

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

FILED

November 23, 2020

**OFFICE OF
APPELLATE COURTS**

In Re Petition for Disciplinary Action
against BRIAN SCOTT VANMEVEREN,
a Minnesota Attorney,
Registration No. 0393462.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility (Director) files this petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility. The Director alleges:

The above-named attorney (respondent) was admitted to practice law in Minnesota on October 26, 2012. Respondent currently practices law in Woodbury, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

- A. On September 10, 2018, respondent was admonished for using his phone during a court proceeding to access social media content containing sexual images that were observed by his vulnerable minor client and her advocate in violation of Rules 4.4(a) and 8.4(d), Minnesota Rules of Professional Conduct (MRPC).
- B. On December 12, 2016, respondent was placed on two years of unsupervised probation for failing to maintain required trust account

books and records that resulted in shortages in multiple client matters in violation of Rule 1.15(c)(3) and (h), MRPC.

FIRST COUNT

L.L. Matter

1. L.L. is the biological mother of two minor children. L.L.'s parental rights were terminated by the district court. By opinion dated December 30, 2019, the Court of Appeals affirmed the termination of L.L.'s parental rights. L.L. was represented by other counsel in the proceedings.

2. On January 2, 2020, L.L. contacted respondent about filing a petition for review with the Supreme Court. Respondent instructed L.L. to bring her paperwork and meet him at a local restaurant the next day.

3. On January 3, 2020, L.L. met with respondent and provided him with papers relevant to her case. Respondent agreed to undertake the appeal for a flat fee of \$15,000.

4. On January 5, 2020, the parties signed a written fee agreement providing for a \$15,000 flat fee. L.L. was to pay \$7,500 by January 5, 2020, and the remaining \$7,500 prior to January 24, 2020.

5. L.L. gave respondent a check, which is dated January 3, 2020, in the amount of \$7,500. L.L. paid respondent another \$1,000 by electronic transfer using Venmo on January 25, 2020, and another \$1,000 on January 26, 2020. In total, L.L. paid respondent \$9,500 of the \$15,000 retainer. Respondent proceeded with the representation despite not receiving the full payment.

6. Respondent assumed he had a 30-day filing deadline, however, he was relying on the wrong rule of procedure for determining the filing deadline, and he failed to review any procedural rules to determine that he was correct. *See* paragraph 9 below. Respondent had 15 days from the filing of the Court of Appeals' decision, which

was filed on December 30, 2019. *See* Minn. R. Juv. Prot. P. 23.07. The petition in L.L.'s case was due on January 14, 2020.

7. On January 17, 2020, L.L. texted respondent and asked him to file the petition for review *in forma pauperis*. Respondent advised L.L. that she made too much money to qualify and, instead, he agreed to advance the filing fee on her behalf.

8. On Saturday, January 25, 2020, L.L. texted respondent and asked when he would be filing the appeal. L.L. stated "Getting anxious. Also you were busy the day I asked but any idea at all what kind of time frame we are looking at for them to accept?" By text that same day, respondent replied, in relevant part, "It [petition for review] should be ready by Sunday night/Monday."

9. On January 29, 2020, respondent attempted to file a petition for review, which was rejected by the clerk of appellate courts as untimely. Respondent did not inform L.L. of the rejection, and instead filed a motion to accept the late filing on January 29, 2020. Respondent stated in his motion:

Appellant's counsel relied upon the general rule contained in Minn. R. App. Pro. 117, Subd. 1(a). The correct authority for calculating the deadline for appellate review of a termination of parental rights opinion by the Minnesota Court of Appeals is Minn. R. Juv. Pract. Proc. 23.07, as noted by the Clerk of Appellate Clerk.

10. On February 3, 2020, the Supreme Court issued an order denying respondent's motion. L.L. was contacted by her former counsel, who informed her of the adverse decision. L.L. then spoke with respondent that same day, who disclosed the missed filing deadline.

11. After missing the filing deadline, respondent blamed L.L. for the late filing. In text messages exchanged later that month, respondent blamed L.L. for failing to timely provide him with relevant documents. Respondent stated in a February 25, 2020, text to L.L., "You never even provided us the transcripts or the documents before the deadline was up. That was YOUR mistake." Respondent reiterated these

statements in his July 9, 2020, response to the ethics complaint that L.L. filed.

Importantly, respondent never sought the transcript from L.L. until the day after the January 14, 2020, filing deadline.

12. Respondent later refunded L.L.'s payments. By check dated March 12, 2020, respondent refunded \$5,000. Respondent refunded the remaining \$4,500 by check dated April 27, 2020. Respondent's refund predates the filing of L.L.'s ethics complaint.

13. Respondent's incompetency and lack of diligence in determining the correct filing date, which resulted in the dismissal of his client's petition for review of the termination of her parental rights due to a missed filing deadline, and failure to timely inform his client of his mistake violated Rules 1.1, 1.3, 1.4(a)(3) and (b), and 8.4(d), MRPC.

SECOND COUNT

Davis Peterson Matter

14. On May 23, 2019, an *ex parte* order for protection (OFP) was entered against Davis Peterson by his wife, KP. On June 3, 2019, Peterson hired respondent to contest the OFP.

15. Over the course of the representation, respondent failed to clearly explain to Peterson the basis of his legal fees, failed to provide Peterson with regular billing statements, and also failed to accurately account for payments received, which resulted in Peterson filing an ethics complaint against respondent. During the course of the Director's investigation, respondent was also unable to accurately account for the payments he had received from Peterson.

16. For the OFP matter, Peterson signed an engagement letter that required a \$3,000 flat fee with "[a]n initial payment of \$1,500 shall be paid on June 3, 2019," and the other \$1,500 to be paid prior to July 3, 2019. The agreement also provided for a 3.5% processing fee for credit card payments.

17. Respondent charged Peterson's credit card \$2,070 (\$2,000 fee and a \$70 processing fee) on June 3, 2019, and \$1,035 (\$1,000 fee and \$35 processing fee) on June 8, 2019. Thus, by June 8, 2019, Peterson had paid the full \$3,000 flat fee for respondent's representation in the OFP despite respondent's claim in a February 27, 2020, letter to the Director that Peterson had not paid the full amount.

18. On August 1, 2019, respondent appeared on behalf of Peterson at a hearing on the OFP. A second OFP was issued by agreement of the parties until August 20, 2020.

19. K.P. initiated divorce proceedings contemporaneous to the OFP matter. Peterson was served with a petition for divorce on May 21, 2019, however, he did not participate in the proceedings or hire respondent to represent him. A final judgment and decree was filed by default on August 1, 2019. Sole physical and legal custody of the children was awarded to the wife and Peterson's parenting time and certain financial issues were reserved. Peterson was also sanctioned \$4,000 as conduct based attorney's fees for failing to participate in the proceedings.

20. Respondent made three additional credit card charges to Peterson's credit card: \$828 on July 7, 2019; \$362.50 on August 1, 2019; and \$362.50 on August 10, 2019, for a total of \$1,553. Over the course of the Director's investigation, respondent provided several different accountings for these fees, including that the fees represented payments for the OFP matter, the fees were for work performed in connection with Peterson's divorce, and the fees included reimbursement for a filing fee on a motion for amended findings in the divorce. Respondent's various explanations indicate that, while he may have eventually performed work to earn the fees, he was not contemporaneously correctly accounting for payments received and failed to clearly explain his fees to Peterson. *See* paragraphs 17 above and 28(c) below. Additionally, respondent did not deposit any of these funds into trust despite a portion of the fees being unearned at the time Peterson's credit card was charged.

21. On August 21, 2019, Peterson signed a written fee agreement providing for a limited scope representation and required a \$2,500 flat fee. The legal services to be provided were defined as, "Hearing (1) and Mediation (1) relating to amended findings from Judgement and Decree filed on August 1, 2019," and included all drafting related to those matters. The agreement further outlined that the representation did not cover trial or an appeal but did not clarify whether it included discovery served in connection with the motion for amended findings. *See* paragraph 33 below. The fee agreement cited an hourly rate for determining a refund.

22. The August 21, 2019, agreement required Peterson to leave a credit card number on file with respondent and authorized respondent to "automatically process transactions with the credit card on file, a minimum of a \$500 payment (or more if possible) every two weeks beginning Thursday August 29, 2019, with the complete balance of \$2,500 paid in full by September 30, 2019."

23. Respondent charged Peterson's credit card \$517.50 on August 29, 2019.

24. On or about August 29, 2019, respondent served but did not file a motion and notice of motion for amended findings. The hearing date was initially scheduled for September 19, 2019, but was continued to November 12, 2019.

25. Respondent did not file his motion for amended filings with the court prior to the November 12, 2019, hearing date as required by Minn. R. Civ. P. 7.02. Respondent was able to file the notice and motion the day of the hearing, and the court permitted the hearing to go forward despite the procedural deficiencies.

26. Opposing counsel, Todd Dwire, filed a responsive motion opposing the request for amended findings and requesting additional conduct based attorney's fees. *See* paragraph 37 below.

27. During the November 12, 2019, hearing, respondent made additional, extensive requests for relief that were not included in his original motion. The court noted respondent's motion was, in fact, a motion to vacate and not a motion to amend. The court took the matter under advisement.

28. On November 21, 2019, respondent and Peterson signed a new fee agreement, which contained unclear terms:

a. In the first paragraph of the agreement, Peterson was required to pay \$3,000, but the agreement did not identify whether this was a flat fee or an advance fee. Peterson believed the \$3,000 was a flat fee. The second paragraph, however, states that Peterson would be billed "depending on the then-current billing rate of the attorney," and sets out an hourly increment of .2 hour minimum billings on work performed.

b. The fee agreement also stated Peterson acknowledged owing "a past due balance of \$2,370, which includes the filing fee [for motion for amended findings]." See paragraph 20 above.

c. The fee agreement stated, "I understand and agree to pay \$1,000.00 on November 21, 2019, and \$1,000 per month on the 21st of each month until the total balance is paid in full." The agreement did not clarify whether the balance to be paid in full included only the \$3,000 and the past due balance (\$2,370) or whether it would include fees incurred outside of those amounts.

d. The fee agreement required respondent to submit monthly invoices to Peterson for all fees and costs and to charge his credit card for the amounts of these invoices. Respondent never submitted monthly billing invoices to Peterson.

e. The fee agreement provided for all fee disputes to be resolved through binding arbitration. While the fee agreement does state that respondent can charge for balances due, it fails to clearly identify whether respondent is

authorized to charge the client's credit card for unpaid balances after the representation is terminated.

29. On December 19, 2019, the court issued an order that noted numerous deficiencies in respondent's motion for amended findings, including procedural deficiencies and seeking relief outside of the scope of the original motion, and generally not having filed a motion seeking the correct type of legal relief on behalf of Peterson. The court granted Dwire's motion for need and conduct based attorney's fees in the amount of \$3,437, and noted "[Peterson's] much delayed appearance and engagement with this case . . . unreasonably contributed to the length and expense of these proceedings." The court reopened the judgment and decree for limited purposes to address the division of assets and liabilities and child support but denied respondent's request to reopen custody and parenting time. The parties were ordered to take additional steps including completion of discovery, negotiate a potential settlement or otherwise prepare for trial.

30. On or about December 17, 2019, Peterson texted respondent that he was "going with a different attorney it isn't working out." On December 18, 2019, Peterson texted respondent, "I've retained a different attorney and won't be needing your services."

31. Peterson retained another attorney, who filed a substitution of counsel on December 20, 2019.

32. On December 19, 2019, respondent charged Peterson's credit card \$500. Peterson believed under the terms of the November 21, 2019, fee agreement that respondent was not permitted to charge his credit card after representation was terminated. Additionally, respondent was on notice from the December 18th text message and other text messages that Peterson was disputing the amount of his fees.

33. On December 31, 2019, respondent sent Peterson an invoice claiming \$1,988 in legal fees relating almost exclusively to drafting of discovery. This was the first billing invoice respondent sent to Peterson.

34. Respondent's failure to timely file a notice of motion and motion and seeking relief outside the scope of his motion during a hearing, which conduct led to additional sanctions against his client, violated Rules 1.1, 1.3, and 8.4(d), MRPC.

35. Respondent's failure to clearly explain the basis of his fee agreements with a client, including to clearly explain modifications to his fees and how credit card charges would be handled, failure to account for fees incurred in excess of the parties' fee agreements, and failure to deposit unearned fees into a trust account violated Rules 1.4(a)(3) and (b), 1.5(a) and (b), and 1.15(c)(3) and (5), MRPC.

COUNT THREE

Todd Dwire Matter

36. Attorney Todd Dwire represented KP in the OFP and divorce proceedings involving Peterson.

37. On November 18, 2019, prior to respondent's termination as counsel for Peterson, Dwire filed an affidavit in connection with a request that his client be awarded need and conduct based attorney's fees in the divorce. Dwire sought \$15,992 in attorney's fees for work performed beginning in September 2019 and which was in addition to the \$4,000 conduct based attorney's fees that were previously awarded on May 21, 2019. *See* paragraph 19 above. In the affidavit, Dwire noted Peterson's conviction for a crime.

38. That same day, respondent filed a responsive letter addressed to the court (and copied to Dwire) and objected to Dwire's attorney's fees by stating, in relevant part:

Mr. Peterson has already been tried, convicted, and sentenced in that matter. It is not up to Mr. Dwire to continue to be his judge and jury for

everything he does to be tied back to his previous crime. **That would be like me bringing up Mr. Dwire's many past speeding tickets, the multiple times Mr. Dwire sues his clients for non-payment of his fees, or the time Mr. Dwire was sued for malpractice, every time we are in court as a reason for his behavior.**

(Emphasis added.)

39. Respondent's conduct in filing a letter with the court containing irrelevant personal attacks against opposing counsel had no substantial purpose other than to embarrass or burden opposing counsel in violation of Rule 4.4(a), MRPC.

FOURTH COUNT

R.D. Matter

40. R.D. has a child with JGR, who is married to another woman. During their relationship, R.D. loaned \$97,500 to JGR so that he could make improvements to certain real property. However, the property in question is owned by JGR and his wife. After R.D.'s relationship with JGR ended, she decided to retain a lawyer to secure repayment of the loan.

41. R.D. was referred to respondent through a friend. Respondent agreed to undertake the representation and provided R.D. with two options: pay a \$2,500 flat fee to seek redress through the courts, or pay respondent a \$1,250 flat fee to draft a contract and stipulation for a lien. R.D. chose the second option.

42. On February 12, 2019, respondent sent R.D. an engagement letter that provided for a flat fee of \$1,250 to be paid in advance of legal services. The agreement specified the legal services to be provided as, "This will cover the contract for the sale of the property as well as a lien, if possible." Respondent orally advised R.D. that she would have to pay a filing fee of \$46 and that she was responsible for filing the lien.

43. Respondent subsequently drafted a document entitled "STIPULATED AGREEMENT & LIEN" (contract). Respondent included irrelevant language about the personal relationship between R.D. and JGR in the contract by stating: "WHEREAS,

[RD] and [JGR] had a personal relationship at the time she provided [JGR] with the money for real property.” The contract further documented the fact that R.D. and JGR were no longer in a personal relationship. These statements reduced the likelihood of JGR agreeing to the contract.

44. Upon receipt of the draft contract, R.D. became concerned that respondent was not competent to secure repayment of her loan to JGR. R.D. subsequently terminated the representation and requested a refund. Respondent refused to make any refund, despite the fact that his flat fee included drafting a contract and lien, and the lien was never drafted. Respondent’s retention of the complete \$1,250 was unreasonable since he did not provide all of the services encompassed by his flat fee agreement, and the competency concerns regarding the contract he drafted.

45. R.D. subsequently retained new counsel and paid \$3,500 for the lawyer to secure a mortgage against the property in question.

46. On July 21, 2019, R.D. filed an ethics complaint against respondent, which the Director investigated. By letter dated August 26, 2020, respondent’s counsel indicated respondent had agreed to refund R.D. \$250 to account for unearned fees, which occurred on or about September 9, 2020.

47. Respondent’s incompetency in drafting a contract that referenced a client’s extra-marital affair, which was irrelevant to the underlying transaction, and adversely impacted the likelihood that the opposing party would sign the contract, violated Rules 1.1 and 1.3, MRPC.

48. Respondent’s failure to timely refund an unearned portion of a fee violated Rules 1.15(c)(4) and 1.16(d), MRPC.

FIFTH COUNT

Yonathan Negash Matter

49. On September 21, 2019, Yonathan Negash retained respondent to represent him in dissolution proceedings. At the time Negash retained respondent, the

divorce was scheduled for trial on September 25, 2019. The court's September 18, 2019, trial order notes that this was the second continuance of the trial date.

50. On or about September 21, 2019, respondent sent Negash an engagement letter providing for a limited scope representation. Negash signed the agreement on September 24, 2019.

51. The agreement provided for a \$2,500 flat fee to be paid in advance of legal services being provided.

52. The scope of the representation, as defined in the agreement, was unclear. The agreement stated:

This fee will cover all research, phone calls, e-mails, consultation, review of evidence, preparation of documents, the hearing on September 25th, as well as one mediation session." However, the agreement also provided, "The client understands and agrees that we are NOT preparing for trial on Wednesday, September 25, and are requesting a continuance request to send this hearing back to mediation."

53. In particular, respondent's agreement did not inform Negash that responding to discovery was excluded from the "document preparation" section included in the \$2,500 flat fee.

54. On September 24, 2019, the day before trial, respondent filed a certificate of representation with the court along with a request for a continuance of the hearing. Opposing counsel objected to the request by letter filed that same day, however, the court continued the trial to January 30, 2020, in order to permit the parties to attend mediation.

55. In early October 2019, the parties discussed a stipulated judgment and decree, however, negotiations failed and the matter was scheduled for mediation. Negash subsequently cancelled mediation then agreed to reschedule it for December 18, 2019.

56. On December 5, 2019, opposing counsel served interrogatories and request for production of documents on respondent. Respondent did not immediately notify Negash of his receipt of these documents or inform him that there would be additional attorney's fees for responding to discovery.

57. Negash cancelled the mediation for a second time shortly before December 18, 2019.

58. On December 17, 2019, respondent's legal assistant emailed the discovery to Negash, and stated he needed to respond by January 4, 2019. The legal assistant also informed Negash that, "The cost for discovery preparation and response is \$3,000 and that would need to be paid in full prior to our completion of the work. This is additional work outside the scope of your initial retainer agreement." The legal assistant also quoted a prepayment of \$15,000 to prepare for trial.

59. On December 18, 2019, Negash emailed the legal assistant stating, "I am not going to be able to afford your additional costs" and terminated the representation.

60. Respondent's failure to clearly explain the scope of his representation and his legal fees, which precluded the client from giving the required informed consent for a limited scope representation, violated Rules 1.2(c), 1.4(a)(1), and 1.5(b), MRPC.

SIXTH COUNT

Becky Cole Matter

61. Becky Cole was involved in a dispute with her landlord. Cole was aware respondent had represented another tenant in a similar dispute with the same landlord, and decided to hire him.

62. On August 6, 2019, respondent emailed Cole an engagement letter containing the terms of their flat fee agreement. Cole signed and returned the agreement by email to respondent on August 6, 2019.

63. By email that same day, respondent and Cole agreed that she would pay \$1,500 up front and the remaining balance (\$1,500) in 30 days, for a total flat fee of \$3,000.

64. On or about August 7, 2018, Cole provided respondent with a \$1,500 cash payment. Respondent alleges he provided Cole with a receipt, which she denies. Regardless, respondent did not have Cole countersign the receipt and he has not maintained a copy of the receipt as part of his required trust account books and records. *See* Appendix 1(I)(6). Cole paid respondent the remaining \$1,500 by credit card on September 9, 2019.

65. Respondent's failure to obtain a receipt for a cash payment countersigned by the client violated Rule 1.15(h), MRPC, as further interpreted by Appendix 1(I)(6).

SEVENTH COUNT

A.M.S. Matter

66. A.M.S. represents a client in a highly contested parenting time and custody dispute involving several minor children. A.M.S. represents the mother and respondent represents the father in the proceedings.

67. By order dated September 17, 2020, the court scheduled a motion hearing to occur remotely on September 24, 2020. A notice for remote hearing was filed with the court on September 18, 2020, noting the hearing would occur by Zoom at 9:00 a.m. on September 24, 2020.

68. A.M.S. and respondent both appeared for the hearing on September 24, 2020. At one point, A.M.S. and respondent were alone in a virtual breakout room to discuss settlement options. Respondent yelled at A.M.S. and asked her if she had "smoked weed" before the hearing. Respondent repeated the accusation several times until A.M.S. asked him what he was talking about. Respondent then stated he "knew all about" A.M.S. and "her constant pot use." A.M.S. replied she was

done and left the breakout room. Respondent and A.M.S. returned to the hearing with the judge.

69. Later that same day, respondent emailed A.M.S. and accused her client of withholding the children from the father. A.M.S. emailed back that the court had ordered the parties to exchange the children after school at the Maple Grove police department. A.M.S. also stated:

You also made allegations towards me privately during the Hearing today, when we were in the breakout room that I had smoked marijuana before the Hearing today and that you “knew all about me” and “my extensive pot use.” Again I have zero idea where these personal allegations are coming from but I can assure you they are false and I am respectfully requesting that they stop immediately.

Respondent replied stating, in relevant part:

With respect to your question on my other email and our breakout room discussion, I was honestly concerned. Both about you and your client. Your eyes appeared watery, and with your client's recent behaviors and her claims that she is acting on her attorney's advice, any other attorney would have surmised the same thing and made the same inquiries.

Respondent also stated, **“Everyone has a past, and sometimes the past creeps back into the current day.** In any case, my comments and questions were out of concern for the safety of the children, and your wellbeing.” (Emphasis added.)

70. On September 25, 2020, A.M.S. filed an ethics complaint against respondent. On September 29, 2020, the Director informed respondent's counsel of the new complaint by A.M.S. and about a forthcoming notice of investigation, which was sent on October 8, 2020.

71. On October 6, 2020, the parties appeared for another hearing in court, this time in person. During the hearing, the court requested that respondent and A.M.S. step into the hallway to discuss a temporary parenting-time plan. Once outside,

respondent referenced the ethics complaint filed by A.M.S. stating that she was “playing games” and “coming for his life and career.”

72. When A.M.S. responded that she did not understand, respondent disclosed that his paralegal previously worked for the lawyer who represented A.M.S. in her divorce, which occurred in 2011. Respondent told A.M.S. that his paralegal remembered working on her case and “told him [respondent] all about her [A.M.S.].” When A.M.S. stated respondent’s paralegal was disclosing confidential client information, respondent stated the information regarding A.M.S.’s alleged pot use was discussed in her ex-husband’s affidavit, which was a publicly filed court record.

73. During that same conversation, respondent also stated he had hired “the best ethics attorney in the state,” then threatened that his attorney was going to “file all of A.M.S.’s divorce records in response to the complaint.” Respondent then asked A.M.S. “if she really wanted to go down that road?” Respondent and A.M.S. then returned to the court room to continue their clients’ hearing.

74. Review of the public court record in A.M.S.’s divorce indicates that respondent’s paralegal was employed by the attorney who represented A.M.S. in her 2011 divorce. The court record, however, reflects no publicly filed affidavits by A.M.S.’s ex-husband in their divorce proceedings¹ or in a related order for protection (OFP) matter.

75. Respondent failed to supervise his paralegal by instructing her not to disclose confidential client information regarding A.M.S.’s divorce case to him. Respondent then ratified his employee’s impermissible disclosure of confidential client communications by using the confidential information, which he had not confirmed

¹ A.M.S.’s ex-husband filed an affidavit in a post-dissolution child support modification, which occurred years after the divorce and also contains no reference to A.M.S.’s alleged pot use.

was in fact publically available information, to intimidate A.M.S. after she filed an ethics complaint.

76. Respondent's failure to supervise his paralegal and prevent her from disclosing confidential client information, which the paralegal knew from her employment at another law firm, and respondent's subsequent use of that confidential information to retaliate against and embarrass an opposing counsel who had filed an ethics complaint against him violated Rules 4.4(a), 5.3(b) and (c)(1)-(2), and 8.4(d), Minnesota Rules of Professional Conduct (MRPC).

EIGHTH COUNT

D.R. Matter

77. At approximately 2:30 a.m. on May 31, 2020, D.R. was arrested for driving under the influence. D.R. was taken into custody and brought to a police station in Champlin, Minnesota. D.R. called respondent after locating his number in a telephone directory. A police report indicates D.R. and respondent spoke for approximately 15-20 minutes on the phone.

78. Respondent quoted D.R. a flat fee of \$4,000 to handle his case. D.R. agreed to pay the fee but respondent was only able to charge \$1,000 to D.R.'s credit card at that time. Respondent did not obtain a signed fee agreement from D.R. and did not put the \$1,000 payment into a trust account as required by Rule 1.15(c)(5), MRPC.

79. The next afternoon (June 1, 2020), D.R. and respondent spoke on the phone. D.R. terminated the representation and requested a refund. Respondent agreed to make a refund but indicated he would deduct attorney's fees for work performed. On June 2, 2020, respondent emailed D.R. that a check was in the mail.

80. On June 5, 2020, D.R. received a \$250 check from respondent. That same day, D.R. emailed respondent that the refund was insufficient given their limited contact. D.R. also requested an accounting.

81. On June 8, 2020, respondent emailed D.R. claiming that, since D.R. had failed to contact him after he was released from jail pursuant to his instruction, he had spent three hours trying to locate D.R. at various jails in order to get him released. Respondent stated he had calculated his refund based upon his “emergency hours” rate of \$400 per hour. Respondent and D.R. never discussed an hourly or emergency hourly rate during their brief call. D.R. believed he had a flat fee agreement with respondent at all times.

82. Respondent initially failed to deposit the \$1,000 flat fee into a trust account, but he was terminated the next day. Respondent did not deposit any of the remaining \$750 into a trust account after clearly and contemporaneously being informed by D.R. on June 5, 2020, that his attorney’s fees were in dispute.

83. On June 21, 2020, D.R. filed an ethics complaint alleging that respondent charged an unreasonable fee. In respondent’s July 5, 2020, answer to the notice of investigation, respondent characterized the three hours of work he performed for D.R. as:

In the morning when I did not hear from him as discussed, I spent the next 3 hours searching MNCIS, jail rosters and calling the jail he had told me he was at trying to locate [D.R.] **in [sic] work with the prosecutor and weekend Judge to get him released.**

(Emphasis added.) On July 16, 2020, the Director emailed respondent asking him to clarify his statement regarding working with “a prosecutor and weekend judge.” On July 17, 2020, respondent emailed back indicating he did not do any work with the prosecutor and weekend judge in D.R.’s matter.

84. Respondent’s failure to deposit disputed attorney’s fees into a trust account absent a compliant flat fee agreement and after being clearly and promptly informed by a former client that his fees were in dispute, using an hourly emergency rate which was not disclosed to the client, in order to calculate a refund of a flat fee and charging an unreasonable fee violated Rules 1.5(a) and (b) and 1.15(b), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Susan M. Humiston

Humiston, Susan

Nov 20 2020 12:11 PM

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