FILE NO. A05-0335

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PETITION FOR DISCIPLINARY ACTION AGAINST JOHN T. ANDERSON, JR., A MINNESOTA ATTORNEY, REGISTRATION NO. 2549.

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

This matter was heard pursuant to notice on April 25, 2005, before Lawrence T. Collins, acting as referee by appointment of the Minnesota Supreme Court. Timothy M. Burke, Esq., appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (hereinafter "Director"). George H. Smith, Esq., appeared on behalf of Respondent John T. Anderson, Jr., who was personally present throughout the proceedings.

The hearing was conducted on the Director's December 16, 2004, Petition for Disciplinary Action. The Respondent testified. The Director submitted 24 exhibits; the Respondent submitted 3 exhibits. Leave of time was granted for presentation of proposed Findings of Fact, Conclusions of Law, Recommendation for Appropriate Discipline, and supporting arguments, the latest being filed May 9, 2005.

Upon the evidence and being advised in the premises, the referee has applied the clear and convincing standard of proof and makes these

FINDINGS OF FACT

1. Respondent was admitted to practice law in Minnesota on October 16, 1970. Respondent currently practices law in Minneapolis, Minnesota. (Resp.Test.)

Diligence, Communication, Misrepresentation

2. Respondent represented William J. Miller in a social security disability matter. (Resp.Test.)

3. In early March of 2003, Respondent advised Miller that the Social Security Appeals Council had denied a request for review of an Administrative Law Judge's decision denying Miller benefits. Respondent advised Miller that the next available alternative was to commence an action in federal court. On March 7, 2003, Miller retained Respondent to represent him in that action. (Exh. 1).

4. On March 24, 2003, Respondent filed a complaint in the United States District Court for the District of Minnesota ("Minnesota Federal Court") seeking judicial review of the denial of disability insurance benefits. Respondent was the attorney of record and the sole attorney responsible for the matter. On that same day, Respondent wrote Miller a letter requesting that he reimburse Respondent for the $150.00 filing fee. On March 25, 2003, Miller tender his check to Respondent for that amount. (Exh. 2, Exh. 3, 4).

5. On May 9, 2003, the Government filed its answer to the complaint, along with a transcript of the administrative proceedings. The local rules for the Minnesota Federal Court require the plaintiff in a social security appeal matter to file a motion for summary judgment within sixty days after the Government files an answer and a certified copy of the record. (Exh. 5, Resp.Admits).

6. The Respondent did not file such a motion. (Resp.Admits).

7. On July 23, 2003, the Magistrate Judge issued an order to show cause, requesting Respondent to within 10 days show why an extension of the time allowed to file the summary judgment motion should be granted. (Exh. 6). Respondent failed to respond, failed to send a copy of the order to his client, and failed to inform his client about the order. (Exh. 7).

8. On August 26, 2003, the Magistrate Judge issued a report and recommendation that the matter be dismissed for failure to prosecute. (Exh. 7). Respondent failed to respond, failed to send a copy of the report and recommendation to his client, and failed to inform his client about the report and recommendation. (Exh. 8).

9. On September 8, 2003, the Government served and filed a request that the Minnesota Federal Court adopt the Magistrate Judge's recommendation. (Exh. 7a). Respondent failed to respond, failed to send a copy of the request to his client, and failed to inform his client about the request. (Resp.Test.)

10. On September 17, 2003, Miller's claim was dismissed. (Exh. 8). Respondent failed to send a copy of the dismissal to his client, and failed to inform his client about the dismissal. (Resp.Admits).

11. In approximately December of 2003, Miller contacted the Social Security Administration and was told that the Agency had no record of his appeal. Miller then spoke with Respondent, which was the first communication Respondent had had with Miller since March of 2003. (Resp.Admits).

12. During this conversation Respondent told Miller that he was no longer eligible for benefits and that the case "was over". Respondent did not tell Miller that the case had been dismissed for failure to prosecute. Respondent also told Miller that an appeal was "useless". Respondent did not tell Miller that the time in which to appeal had expired. (Resp.Admits).

13. Miller requested Respondent refund the $150.00 that Miller had paid Respondent for the filing fee. Respondent failed to respond. (Resp.Admits).

Conduct Prejudicial to the Administration of Justice, Cooperation with the Board of Professional Responsibility

14. On May 7, 2004, the Director mailed to Respondent notice of investigation of Miller's complaint and requested his written response within 14 days. (Exh. 9). Respondent did not provide the written response. (Exh. 10). Respondent contacted the District Ethics Committee on May 24, 2004 and advised them that he would provide the response by May 27, 2004. He ultimately responded on June 22, 2004. (Resp.Admits).

15. On October 18, 2004, Respondent was informed that the matter was under consideration by the Director's office. (Exh. 11). On October 20, 2004, the Director requested Respondent to provide additional information by November 3, 2004. (Exh. 12). Respondent did not provide the material. (Exh. 13, 14). Further requests for the information were made to Respondent on November 4 and November 15, 2004. (Exh. 13, 14). Respondent signed for receipt of a certified letter from the Director on October 20, 2004 requesting the information but failed to respond. (Exh. 15). Respondent testified that it was his belief that he had provided the District Ethics Committee with all of the information that they needed.

16. Respondent appeared at the Director's office on December 14, 2004. (Resp.Test).

Disciplinary History

17. Respondent has a disciplinary history as follows:

- April 17, 1992-Admonition for neglecting a client matter and for practicing law while his license was suspended for nonpayment of the attorney registration fee.
- June 4, 1993-Admonition for failing to respond to his client's multiple requests for communication and answers to questions.

- July 17, 1996-Admonition for surrendering a client's file to another law firm and failure to disclose to that client his intention to divide fees with that other firm.
- October 16, 1996-Public reprimand and two years' probation for neglecting three client matters and failing to communicate adequately with those clients.
- August 26, 1997-Admonition for neglecting a client matter and failure to communicate adequately with the client.
- August 21, 2000-Admonition for losing a prospective client's paperwork.

Mitigation Claim

18. Respondent testified that in September of 2004 he was diagnosed with diabetes, of which he was previously unaware. Respondent testified that as a result of his diabetes he suffered fatigue and confusion over an extended time leading up to the diagnosis.

19. Respondent testified that he is now taking medication which makes him more energetic and less confused.

20. Respondent testified that he "could not tell [the Referee] for sure" whether the fatigue from his undiagnosed diabetes is what caused Respondent to fail to work on Miller's matter or to communicate adequately with Miller.

21. The Referee received Respondent's medical records in evidence, over the Director's objection, for the limited purpose of establishing dates that Respondent consulted a medical provider and the identity of the provider consulted on each date. (Exh. 103).

22. Respondent offered no medical testimony that diabetes caused the misconduct or that the misconduct is not likely to reoccur.

23. Throughout the hearing Respondent's demeanor was appropriately respectful, his bearing was professional, and he offered credible testimony. As is evident from his responsive pleading and the content of his testimony, Respondent accepts responsibility for his admitted conduct and failures to act.

CONCLUSIONS OF LAW

1. Respondent's failure to act with reasonable promptness and diligence in the Miller matter violated Rule 1.3, Minnesota Rules of Professional Conduct (MRPC).

2. Respondent's failure to keep his client reasonably informed about the status of the matter and promptly comply with reasonable requests for information in the Miller matter violated Rule 1.4, MRPC.

3. Respondent's conduct with regard to reasonable efforts to expediting litigation did not clearly and convincingly violate Rule 3.2, MRPC.

4. Respondent's engaging in misrepresentation and conduct that is prejudicial to the administration of justice in the Miller matter and in the ensuing investigation violated Rule 8.4(c) and (d), MRPC, respectively.

5. Respondent's failure to respond in a timely manner to disciplinary authority's lawfully authorized demand for information violated Rule 8.1(a)(3), MRPC.

6. Respondent's violations are substantially similar to prior disciplinary infractions committed by him, which is an aggravating factor.

7. Though Respondent's diabetes interfered with his ability to competently perform his duties as an attorney, Respondent has not proven by clear and convincing evidence that his diabetes can be said to have caused his misconduct or that his misconduct is not apt to recur.

8. Respondent has admitted the facts surrounding the accusations and has not attempted to mislead the investigation.

Upon all of the foregoing, and supported by prior decisions of the Minnesota Supreme Court, including In re Westby, 639 N.W.2d 358, (Minn. 2002),[1] In re Flanery, 431 N.W.2d 115 (Minn. 1988),[2] In re Disciplinary Action Against Albrecht, 660 N.W.2d 790 (Minn. 2003),[3] and In Re Graham, 609 N.W.2d at 894,[4] this referee offers these

RECOMMENDATIONS FOR DISCIPLINE

1. That Respondent, John T. Anderson, Jr., be indefinitely suspended from the practice of law in the state of Minnesota, and be ineligible to reapply for reinstatement for a minimum of sixty (60) days, and that he only be reinstated on condition that his law office practices and procedures, including books and records, be supervised for a period of two years by a lawyer appointed by the Director's office.

2. That Respondent, John T. Anderson, Jr., comply with the requirements of Rule 26, Rules on Lawyers Professional Responsibility (RLPR).

3. That Respondent, John T. Anderson, Jr., pay to the Director $900.00 in costs, plus disbursements, pursuant to Rule 24, RLPR.

Dated this 26th day of May, 2005.

Lawrence T. Collins
Referee

[1] Holding that Conduct which interferes with the disciplinary process is prejudicial to the administration of justice in violation of Rule 8.4(d).

[2] Holding that where an attorney decides to cooperate after initially failing to respond to a notice of investigation, the discipline imposed should not be as severe as where the attorney continuously refuses to cooperate.

[3] Outlining the considerations for a claim of mitigation based upon illness. Providing useful analogy on appropriate discipline for similar conduct. *See also* In Re Hart, 431 N.W.2d 108 (Minn. 1988).

[4] Outlining proper treatment of prior offenses as aggravating factors and use of prior discipline cases for guidance.