

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against JEFF D. BAGNIEFSKI,
a Minnesota Attorney,
Registration No. 149329.

**PETITION FOR REVOCATION
OF PROBATION AND FOR
FURTHER DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement contained in the attached November 12, 2002, stipulation for probation (Exhibit 1) pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 21, 1983. Respondent currently practices law in Rochester, Minnesota.

DISCIPLINE HISTORY

A. On November 12, 2002, the Chair of the Lawyers Professional Responsibility Board approved a stipulation to extend until January 19, 2005, respondent's private probation incorporating the terms of his January 19, 2001, probation stipulation. Respondent's probation extension was based upon admissions that he advised his client not to comply with a court-ordered visitation schedule in violation of Rules 1.2(c), 3.4(c), 4.4 and 8.4(d), Minnesota Rules of Professional Conduct (MRPC), and billed a client for the time he spent responding to an ethics complaint filed with the Director's Office in violation of Rules 1.5(a) and 8.4(d), MRPC. *See*, Exhibit 1.

B. On January 19, 2001, respondent entered into a stipulation for private probation for failure to maintain the required trust account books and records in violation of Rule 1.15, MRPC, failure to diligently pursue finalization of a QDRO in violation of Rule 1.3, MRPC, and failure to notify a client about a pending hearing in violation of Rule 1.4(b), MRPC. *See Exhibit 2.*

C. On November 27, 2001, respondent received an admonition for failure to present the court with information concerning a client's reasonable monthly expenses in a modification of child support matter in violation of Rule 1.1, MRPC.

D. On November 7, 1997, respondent received an admonition for failure to timely submit second and third drafts of a QDRO to the pension administrator in violation of Rule 1.3, MRPC.

E. On March 7, 1997, respondent received an admonition for Yellow Page advertising indicating bankruptcy specialization without being certified as a specialist in violation of Rule 7.4(b), MRPC.

F. On January 25, 1993, respondent received an admonition for rendering services as an attorney on behalf of a client after acting as mediator between the client and the client's then spouse in violation of Rule 1.7(b), MRPC.

G. On October 6, 1989, respondent received an admonition for failure to timely notify the Minnesota Court of Appeals and opposing counsel of abandonment of an appeal and failure to timely remit maintenance payments on behalf of his client in violation of Rules 1.3, 1.5(a) and (b) and 8.4(d), MRPC.

INTRODUCTION

Among the conditions of respondent's probation was that respondent would abide by the MRPC and commit no further unprofessional conduct, and that if, after giving respondent an opportunity to be heard, the Director concluded that respondent

had not complied with the conditions of the probation, then the Director could file this petition without the necessity of Panel proceedings.

The Director, after giving respondent an opportunity to be heard, has concluded that respondent has not complied with the conditions of the probation.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

A. Flueger Matter

1. On September 25, 2000, Ed Flueger placed on the record in court an oral stipulation in his marriage dissolution. He was represented by Charles Lee, who Flueger believed was not prepared for trial and strongly urged Flueger to make the stipulation.

2. Immediately after the hearing, Flueger regretted the stipulation and sought out new counsel to determine whether he could get the stipulation changed. Flueger called respondent on October 2, 2000, and met with him for the first time on October 3, 2000.

3. At the October 3, 2000, meeting Flueger told respondent about his September 25 stipulation, gave him a highlighted, annotated copy of adverse counsel Pat Arendt's proposed order (Exhibit 3) and asked respondent if there was any chance he could get the proposed order changed. Flueger told respondent that there were things in the order that he had not stipulated to and other things he had agreed to under pressure that he also wanted changed.

4. Respondent agreed to represent Flueger and told Flueger that he thought there was a good chance he could get the changes Flueger requested. Flueger gave respondent a check for \$1,000.

5. Within a few days of the October 3, 2000, meeting, Flueger delivered to respondent his entire dissolution file.

6. On or about October 12, 2000, respondent sent Flueger's former counsel a substitution of counsel. Respondent filed and served the substitution of counsel on October 30, 2000. *See*, Exhibit 5.

7. On October 25, 2000, before respondent had served or filed the substitution of counsel, Arendt wrote to Judge Bibus, with a copy to Lee, enclosing a copy of his proposed judgment and decree and requesting a review hearing for November 1, 2000. The letter stated, "The terms contained in the Judgment and Decree were read into the Court's record and verbally approved by both parties on September 25, 2000." *See* Exhibit 4.

8. On October 27, 2000, Lee faxed a copy of Arendt's letter (Exhibit 4) to respondent.

9. On October 30, 2000, respondent wrote to Arendt stating that he had received a copy of the October 25 letter. In that letter respondent wrote, "Please be advised that my client, Mr. Edward Flueger, is not stipulating to the terms of the proposed agreement" (Exhibit 5).

10. Respondent participated in the telephone review hearing on November 1, 2000. As a result of the hearing, Judge Bibus asked each party to submit a brief on his position by November 8, 2000.

11. Respondent did not advise Flueger about the review hearing or November 8, 2000, deadline.

12. On November 8, 2000, Arendt submitted his brief. Respondent submitted nothing.

13. In a letter dated November 15, 2000, but postmarked November 22, 2000, respondent asked Flueger for the first time about securing a transcript of the

September 25 proceedings. Respondent also enclosed a copy of Arendt's brief (Exhibit 6).

14. Flueger immediately faxed respondent a lengthy response (Exhibit 7) in which he expressed concern that he not be defaulted by respondent's missing the November 8 deadline. Flueger followed up with phone calls to respondent which respondent did not return.

15. Flueger made an appointment to see respondent immediately after the Thanksgiving weekend. Flueger and his friend, Tamara McDonald, went to respondent's office but found the office unlighted and locked. From his cell phone Flueger checked his home phone voicemail and found a message from respondent saying that he had a conflicting appointment and that his case was "somewhat problematic."

16. Flueger made another appointment for a few days later. Again, respondent called Flueger's cell phone on the afternoon the meeting was scheduled and cancelled the meeting.

17. On November 28, 2000, Arendt wrote Judge Bibus (Exhibit 8), "Because Mr. Flueger has not complied with the November 8 deadline nor submitted any sort of written argument to the Court, I would again request that the Court sign the Findings which I have submitted (if the Court has not already done so)."

18. On November 30, 2000, Judge Bibus signed Arendt's proposed judgment and decree. In the court's memorandum to the order, Judge Bibus wrote:

The Court asked Petitioner's counsel to prepare proposed findings reflecting the terms of the parties' stipulation and forward them to Respondent's counsel to be approved as to form. On September 28, 2000, Petitioner's counsel sent Respondent's counsel an original copy of the proposed findings. On October 21, 2000, Petitioner was informed that Respondent had retained new counsel and that Respondent would not be honoring the parties' stipulation.

On November 1, 2000, Petitioner's counsel and Respondent's new counsel appeared before the court for a review hearing. Both parties were given two weeks to submit written arguments to the court. On November 8, 2000, Petitioner submitted a letter brief. The Court has yet to receive any written arguments from Respondent.

Given all the circumstances and facts before the court, it is in the interests of justice to issue the Judgment and Decree according to the original stipulation arrived at and agreed to in open court on September 25, 2000, there being no just reason for further delay.

Exhibit 9.

19. On December 5, 2000, respondent wrote to Flueger enclosing a copy of the November 30, 2000, notice of filing and order and judgment. In the letter he stated, "Please note that it would appear your only recourse would be to file a Motion to Amend the Court Order which was entered as part of a Stipulation placed on the Court Record" (Exhibit 10).

20. Upon receipt of the judgment and decree, Flueger repeatedly called respondent who refused to return his calls.

21. McDonald, who knew respondent's paralegal, Shannon Banitt, called her at home on December 8 or 9, 2000. Banitt told McDonald to get a transcript, not to worry that the Order was not a problem, that respondent would file a motion to amend and would prepare an affidavit for Flueger to sign.

22. On December 14, 2000, Flueger faxed respondent a transcript of the September 25, 2000, proceedings.

23. On December 18, 2000, Flueger visited respondent's office to review an affidavit respondent had prepared for him. The affidavit presented to Flueger was not in a final form (Exhibit 11). Specifically, the paragraph addressing Flueger's income was incomplete and had blank lines where respondent wanted Flueger to insert information. In addition, a signature line and notarization block were not included.

Shannon Banitt directed Flueger to take the affidavit home with him, make any necessary changes and send it back to respondent. In addition, however, Banitt directed Flueger to sign a blank signature page. *See*, Exhibit 12. Flueger did so and Banitt notarized it.

24. On December 19, 2000, Tamara McDonald faxed to respondent a revised version of the affidavit (Exhibit 13). Among other things, the revised affidavit eliminated the entire paragraph concerning income that had been in respondent's draft. Flueger replaced that paragraph with paragraphs indicating that he had recently accepted new employment and that he did not know whether the employment was permanent or what his eventual income would be.

25. Although, in finalizing the affidavit, respondent retained the language described above, respondent added to the affidavit a new paragraph that more specifically addressed Flueger's purported income. *See*, Exhibit 14. The paragraph read, in pertinent part:

As proof of my income, I attach a copy of my pay stub which indicates that I make approximately \$2,560.00 per month and based on that and the fact that I am off work approximately four months per year, I average approximately \$20,000.00 per year.

26. Respondent did not consult with Flueger concerning the addition of this paragraph or even inform Flueger that he was adding it.

27. In fact, the paragraph respondent added to Flueger's affidavit was inaccurate. The pay stub respondent attached was from a position Flueger had briefly held in November 2000 and the annual income figure was understated.

28. Respondent attached to the revised affidavit the signature line Flueger had signed on December 18, 2000, together with Banitt's notarization block (Exhibit 14). Respondent filed the affidavit with the court on or about December 20, 2000. *See*, Exhibit 14.

29. The hearing on the motion was scheduled for 10:00 a.m. on January 17, 2001. Respondent did not arrive in court until 10:30 a.m. Respondent had not met with or communicated with Flueger prior to the hearing.

30. On January 30, 2001, Judge Bibus issued his order denying Flueger's motion and awarding adverse counsel \$1,500 in attorney fees. The court stated: "There simply was no reasonable basis for filing this motion" (Exhibit 15).

31. Flueger paid the sanctions.

32. On October 26, 2001, respondent sent Flueger a bill, which reflected almost 38 hours of services and more than \$4,000 in additional fees and costs.

33. Respondent's October 26, 2001, bill contains a number of false, duplicate and/or erroneous entries. Examples of these entries are set forth below.

34. Respondent claims to have had "telephone conference[s] with client" on October 30, 2000, November 29, 2000, December 12, 2000, December 13, 2000, December 19, 2000, December 20, 2000, and January 16, 2001. These telephone conferences did not occur and the entries on respondent's bill indicating that they did are false.

35. Respondent's October 26, 2001, bill includes six time entries on five different dates for preparation of the substitution of counsel and the related cover letters. Also, the bill includes three different time entries on three different dates for preparation of the letter to Flueger dated November 15, 2000, but not mailed until November 22, 2000. These entries are duplicative and the resulting time respondent attributed to these services is inflated.

36. Respondent's October 26, 2001, bill reflects twelve entries on twelve different dates for file organization. These entries are likewise duplicative and the resulting time respondent attributed to this service is inflated.

37. When Flueger contested and refused to pay respondent's bill for more than \$4,000 in additional attorney fees, respondent mailed him a summons and complaint to collect the fee.

38. Flueger responded alleging improper service. Respondent then sent the matter to a collection agency. When respondent continued to send collection letters and to refuse to return his calls, Flueger filed a complaint with the Director's Office.

39. On November 30, 2003, respondent sent Flueger an additional bill for time that respondent spent in answering Flueger's ethics complaint. *See*, Exhibit 16.

40. Respondent's conduct in failing to file a brief following the review hearing and in failing to return Flueger's calls or adequately advise Flueger about his case violated Rules 1.3 and 1.4, MRPC.

41. Respondent's conduct in allowing Flueger to sign a blank signature page, directing his paralegal to notarize Flueger's signature, attaching the signature page and notarization block to Flueger's affidavit, and adding income information, which was inaccurate, to Flueger's affidavit and filing the altered affidavit without consulting with Flueger, violated Rules 1.4 and 8.4(c) and (d), MRPC.

42. Respondent's conduct in filing a motion to amend for which he provided no reasonable basis in law or fact violated Rules 3.1 and 8.4(d), MRPC.

43. Respondent's conduct in billing for services that he did not provide or that were duplicative and billing for time spent on responding to Flueger's complaint to the Director's Office violated Rules 1.5(a) and 8.4(d), MRPC.

SECOND COUNT

B. Lancaster Matter

44. Respondent represented Frank Szydal (n/k/a Frank Lancaster) in a marriage dissolution. By January 15, 2003, Lancaster had paid respondent approximately \$11,059 in attorney fees.

45. Before trial Lancaster called respondent and told him he did not want to go to trial, he was tired of fighting, that his ex-wife could have everything, and that all he wanted was reasonable child support and visitation.

46. Respondent urged Lancaster not to settle on such terms but to go to trial and get a fair settlement. To that end, respondent wrote Lancaster on February 20, 2003, stating:

In other words, to the extent, my efforts on your behalf which result in charging you attorney's fees are not exceeded by the sums you receive by the court, I will assume 100% of the attorney's fees incurred. Currently, to the extent you receive \$1.00 more in relief from the court than is billed to you through my efforts in attorney's fees, you will be expected to pay 100% of the attorney's fees incurred.

Exhibit 17.

47. The fee arrangement proposed in respondent's February 20, 2004, letter to Lancaster constituted a contingent fee arrangement.

48. On that basis Lancaster agreed to proceed to trial. The resulting court order did not provide Lancaster with relief greater than respondent's attorney's fees. On July 25, 2003, the court entered an order in favor of Lancaster's ex-wife for approximately \$84,000. Lancaster subsequently hired new counsel and was able to reduce the amount owed to \$60,000.

49. Respondent failed to honor his February 20, 2003, agreement and for several months after the unfavorable order billed Lancaster for more than \$9,000 in fees

for his additional services, adding a finance charge each month the account went unpaid. See Exhibit 18.

50. Lancaster called respondent about these bills repeatedly. When respondent refused to return these calls Lancaster filed a complaint with the Director's Office.

51. Respondent's conduct in making a contingent fee agreement in the marriage dissolution violated Rule 1.5(d), MRPC.

52. Respondent's conduct in failing to honor his fee agreement with Lancaster violated Rules 8.4(c) and (d), 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.

Dated: September 21, 2004.


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