

FILE NO. A09-1066
STATE OF MINNESOTA
IN SUPREME COURT

COPY

In Re Petition for Disciplinary Action
Against ROBERT H. AITKEN, III,
a Minnesota Attorney, Registration No. 301711.

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

The above-entitled matter came on for hearing on September 30, 2009, before the Honorable Warren E. Litynski, the duly appointed Referee by the Minnesota Supreme Court.

Cassie Hanson appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director).

Robert H. Aitken, III (Respondent), appeared and was represented by his attorney, Tom Kuesel.

The hearing was conducted on the Director's May 28, 2009, Petition for Disciplinary Action.

Director called the following witnesses: Alan Chute, Roxanne Chute's brother, Roxanne Chute, and Kristine Kolar, Ninth District Chief Public Defender.

Respondent testified.

The parties were directed to submit proposed Findings of Fact, Conclusion of Law, Recommendation for Discipline, and a Memorandum on or before October 16, 2009, at which time the record closed.

The return date to the Minnesota Supreme Court is November 12, 2009.

Based on the evidence submitted to the Referee, and upon all the files, records and proceedings herein, the Referee makes the following Findings of Fact, Conclusions of Law, and Recommendation for Discipline:

FINDINGS OF FACT

1. Respondent was admitted to practice law in Minnesota on October 23, 2000. From October 2000 until February 2007 Respondent was engaged in private law practice.
2. From sometime in February 2007 until sometime in July 2008 Respondent worked as a Public Defender in the Ninth Judicial District. During the entire time, Kristine Kolar was the Chief Public Defender in the Ninth Judicial District.
3. Currently, Respondent is the Executive Director for the Leech Lake Band of Ojibwe.
4. Respondent has no disciplinary history.

5. In December 2006, Roxanne Chute (Chute) was charged with trespass and obstruction in Beltrami County, Minnesota.
6. At a hearing on December 26, 2006, Chute requested appointment of a Public Defender. Attorney Kristine Cannon was appointed.
7. At sometime after Ms. Cannon was appointed, she had personal contact with Chute's brother, Alan Chute. He is licensed to practice law in Minnesota, Pennsylvania and Kentucky.
8. Chute suffers from multiple sclerosis. She has some slight impairment of her memory. However, regarding this case, the Referee finds that her testimony was credible.
9. Sometime in February 2007, Respondent took over Chute's case. (Kolar Test.)
10. On March 21, 2007, there was a plea hearing. (Ex. 5, p. 3) Respondent appeared on behalf of Chute who was not at the hearing. (Kolar Test.) Chute was not present because Respondent had failed to send her notice.
11. At some time prior to April 24, 2007, the date of the next hearing, the prosecutor tendered a plea offer to Respondent; i.e., if Chute would plead guilty to trespassing, the obstruction charge would be dismissed. (R. ans., p. 1.) Apparently the attorneys agreed as to the terms of the sentence; however, the terms of the sentence were never discussed with or conveyed to Chute.
12. On April 24, 2007, Respondent and Chute attended a hearing. (R. and Chute test.) A plea petition in accordance with the agreement was to be filed with the Court. (Ex. 5, p. 3.)¹
13. Additional hearings were held on May 9 and 23, 2007. Respondent appeared, but Chute did not appear. She had not been given notice by Respondent. As of May 23, 2007, no plea petition had been filed. There is no indication as to why the plea petition had not been filed, or why Chute had not signed a plea petition.
14. The Court scheduled another hearing to be heard on May 30, 2007.
15. On May 24, 2007, Respondent mailed to Chute a plea petition together with correspondence. (Ex. 1 as to correspondence.) Chute received the items on May 25 or 26, 2007. Chute did not look at the contents of the envelope but merely laid it aside.
16. Ex. 1 states in part that Respondent and Chute had discussed the matter and requested that Chute sign the Petition to Enter a Plea of Guilty if she was comfortable with that. Further, if Chute had any questions, she was instructed to contact Respondent at the 800 number

¹ In the proposed Findings of Fact submitted to the Referee, the Director refers to the hearing as being held on April 24, 2007. This squares with the date found in Ex. 5, p. 3. However, in the post-hearing Memorandum submitted to the Referee by the Director, the reference is to a hearing on April 21, 2007. The Referee is unable to locate a hearing date of April 21, 2007.

listed. Chute testified that she called Respondent a number of times, but he never called back. However, Chute did not produce any evidence to support her testimony.

17. The Petition to Enter Plea of Guilty contained provisions for sentencing. This was a surprise to Chute and she never discussed them with Respondent.
18. Respondent appeared at the May 30, 2007, hearing. Chute was unaware of the hearing and did not appear.
19. Sometime during the pendency of the action Respondent had a telephone conversation with Alan Chute. Respondent stated that during the conversation Alan Chute told Respondent that he should just sign the plea petition himself. Alan Chute denies telling Respondent to sign Chute's name to the petition.
20. The Referee finds that Alan Chute and Respondent had a phone conversation; however, the Referee rejects Respondent's claim that Alan Chute told him to sign Chute's name to the petition.
21. Respondent and Chute had no contact, directly or indirectly, prior to the hearing on May 30, 2007. The hearing took place as scheduled. Respondent appeared, but Chute did not. It appears that Respondent did not notify Chute of the hearing date and time. The Court can only assume that Respondent felt it was unnecessary to advise Chute of the hearing time and date because Respondent was awaiting the plea petition.
22. Because the plea petition had not yet been filed, the Court set the matter for a continued hearing to be held on June 1, 2007.
23. On the day of the hearing, Respondent printed and signed Chute's name on the plea petition without her knowledge or consent and backdated it to May 24, 2007, so as to make it appear that Chute had signed and returned the plea petition to him by mail at an earlier date. (R. ans., p. 1; Exs. 2 and 3.) Respondent then signed an acknowledgment of counsel and dated it June 1, 2007. (R. ans., p. 1; Ex. 4.) Respondent filed the plea petition with the district court, which approved it that same day, June 1, 2007. (R. ans.; Ex. 4.) By forging Chute's signature to the plea petition and filing it with the district court, Respondent admittedly submitted a misleading document to the district court. (R. Test.)
24. Chute was unaware that Respondent had forged her signature and filed a plea petition in her name. (Chute Test.) The public defender file indicates that Respondent did not forward a copy of the signed plea petition to Chute and did not provide her with any sentencing information. (Kolar Test.) Chute was unaware of any sentencing conditions.
25. In either late May or early July 2008, Deb Hunt, the Beltrami County Court Administrator, contacted Chute by mail regarding payment of the fine and costs. Chute was surprised because she had never signed any plea petition. Hunt then faxed a copy of the signed plea petition to Chute. This was the first time that Chute learned a plea petition had been filed with the District Court in her name.
26. After talking with Hunt, Chute opened the envelope which contained the plea petition and

Ex. 1.

27. Chute did not recognize the signature purporting to be her signature on the plea agreement and, as a result, on July 2, 2008, called and spoke with Kristine Kolar, Chief Public Defender for the Ninth Judicial District Public Defender's Office. (Chute and Kolar Test.) Chute informed Kolar that the signature was not hers and that she had not returned the plea agreement mailed to her in May 2007. (Chute and Kolar Test.) Chute e-mailed Kolar a copy of a cancelled check with her signature, a second signature sample and handwritten numbers in support of her claim that her signature was forged. (Kolar Test.; Ex. 8, p. 12.)
28. Chute also informed Kolar that she could not have signed the petition on May 24, 2007, because it was the same day Respondent mailed it to her from the public defender's office in Bemidji to her home in Thief River Falls. (Chute and Kolar Test.; Ex. 1.)
29. Chute was upset and confused about how a plea petition had been entered in her name. (Chute and Kolar Test.) Chute asked Kolar to determine who had signed her name to the plea petition without her consent. (Chute and Kolar Test.) Kolar determined that Chute was credible and undertook an investigation, which included reviewing the public defender and court files for Chute's matter and interviewing Respondent and other witnesses. (Kolar Test.)
30. After reviewing the public defender and court files, Kolar confronted Respondent about the forged signature. (R. ans., p. 1; Kolar Test.) Respondent admitted to Kolar that he signed the plea petition in Chute's name, but alleged that he had done so with her permission. (R. ans., p. 1; Kolar Test.) Respondent further claimed that he signed Chute's name at the suggestion of Alan Chute. These were misleading statements designed to conceal his forgery and neglect of Chute's matter.
31. Kolar reviewed the "Register of Actions" for Chute's criminal file on the computer program Odyssey, which at the time was the official court documentation and information tool. (Kolar Test., Ex. 5.) According to the register, the district court took Chute's case under advisement on March 21, 2007. (Ex. 5, p. 3.) The notes for the next three hearings, respectively April 24, 2007, May 9, 2007, and May 23, 2007, indicate the district court was waiting for Respondent to submit a plea petition, which Respondent first mailed to Chute on May 24, 2007. (Ex. 5, pp. 2-3.)
32. Kolar contacted the district court. By order dated July 2, 2008, the district court vacated *nunc pro tunc* Chute's conviction order dated June 1, 2007, and scheduled a hearing for continued proceedings on June 23, 2008. (Chute and Kolar Test.; Ex. 6.)
33. Kolar informed Chute that the conviction was vacated and the Court would schedule a new hearing. (Kolar and Chute Test.) Kolar and Chute discussed reinstating the plea offer. By letter dated July 3, 2008, Kolar sent Chute a new plea petition to sign and return. Chute signed the plea petition on July 14, 2008, which was entered by the district court. (Ex. 7.)
34. This plea petition contained the exact same terms as the one which Respondent had presented to the Court on June 1, 2007.

Non-Cooperation

35. Respondent admits count two of the petition, which details Respondent's non-cooperation in the Director's investigation and these disciplinary proceedings. (R. ans., p. 2; R. Test.)
36. On July 8, 2008, Kolar filed an ethics complaint with the Director regarding Respondent's conduct in the Chute matter. (Ex. 8.)
37. On July 17, 2008, a notice of investigation was mailed to Respondent. The matter was assigned to the Fifteenth District Ethics Committee (DEC) for investigation. By letter dated July 22, 2008, Respondent was informed that John Dimich was the DEC investigator assigned to investigate the complaint. Respondent failed to respond to the notice of investigation. (Ex. 9.)
38. When Respondent failed to respond, Dimich sent Respondent a follow-up letter dated August 25, 2008, enclosing a copy of the complaint and again requesting a response by no later than September 15, 2008. (Ex. 10.) Respondent failed to respond.
39. In December 2008, Dimich informed John Udem, Chair of the Fifteenth DEC, that Respondent had failed to respond to his communications. Udem attempted to contact Respondent twice at his home telephone number of (218) 335-2167, but received busy signals. Udem subsequently referred the matter back to the Director for further investigation noting Respondent's non-cooperation.
40. On January 7, 2009, the Director sent a letter to Respondent enclosing the DEC report and requesting a response. (Ex. 11.) Respondent failed to respond.
41. On January 29, 2009, the Director sent Respondent a second letter requesting his written response to the complaint and an explanation regarding his non-cooperation. (Ex. 12.) Respondent failed to respond.
42. On March 26, 2009, the Director sent Respondent a third letter noting his complete failure to cooperate in the Director's investigation, requesting his response to the complaint, and noting that if he failed to respond, the Director would have no choice but to issue charges of unprofessional conduct. (Ex. 13.) Respondent failed to respond.
43. On April 15, 2009, the Director performed an Internet address search to confirm Respondent's telephone number and address. The Director located two numbers for a Robert Aitken in Bemidji, Minnesota. The Director called (218) 759-4812 and spoke with an individual who identified himself as Respondent's father. Respondent's father confirmed the mailing address used by the Director and the DEC, namely 2636 Pathway Road, Bemidji, MN 56601, was Respondent's home address. Respondent's father confirmed Respondent's telephone number and provided Respondent's work number (218) 335-8230. This number is listed as Respondent's work number on the website for the administrative division of the Leech Lake Band of Ojibwe.
44. That same day the Director called Respondent's work number and was directed to the voicemail of "Robert Aitken." The Director left a message informing Respondent that the

Director would have no choice but to issue charges of unprofessional conduct for non-cooperation unless Respondent contacted the Director. The Director also confirmed that numerous letters had been mailed to Respondent with no response. Respondent did not contact the Director.

45. On May 1, 2009, the Director mailed charges of unprofessional conduct along with a notice of pre-hearing meeting and notice of panel assignment to Respondent. The notice of pre-hearing meeting stated that a pre-hearing would occur at the Director's Office on May 14, 2009, at two o'clock in the afternoon. Respondent did not attend the pre-hearing meeting. Respondent did not contact the Director to respond to the pre-hearing meeting. (Ex. 14.)
46. Pursuant to Rule 9(b), Rules on Lawyers Professional Responsibility (RLPR), Respondent's answer to the charges of unprofessional conduct was due within seven days of the pre-hearing meeting. Respondent failed to submit an answer. (Exs. 14 and 15.)

CONCLUSION OF LAW

1. Respondent's conduct violated Rules 8.4(c) and (d), Minnesota Rules of Professional Conduct (MRCP), and Rule 25, RLPR.

RECOMMENDATION FOR DISCIPLINE

1. *Aggravating Circumstances*

- a. This Referee finds no aggravating circumstances.

2. *Mitigating Circumstances*

- a. Remorse. The Referee finds that Respondent was not remorseful. Therefore, this shall not be considered a mitigating circumstance.
- b. Respondent has no disciplinary history. This case came to Respondent after another Public Defender was involved. Respondent became a Public Defender at about the same time he received this case. Conceivably this could have been Respondent's first case as a public defender, and although he should have known better, he may not have been acquainted with all of the rules and procedures.
- c. Even though Respondent was somewhat dilatory in getting the petition to his client for her signature, Respondent did not have his client's cooperation regarding the resolution of this case; i.e., for example, if Chute did not look at the papers she received for approximately 13 months, as the claim stated, Respondent, instead of filing a Rule 15 Petition with a forged signature, should have asked the Judge for suggestions on how to proceed
- d. After Chute complained about the false signature, she accepted the same agreement previously offered by the prosecutor. Further, she did not have to accept the sentencing provisions stated in the petition. She always has the right of allocution, and if she explained for example, her medical status, the Judge might very well have

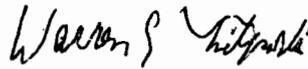
waived the monetary provisions. Or, if the client can show that she did not have the financial wherewithal to make the agreed upon financial obligations, the Judge might have allowed her to work these off on some type of community service.

The Referee recommends:

This Referee recommends the following regarding discipline:

1. Respondent, Robert H. Aitken, III, be suspended from the practice of law for a period of thirty (30) days.
2. The 30 day suspension should be stayed; Respondent shall be publicly reprimanded; Respondent shall be placed on probation for a period of two years under such terms and conditions as the Court and/or the Director may determine.
3. Respondent, Robert H. Aitken, III, shall comply with Rule 26, RLPR.
4. Respondent, Robert H. Aitken, III, shall pay \$900.00 in costs pursuant to Rule 24(a), RLPR.

Dated this 12 day of November, 2009.



Warren E. Litynski, Referee