor did it adjudicate any rights of Sampson or his business on that basis.

14. Respondent understood that representation would be transferred to a new firm as soon as possible based on when Sampson was able to find a firm to represent him in the counterclaims. On December 16, 2014, Respondent prepared a representation agreement in which Respondent confirmed his prior discussion with Sampson that he would not represent SDF regarding the counterclaims and that Sampson would need alternate counsel to pursue those claims. (Ex. 16). Sampson signed the agreement.

15. Respondent's retainer agreement that Sampson signed also stated: "You hereby authorize us to pay any balance due us out of the funds before transferring the remainder to you." (Ex. 16 at 3).

16. On October 9, 2014, Kemps' attorney filed a Certificate of Representation with the court that listed Respondent as counsel for Sampson. (Ex. 8). Respondent and Sampson continued to seek counsel for representation on the counterclaim but were unsuccessful. (Exs.1, 9).

17. Respondent sent Sampson invoices for the services he provided, which included drafting and serving the Answer and Counterclaim. Respondent testified he had considered filing the Answer and Counterclaim in district court but because Sampson had not paid his outstanding bill, Respondent decided to wait and put the pleading, with a check made out to Steele County Court Administration, dated October 24, 2014 in the amount of $327, that Respondent's staff had prepared, in his file. (Resp. Test., Ex. 51). The check that had been issued but not mailed was entered by Respondent's staff as an expense on the invoice for that month. (Ex. 2, at 7). The fee was included with the funds that Respondent distributed to his law firm from the escrow account in December 2016. Those funds were returned to the escrow account in December 2017. In the final distribution of funds from the escrow account in September 2018, Respondent distributed to his law firm a portion of Sampson's outstanding balance. The funds did not specifically designate the filing fee as being paid.

18. Sampson testified that he had received invoices from Respondent for Respondent's services and that he had not questioned or contested any of the entries on those invoices. Sampson did not pay the invoices.

19. On November 3, 2014, the IRS served Respondent with a levy on the funds in the SDF escrow account. (Ex. 12). The levy included a statement that SDF had unpaid taxes, primarily unpaid employee withholding taxes and penalties, of $182,913.73.

20. In response to the IRS, Kemps claimed its interest in the escrow funds superseded the IRS' interest. (Ex. 13). The IRS directed Respondent to withhold dispersing the funds while the IRS attempted to clarify the issue, which the IRS officer anticipated might take up to 60 days. (Ex. 14). There is no evidence that Respondent received any further communications from the IRS regarding the escrow funds.

21. On April 21, 2015, in preparation for an upcoming mediation, Respondent wrote to the mediator and argued Sampson's position regarding both the Answer and Counterclaim. (Ex. 17). The counterclaim was discussed at the mediation as well. The case did not settle at mediation.

22. On July 2, 2015, Respondent informed Sampson that "if a substantial payment is not made by July 17, 2015, our firm will withdraw from representation of Sampson Dairy and you and your wife." (Ex. 18). Respondent also stated with regard to the counterclaim, "Our firm has advised you that we are doing the minimum necessary to preserve that claim while you have sought out other law firms to represent you on a contingency basis. You have met with many attorneys, some that I have referred you to and none have agreed to represent you or Sampson's on that claim." (*Id.*)

23. Respondent's letter advised Sampson of his options for defending or settling the lawsuit as well as seeking bankruptcy protection. Respondent did not inform Sampson that although he served the Answer and counterclaim on Kemps, he had not filed them with the

court. Respondent did not file the Answer and counterclaim because he was withdrawing from the case. A counterclaim is commenced when it is served. *See Dolly v. Nichols*, 386 N.W. 2d 261, 263 (Minn. App. 1986).

24. Respondent did not tell Sampson that Sampson needed to file the Answer and counterclaim.

25. On July 17, 2015, Respondent filed a Notice of Withdrawal with the court. (Ex. 19). The notice stated in part, "A copy of this Notice has been served upon the parties through their counsel and pending any substitution of counsel the Defendants may be served at: Sampson's Dairy Foods, Inc. c/o Joseph Sampson . . ." (*Id.*) Sampson assumed representation of himself and did not obtain counsel for SDF.

26. On July 30, 2015, Kemps filed a Motion for Summary Judgment. (Ex. 20). Sampson appeared on his own behalf at the hearing on October 23, 2015. The counterclaim against Kemps was not in his individual capacity. SDF was not represented. On January 11, 2016, the court granted partial summary judgment for Kemps on two of its five counts but reserved the issue of damages for trial. The court declined to address the counterclaims on the basis that they had never been filed. The court's order stated, "Defendant Sampson Dairy never filed its counterclaim, so summary judgment is unnecessary for any alleged counterclaims." (Ex. 21).

27. On March 4, 2016, Sampson filed the Answer and counterclaim that Respondent had served in October 2014. On March 21, 2016, Kemps objected to Sampson's filings as untimely and, prior to the April 13, 2016 trial date, the court dismissed Sampson's counterclaims with prejudice because they had not been timely filed. (Ex. 25).

28. On April 11, 2016, Respondent recorded Notices of Attorney Lien against Sampson's real property in Steele and Freeborn counties. (Ex. 26). Respondent asserted a lien of $24,741.36 for unpaid legal fees and costs. Respondent served copies of the filed lien notices on Sampson by certified mail on April 25 and April 27, 2016. (*Id.*) The amount of the lien included the $327 filing fee which was not incurred.

29. On April 18, 2016 Sampson, Kemps, and Americana signed a stipulation of dismissal that was approved by the court on April 29, 2016. (Ex. 27). Sampson testified that as a result of the stipulation, neither he nor Kemps paid the other any money. The stipulation stated that Kemps and Americana Community Bank had settled the controversy between them, and that Americana's crossclaims against Sampson, Mrs. Sampson, and SDF were dismissed without prejudice. (*Id.*)

30. Neither the April 29, 2016 stipulation nor the court addressed the funds being held in escrow by Respondent. The escrow account on 4-30-2016 totaled $40,138.55 (Ex. 7 at 25). Kemps abandoned its claim to the funds after determining litigation with the IRS regarding the levy was not cost-effective. (Petition, para. 21; Answer, para. 16). While Sampson may have assumed the funds would be distributed to pay his outstanding debt to Americana, Sampson did not state in his testimony that he believed he had a claim to the funds in the escrow account.

31. Respondent's final invoice dated 5/13/2016 was in the amount of $25,624.30, (Ex. 2 at 31), which included the $327 filing fee and lien recording fee. (Ex. 2 at 7).

32. On October 19, 2016, Sampson's tax attorney contacted Respondent by email

inquiring about the funds held in escrow. The tax attorney believed that the funds "presumably would be distributed to Sampson and/or Sampson Dairy Foods Inc.?" Respondent replied that Sampson "has not paid for my representation and I would claim an attorney lien also but would rather work it out with him." (Ex. 28).

33. In the fall of 2016, Respondent sought advice from attorney Thomas Brever regarding the ramifications of the IRS levy upon the escrowed funds. On December 14, 2016, Brever advised Respondent that the levy attached to the funds in the account at the time the levy was received. (Ex. 29). Brever also expressed to Respondent that the law firm was free to use all funds collected after the levy was served to pay fees, as long as Respondent's engagement agreement permitted him to do so. Respondent's agreement with Sampson expressly provided for an attorney's lien against Sampson's property (Ex. 16), which included the escrow funds. "Attorney fees . . . shall become a lien against any property I may own or may acquire in the future." (Ex. 16). Respondent testified that he believed at the time that he had a right to offset the funds in escrow against Sampson's outstanding invoices.

34. Respondent testified that he also spoke with Brever about his advice. Through these calls Respondent understood that the IRS levy would remain attached to the funds even if they were disbursed from the account to another party. To wit, if Respondent withdrew the funds and the IRS later demanded them, Respondent would be required to provide the funds.

35. At the time Respondent received the IRS levy, $14,022.54 had already been deposited in the escrow account; $10,718.82 was deposited after the levy was received. On December 15 and 16, 2016, Respondent withdrew $10,718.82 and $14,022.54 respectively from the escrow account and deposited the funds in his law firm's trust account. Respondent

testified that his intention in dividing the funds in that manner was so they could be more easily traced if the IRS pursued its levy. The funds were transferred a few days later to the law firm's business account. Respondent did not promptly communicate to Sampson that he had withdrawn the funds nor did he provide Sampson with an invoice or accounting reflecting satisfaction of the outstanding attorney fees or distribution of the client's funds.

36. Respondent's action in recording a lien against Sampson's real property is based on the parties understanding that Sampson would pay Respondent from proceeds of the sale of Sampson's real property. Respondent did not bring a summary proceeding pursuant to the lien for attorney's fees statute, Minnesota Statute section 481.13, subd. 1(c), to establish the liens he served in April 2016 regarding Sampson's real property. Nor did he serve a separate attorney lien regarding the escrow funds.

37. In March 2017, Americana Bank initiated a lawsuit against Sampson to obtain a judgment regarding Sampson's and SDF's outstanding loan balances. (Ex. 54). Respondent's firm was joined as a defendant because of the attorney liens that Respondent had recorded against Sampson's real property, in which Americana had a security interest. (*Id*., para. 40). In April 2017, the IRS and the Minnesota Department of Revenue each sent letters to Americana Bank's attorney stating that they would not participate in the proceeding and did not oppose the relief that Americana sought. (Exs. 55 and 56).

38. On August 22, 2017, the court granted Americana's motions for summary judgment and entered judgment in favor of Americana Community Bank and against Sampson and SDF for $267,256.07. (Ex. 57).

39. In November 2017, Americana Bank contacted Respondent to inquire about the

funds in escrow. Respondent testified that he thought Americana's interests had already been satisfied and asked them for evidence that they still had a claim on the funds. On December 11, 2017, after Americana provided Respondent with information supporting its claims, Respondent deposited back into the escrow account the $24,741.36 he had previously withdrawn to pay attorney's fees.

40. On April 17, 2018, in response to a letter from the Office of Lawyers Professional Responsibility, Respondent informed the Office that based on the opinion he received from the law firm of Foster Brever Wehrly, PLLC, he had "applied $24,741.36 from the trust account to our attorney fees on December 19, 2016." Then sometime in 2017, Americana Bank claimed a perfected security interest in the funds and Respondent deposited the $24,741.36 back into the account on December 11, 2017 and "remains there." (Ex. 32).

41. Americana notified Respondent on August 9, 2018 that it was a first lien holder with a validly perfected security interest in the escrowed funds, which it requested that Respondent release to Americana. (Ex. 34). Respondent testified that he spoke with the bank officer by phone and raised his interest in obtaining payment for his outstanding attorney fees, for which he had an attorney lien. Respondent stated that he and the bank officer agreed that Respondent's firm would receive $10,000 of the funds as payment toward his outstanding invoices and the remaining funds would be released to Americana.

42. Respondent and Americana signed a stipulation on escrow funds on September 25, 2018 (Ex. 35) more than five months after Respondent was contacted by OLPR and with no apparent intervening correspondence. There is no evidence in the record of further correspondence with the OLPR until 2019. Respondent drafted the agreement recognizing the

prior IRS levy and providing that if either Sampson, Kemps or the IRS ever demanded or asserted a right to the funds, both Respondent and Americana would deposit the money back into an escrow account until the claims were resolved. Americana was paid $30,145.48 and Respondent was paid $10,000 for outstanding attorney fees.

43. Respondent testified that when the escrow funds were disbursed by the law firm, first in December 2016, and ultimately in September 2018, he did not directly receive those funds. Respondent testified that he benefited only indirectly from the law firm's receipt of the escrow funds in that the shareholders' compensation is based in part on their total collections for the year, less expenses. Respondent has no delinquent debts or judgments outstanding against him. He was not experiencing personal financial issues that motivated him to disburse the escrow funds.

44. Respondent testified that he did not think to obtain an order from the district court permitting the distribution of the escrow funds because he was aware the lawsuit had been closed pursuant to the parties' stipulation. Respondent testified that he realizes there were additional procedures he should have followed, including communicating with Sampson, before disbursing the funds.

45. William Tuttle (Tuttle), William Hoversten (Hoversten), and Steven Johnson (Johnson), testified about Respondent's contributions to the community in Waseca and the vicinity. Respondent is the recipient of several community service awards over the years. He started a sober house after the death of his son to substance abuse. He serves on the boards of the Waseca Development Corporation and several nonprofits, and he provides volunteer legal services for nonprofits.

Character Witnesses

46. Tuttle is a friend and business partner. He testified by video call about his personal and professional relationship with Respondent. They have known each other since 1982 through various volunteer programs they both participated in, including the Jaycees. They have also been business partners in several ventures in St. Paul and southern Minnesota over the past several decades. Tuttle described Respondent as a caring person who constructed a sober house in Waseca after Respondent's son died following struggles with drug abuse. Tuttle stated that Respondent wanted to help so that other parents did not have to experience the pain of losing a child to substance abuse. Tuttle testified that Respondent explained the issues in Sampson's case to him including the mistakes Respondent made. Tuttle believed that Respondent was remorseful for the mistakes he made in his representation of Sampson. Tuttle testified that he still trusts Respondent even after reading the Petition and would still retain Respondent to handle legal matters. His testimony is credible.

47. Hoversten is Respondent's law firm partner. Hoversten hired Respondent when Respondent was graduating from William Mitchell. He regards Respondent as an excellent business partner. He testified that the firm has not experienced any financial difficulties that would have motivated Respondent to improperly transfer money to the firm. Hoversten was also not aware of Respondent having any financial problem that would have created a need for him to improperly take the escrow funds. Hoversten said that Respondent is remorseful for the conduct at issue and that Respondent is now more deliberate in addressing procedural matters to avoid the mistakes that he made. His testimony is credible.

48. Johnson is a friend and business partner. Johnson testified about his business, legal, and social relationships with Respondent over the past several decades. Johnson noted that he and Respondent have been partners in various investments and businesses. Johnson regards Respondent as upfront and honest. Johnson testified that he was very surprised to learn of this Petition as it is his opinion that Respondent always does his best to follow the rules. Johnson testified that Respondent told him about the issues in the case. Johnson had read the Petition and did not believe that Respondent had held back any important facts. Johnson stated that he still trusts Respondent as a business partner and still retains Respondent as his lawyer in various matters even after being aware of the allegations. His testimony is credible.

MITIGATION AND AGGRAVATION

49. Respondent has two prior disciplines. In 1999, he received an admonition for representing a husband and wife in bankruptcy and at the same time represented the wife in an ongoing marital dissolution in violation of MRPC Rule 1.7(b), and for undertaking representation of the parties when the wife's interests were adverse to the husband's in violation of MRPC Rule 1.16(a). In 2010, Respondent was admonished for failure to obtain informed consent when he gained a possessory interest in his client's horse trailer without advising his client to seek independent legal counsel, in violation of MRPC Rule 1.8(a). Rule 1.8(a) does not apply to the distribution of escrow funds. "It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee." MRPC Rule 1.8, cmt 1. Both admonitions are remote in time and

not similar to the matter at hand. Respondent did not accept an interest in Sampson's business as payment of his fees. The discipline history is an aggravating factor. *See In re Letourneau*, 712 N.W.2d 183 (Minn. 2006).

50. To be a mitigating factor, remorse must center on harm to the victim. *See, In re Severson*, 860 N.W.2d 658, 670 (Minn. 2015). Remorse centered on harm to the lawyer is a lack of remorse and is an aggravating factor. *In re Stanbury*, 614 N.W.2d 209, 214 (Minn. 2000) (cited in *In re Kalla*, 811 N.W.2d 576, 583 (Minn, 2012)). Respondent expressed remorse for his misconduct in both failing to follow the procedural requirements for establishing an attorney lien and in not notifying Sampson of the escrow account. He testified that his misconduct impacted Sampson, his law firm, the community, the legal profession, and his family. Respondent did not become defensive and admitted what he had done without excuse. His demeanor, as observed by this referee, was one of remorse for his misconduct and is a mitigating factor.

51. Respondent presented testimony about his substantive community work. Tuttle testified that Respondent built a sober house after his son died from drug abuse. He was motivated to help so that other parents would not suffer the loss of a child. His substantive community work is a mitigating factor.

52. Respondent presented testimony about his "good character and significant contributions to the community" through pro bono legal services, board service, and other community service. Character witnesses were consistent in their belief that he was a person of good character whom they trusted with their important affairs. Respondent's good character is a mitigating factor. *See In re Rooney*, 709 N.W. 2d 263, 271 (Minn. 2006); *In re Albrecht*, 779 N.W. 2d 530, 537-8 (Minn. 2010).

53. The harm resulting from Respondent's misconduct is limited. The parties with interest in the escrowed funds were Americana, Kemps, the IRS, and Respondent's law firm. Sampson had not questioned Respondent's invoices (Sampson Test.) and had signed the retainer agreement (Ex.16). Sampson assumed that Americana Bank would receive the funds to pay his debts; Kemps abandoned its claim to the funds after determining litigation with the IRS regarding the levy was not cost effective. (Petition at 5). In the disbursement, Americana received $30,145.48 towards its $267,256.07 judgment against Sampson; Respondent's firm received $10,000 for attorney fees that amounted to $25,624.30. Where the attorney's misappropriation does not cause the client to suffer "any prejudice or damage," the attorney is entitled to mitigation. *See, e.g., In re Fairbairn*, 802 N.W. 2d 734,747 (Minn. 2011).

54. Respondent's cooperation with the investigation is a mitigating factor.

55. Respondent's 37 years of experience in law is a neutral factor.

Based upon the above Findings of Fact, the Referee makes the following:

CONCLUSIONS OF LAW

1. Respondent violated MRPC Rule 1.5(a) when he charged Sampson the $327 filing fee even though the documents were not filed.
2. Respondent violated MRPC Rules 1.1, 1.15(a) and (b) and Rule 8.4(d) by not giving notice to Sampson and by not properly perfecting and establishing an attorney lien or obtaining a further order of the district court.
3. Respondent violated MRPC Rule 1.1, 1.4(a)(2), and 1.16(d) when he did not file the Answer and counterclaim or advise Sampson to file it.

4. The Director has not proved by clear and convincing evidence that Respondent engaged in conduct involving dishonesty, deceit, or misrepresentation in violation of MRPC Rule 8.4(c).
5. The Director has not proved by clear and convincing evidence that Respondent misappropriated funds. In his retention letter which Sampson signed, Respondent specifically mentioned that his fees could be paid from Respondent's property which included escrow funds.
6. The September 25, 2018 Stipulation on Escrow Funds between Respondent and Americana Bank also stated, "if Kemps, Sampson, or the IRS demands or asserts that they have a right to said funds disbursed that Americana Community Bank and Patton, Hoversten & Berg, P.A. agree to deposit the amounts received pursuant to this Agreement into an escrow account until said claims are resolved . . ." (Ex. 35). There is no evidence that Sampson demanded the funds from Respondent.
7. The Director has not proved by clear and convincing evidence that Respondent violated MRPC Rule 1.1 by failing to correct Kemp's description of SDF as a wholesale product dealer. In the Answer that he prepared, Respondent denied that SDF was a wholesale product dealer – in itself a correction of Kemp's mistake. Further, there is no evidence that the district court issued any ruling that SDF was a wholesale product dealer.
8. The Director has not proved by clear and convincing evidence that Respondent violated Rule 1.8(a)(1)-(3) because disbursement of funds from an escrow account is not a business transaction with a client.

9. Respondent did not hide what he was doing. He was transparent in his handling of the funds and in telling Sampson's tax attorney, Brever, and Americana that he would try to recoup his attorney fees from the escrow. There is no evidence that his motive was selfish.
10. The Director did not prove by clear and convincing evidence that Respondent was motivated by greed and selfishness and acted dishonestly.
11. The attached Memorandum is incorporated herein by reference.

RECOMMENDATION

Based upon the above Findings of Fact and Conclusions of Law, and after consideration of the mitigating and aggravating factors, the undersigned recommends Respondent receive a public reprimand, two years of supervised probation, and payment of $900 in costs pursuant to Rule 24, Rules on Lawyers Professional Responsibility.

The supervised probation shall include the following conditions:

(1) Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation and promptly respond to the Director's correspondence by the due date. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct which may come to the Director's attention. Upon the Director's request, respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation.

(2) Respondent shall abide by the Minnesota Rules of Professional Conduct.

(3) Respondent shall be supervised by a licensed Minnesota attorney, appointed by the Director,

to monitor compliance with the terms of this probation. Respondent shall provide to the Director the names of four attorneys who have agreed to be nominated as respondent's supervisor within two weeks from the date of this opinion. If, after diligent effort, respondent is unable to locate a supervisor acceptable to the Director, the Director will seek to appoint a supervisor. Until a supervisor has signed a consent to supervise agreement, the respondent shall on the first day of each month provide the Director with an inventory of active client files described in paragraph 4 below. Respondent shall make active client files available to the Director upon request.

(4) Respondent shall cooperate fully with the supervisor's efforts to monitor compliance with this probation. Respondent shall contact the supervisor and schedule a minimum of one in-person meeting per calendar quarter. Respondent shall submit to the supervisor an inventory of all active client files by the first day of each month during the probation. With respect to each active file, the inventory shall disclose the client name, type of representation, date opened, most recent activity, next anticipated action, and anticipated closing date. Respondent's supervisor shall file written reports with the Director at least quarterly.

(5) Respondent shall initiate and maintain office procedures which ensure that there are prompt responses to correspondence, telephone calls, and other important communications from clients, courts, and other persons interested in matters which respondent is handling, and which will ensure that respondent regularly reviews each and every file and completes legal matters on a timely basis.

Date: February 18, 2020

/s/ Gail Chang Bohr

Gail Chang Bohr

MEMORANDUM

The standard of proof in attorney discipline cases is "full clear and convincing evidence." *In re Letourneau*, 712 N.W.2d 183, 187 (Minn. 2006). "Clear and convincing proof . . . requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). Where the evidence is ambiguous, the standard will not be met. *Letourneau* 712 N.W.2d at 188.

This case presents some unique facts concerning an escrow account in which several parties and the IRS had an interest. It is a case of first impression. The question is whether the Respondent's withdrawal of funds from the escrow account for partial payment of attorney's fees, based on the retainer agreement signed by both Respondent and Sampson, constitutes misappropriation. This referee does not find it does. Even though Respondent did not bring a summary proceeding pursuant to Minnesota Statute section 481.13, subd.1(c), Sampson and Respondent had an agreement about attorney's fees. The IRS levy and Respondent's withdrawal, re-deposits and ultimate withdrawal does not eliminate that fact. Respondent's failure to communicate with Sampson about the disbursement from the escrow funds was not charged by the Director and is not considered.

The Director did not prove by clear and convincing evidence that Respondent committed the misconduct of misappropriation.

Misappropriation of client funds occurs when "'funds belonging to a client are not deposited in a trust account and are used for any purpose other than that specified by the client,'" *In re Lundeen*, 811 N.W.2d 602, 608 (Minn. 2012) (quoting *In re Westby*, 639

N.W.2d 358, 370 (Minn. 2002)) quoted in *In re Tigue*, 900 N.W.2d 424, 429 (Minn. 2017). The funds in question were in escrow because of a lawsuit between Kemps, Sampson, SDF, and Americana Bank. The parties stipulated to the escrow and it was signed by the court. The question, were the funds used for a purpose other than that specified by the client, must be answered in the negative. Sampson and SDF owed $267,256.07 to Americana, over $300,000 to Kemps, $25,624.30 to Respondent and in addition, the IRS levy of $182.913.73 for employee taxes. Kemps abandoned its claim after the IRS levy was served. The highest amount the escrow funds reached was about $40,000. When it was disbursed to Americana and to Respondent, the stipulation stated that the funds would be restored if Kemps, Sampson, or the IRS demanded the funds until the matter was resolved.

Misappropriation may also occur when a lawyer "perform[s] no work on [client matters and never return[s] the funds to the clients." *In re Lundeen*, 811 N.W. 2d 602, 608 (Minn.2012) cited in *In re Voss*, 830 N.W. 2d 867, 874 (Minn. 2013). This is not the case here. Respondent billed Sampson $25,624.30 for the work he performed.

With the benefit of hindsight, the Director sees Respondent's consultation with Brever and discussions with Americana Bank as proof of Respondent's utter disregard of Sampson.

This referee is not convinced such was the case. Each step that Respondent took with regard to the escrow account appears to be taken with regard to the IRS' levy, which appeared to supersede all other claims to the funds. Respondent put money back in the escrow account after Americana contacted him about their claim. Even the stipulation

between Americana and Respondent's firm did allow for challenge by Sampson with regard to the disbursement of the funds.

As of August 22, 2017, Sampson had a judgment against him and in favor of Americana Bank in the amount of $267,256.07. Sometime in April 2018, the OLPR contacted Respondent. (*See* Ex. 32). Curiously, the exhibits do not contain what specifically the Director was investigating. More than five months later, on September 25, 2018, Respondent and Americana signed a stipulation regarding the escrow funds.

In cases of misappropriation there is a pattern of misconduct, repeated misconduct, egregious behavior by attorneys, and involving several clients illustrating a pattern. *See, e.g., In re Tigue*, 900 N.W.2d 424 (Minn. 2017) (negligent and intentional misappropriation of trust accounts); *In re Klotz*, 909 N.W.2d 327 (Minn. 2018) (misappropriation of funds, commingling of funds, failure to maintain trust account records, misleading statements to the Director among other misconduct); *In re Rooney*, 709 N.W. 2d 263 (Minn. 2006) (misappropriation of funds affecting several clients). *But see In re Fling*, 316 N.W. 2d 556 (1982) (unintentional and negligent misappropriation).

In the case at hand, Respondent had an isolated, single incident with one client and one fund and Respondent had an agreement for payment involving the funds. Misappropriation cases are not apt.

Respondent's failure to file the Answer and counterclaim and failure to tell Sampson to file it appears to be more in the realm of malpractice than in the realm of ethical violations – were Sampson able to prove up the underlying suit. Respondent told Sampson in writing that Respondent was doing the minimum to preserve the counterclaim and Sampson needed to hire another attorney to pursue it. Respondent

made many referrals to attorneys but none agreed to represent Sampson in his two million dollar claim against Kemps. Some attorneys expressed their view that Sampson's case was hard to prove because he did not have any documentation of contracts with Kemps or any other evidence to support his claim (Exs. 1,9). Sampson represented himself but SDF, as a company, needed separate counsel. By serving the Answer and counterclaim, Respondent did commence the suit. Respondent now admits that he made a mistake in not telling Sampson to file the counterclaim.

Discipline

The purpose of disciplinary sanctions for professional misconduct is not to punish the attorney, but rather 'to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys.' *In re Vaught*, 693 N.W.2d 886, 890 (Minn.2005) (quoting *In re Oberhauser*, 679 N.W.2d 153,159 (Minn. 2004)). Each attorney discipline case is evaluated on an individual basis. *In re Houge*, 764 N.W.2d 328, 337 (Minn. 2009).

In imposing discipline, we consider four factors: "(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violation; (3) the harm to the public; and (4) the harm to the legal profession." *In re Rebeau*, 787 N.W. 2d 168, 173 (Minn. 2010) (quoting *In re Nelson*, 733 N.W. 2d 458, 463 (Minn. 2007)).

The misconduct here is charging the filing fee when the documents were not filed and not communicating with Sampson about the need to file the Answer and counterclaim.

We consider similar cases for guidance, but we ultimately determine the proper discipline "based on the unique facts and circumstances of each case." *In re Matson*, 889 N.W. 2d 17, 25 (Minn. 2017) citing *In re Rebeau*, 787 N.W. 2d 168, 174 (Minn. 2010).

CONCLUSION

The Director did not prove by clear and convincing evidence that Respondent misappropriated funds. Respondent did commit misconduct. A public reprimand and two years supervised probation accounts for the seriousness of the offenses. *In re Letourneau*, 712 N.W.2d 183 (Minn. 2006) (to prevent similar harm to other clients, one year supervised probation).