

STATE OF MINNESOTA

IN SUPREME COURT

File No. A12-087

In Re Petition for Disciplinary Action

against PATRICK CHRISTOPHER BURNS,
a Minnesota Attorney,
Registration No. 307890.

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

The above-captioned matter was heard on September 13 and 14, 2012, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. Cassie Hanson, Senior Assistant Director, appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Eric Cooperstein appeared on behalf of Patrick Burns (respondent), who was also present at the hearing.

The hearing was conducted on the Director's May 11, 2012, petition for disciplinary action ("petition"). The Director presented the testimony of Carol Palmer, Ana Canela, Suzanne Pasch, Kim Bonuomo and Lyn Denny (by affidavit). Respondent testified at the hearing and presented the testimony of Erik Hansen, Rachael Pierce, Kelly Burns, and Martin Melang. Director's Exhibits 1-55 were received into evidence. Respondent's Exhibits 101-108 were received into evidence.

The parties were directed to submit on or before September 28, 2012, proposed findings of fact, conclusions of law, a recommendation for the appropriate discipline and a memorandum of law. The referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court no later than October 25, 2012.

In his answer to the petition for disciplinary action, respondent admitted the majority of factual allegations and denied all rule violations, except violating Rule 1.4, Minnesota Rules of Professional Conduct (MRPC), in Count Four. The findings and conclusions made below are based upon respondent's admissions, the documentary evidence 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 evidence as outlined above, and upon all of the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

Introduction

1. Respondent was admitted to practice law in Minnesota on May 11, 2001. Respondent currently practices law in Minneapolis, Minnesota. At all times relevant, respondent has been the senior partner in the law firm of Patrick Burns & Associates (hereinafter "the Burns firm") and had supervisory authority over all associate attorneys and non-lawyer staff.

Count One: Failure to Timely Remit Unearned Client Fees

2. Suzanne Pasch faced financial difficulties and was unable to afford her mortgage. On August 31, 2009, Pasch met with respondent and retained him to renegotiate her mortgage. Pasch paid a \$1,500 retainer which was deposited into trust. Pasch and respondent discussed pursuing bankruptcy if renegotiation was unsuccessful but Pasch did not retain him to handle anything beyond renegotiation of her mortgage at that time.

3. Respondent assigned renegotiation of Pasch's mortgage to Andrew Myers, a contract attorney in the Burns firm. After unsuccessfully trying to negotiate with Pasch's lender, Myers discussed the possibility of Pasch defaulting on her mortgage payments and filing for bankruptcy. In December 2009, Pasch was directed to Martin Melang, another associate in the Burns firm, about retaining the firm to handle her bankruptcy.

4. In January 2010, Pasch met with Martin Melang, another PBA associate, to discuss whether bankruptcy was appropriate for Pasch and what fees the firm would charge for the proceeding. After that meeting, several e-mails were exchanged with Pasch and amongst the attorneys at PBA regarding the attorney fees that would be charged for her bankruptcy.

5. On January 26, 2010, Pasch sent respondent an email terminating his firm's representation of her. At that time, Respondent was still holding approximately \$725 in unearned fees in trust for Pasch. Pasch did not request a refund of her fees at that time.

6. On July 6, 2010, Pasch sent respondent an e-mail through the website www.findlaw.com. Pasch requested a refund of the unearned retainer. Pasch's e-mail was directed to Respondent's "spam" e-mail folder. Hence, Respondent did not receive the e-mail at the time it was sent.

7. On July 26, 2010, Pasch sent respondent a letter requesting a refund. Respondent did not receive the letter, despite the presence of office systems designed to track and scan all incoming mail. On August 13, 2010, Pasch filed an ethics complaint with the Director claiming respondent had failed to remit unearned attorney's fees. On August 26, 2010, respondent remitted the unearned fees of \$725 to Pasch.

Count Two: Unauthorized Credit Card Transactions

Ana Canela Matter

8. In August 2009, Ana Canela hired respondent to represent her in her marriage dissolution. Canela signed a written retainer agreement that provided for an initial \$5,000 retainer and thereafter an hourly rate of \$250 for attorney's fees. Canela paid the \$5,000 retainer by credit card and made additional fee payments using the same credit card.

9. On November 27, 2009, Canela e-mailed respondent and discharged him from representation. Canela disputed some of respondent's attorney's fees. Respondent requested that his associate, Martin Melang, review the billing statements that had been sent to Canela. Melang recommended that Canela receive a \$1,000 credit for the attendance of two attorneys at Canela's Initial Case Management Conference (ICMC). Respondent approved the credit.

10. On December 11, 2009, Melang wrote Canela and explained that she would receive a \$1,000 credit, to be applied against her outstanding balance of \$651.88. Melang enclosed the firm's check for \$348.12 as payment for the remainder of the credit. The Bums' law firm also returned the client file to Canela and filed a withdrawal motion with the court that same month. The credit

was not entered into the firm's accounting system. As a result, the firm's records continued to show, incorrectly, that Canela had an outstanding balance.

11. Canela received a December 30, 2009, billing statement incorrectly claiming that she owed \$740.07 in attorney's fees and costs. Respondent's office manager, Kelly Burns, explained that at that time their accounting system automatically generated invoices for clients with outstanding balances. On January 8, 2010, Canela e-mailed respondent regarding the charges. That same day, respondent e-mailed Joanne Burns, his mother, who also worked as a non-lawyer assistant at PBA, to correct the mistake. The billing error was not corrected. On February 2, 2010, Canela received another invoice for the same amount.

12. On February 11, 2010, PBA staff, in the course of processing a batch of invoices for which it had credit card authorizations in its files, mistakenly charged Canela's credit card \$629.06, as payment for the outstanding balance (after deducting 15% from the balance due for payment by credit card). Upon discovering the charge, Canela e-mailed respondent demanding that the charge be reversed, which respondent subsequently ensured took place.

Carol Palmer Matter

13. In November 2007, Carol Palmer retained respondent to handle a probate dispute involving the estate of her mother. The parties agreed that Palmer would pay an hourly rate for legal services. Palmer provided respondent with a credit card and authorization to charge her credit card over the course of the representation.

14. Palmer became dissatisfied with respondent's legal services and sent him a letter dated July 1, 2009, terminating the representation. On July 8, 2009, respondent sent Palmer a copy of her client file and acknowledged the termination of the representation.

15. On July 1, 2009, respondent also sent Palmer an invoice for work completed through June 30, 2009, indicating that Palmer owed \$561.80. Palmer did not pay the bill. On August 3, 2009, respondent sent Palmer an invoice

reflecting brief additional work completed on July 1, 2009, and showing a balance due of \$616.75.

16. On August 6, 2009, respondent's staff charged Palmer's credit card \$524.24 as payment for attorney's fees, after a 15 percent discount for payment by credit card. On August 12, 2009, Palmer faxed respondent a demand that the unauthorized charge to her credit card be refunded. Within two hours of receiving Palmer's fax, respondent refunded the \$524.24 back to Palmer's credit card.

17. On September 1, 2009, respondent's office sent Palmer an invoice for \$718.00, which was comprised of the \$524.24 credit card reversal, \$92.51 for the reversal of a 15 percent discount that had been applied at the time of the credit card payment, and an additional \$101.25 that was charged in error. Palmer did not pay the bill or bring the error to Respondent's attention. In November 2009, without further contact with Palmer, Respondent unilaterally wrote off the entire outstanding balance.

Count Three: Improper Service of a Subpoena and
Obtaining Documents in Violation of the Rights of Others

18. In 2009, Thomas Carlson and his wife were involved in a contentious divorce. Respondent represented Carlson's wife, who had made allegations that Carlson had sexually abused the parties' children. As a result, Carlson completed a voluntary psycho-sexual evaluation (hereinafter "evaluation") that was provided to the court and the court-appointed guardian ad litem (GAL).

19. Respondent unsuccessfully attempted to obtain a copy of the evaluation from both Carlson's first attorney, the GAL, and later from Kim Bonuomo, successor attorney for Carlson. At the time Bonuomo started representing Carlson there was an outstanding discovery request for the evaluation. Bonuomo did not believe that respondent was entitled to the evaluation. Regardless of whether Bonuomo was legally correct in this assertion,

respondent had not at this time filed an order to compel or otherwise sought the trial court's intervention in obtaining the evaluation.

20. Respondent directed Rachel Pierce, a non-lawyer assistant in the Burns firm, to prepare third party subpoenas to be served on two medical providers that had completed Carlson's evaluation. Respondent directed Pierce by email to also prepare cover letters to Bonuomo. Respondent did not supervise Pierce or verify that she had followed through on his request. At the time, Pierce was a college student who had no formal legal assistant training beyond her work in respondent's firm. Pierce had only previously once served a third party subpoena some nine months earlier under respondent's supervision.

21. Pierce subsequently served the third party subpoenas, but notification was not sent to Bonuomo as required under Minn. R. Civ. P. 45.01.

22. On or about March 25, 2010, one of the medical providers provided a copy of Carlson's evaluation in response to respondent's third party subpoena. As a result, respondent obtained evidence in violation of the opposing party's procedural rights. Had Bonuomo received notice, she would have moved to quash the subpoena.

23. Upon learning that respondent had obtained the evaluation, Bonuomo confronted respondent who eventually provided courtesy copies of the subpoenas and the evaluation he had obtained. This was the first time that Bonuomo had seen the version of the evaluation subpoenaed by respondent, which was more detailed than previous versions. As a result, Bonuomo filed a motion with the district court seeking sanctions. The district court issued an order requiring the parties to agree to a protective order to address the concerns raised by Bonuomo. The district court did not otherwise sanction respondent.

Count Four: Failure to Supervise & Related Misconduct:

Lyn Denny Matter

24. In or about May 2009, Lyn Denny contacted the Burns firm to discuss challenging her ex-husband's attempt to discharge in bankruptcy a property settlement she had been awarded in their divorce. The amount of the settlement was substantial at \$106,066.42. The settlement award was not a spousal maintenance award.

25. Denny initially spoke with Nathan Hobbs, an associate in the Burns firm who had recently developed a bankruptcy practice within the firm in the fall of 2008. On June 6, 2009, Denny retained the Burns firm and paid a \$1,000 retainer. Hobbs was assigned to handle Denny's creditor claim.

26. Hobbs failed to diligently pursue Denny's creditor claim. In particular, Hobbs failed to timely file a proof of claim pursuant to section 501(a) of the bankruptcy code. In addition, in November 2009, Hobbs began failing to return Denny's communications. Respondent was not aware at the time that Hobbs had neglected Denny's case or failed to respond to her communications.

27. Respondent fired Hobbs in December 2009 after respondent discovered that Hobbs had forged documents and made false statements to cover up his mishandling of an unrelated litigation matter. Respondent arranged for Hobbs to spend about ten days training another of the firm's associates, Martin Melang, in bankruptcy law. Respondent then transferred Hobbs' approximately 40 open files to Melang, whose civil litigation matters were transferred to other lawyers in the law firm.

28. PBA sent letters to all of the Hobbs' clients on or about December 18, 2009, including Denny. Denny did not receive the letter and did not learn that Hobbs had been fired until January 5, 2010, when respondent replied to an e-mail Denny had sent to him, in which Denny complained about the delays in her case and Hobbs' neglect.

29. By e-mail to Denny dated January 7, 2010, respondent stated that

he would schedule a conference call with her for that day and stated that the firm would address her file "shortly." The conference call did not occur.

30. Denny next emailed respondent on February 3, 2010, indicated that her last communication with respondent was January 7, 2010, and asked respondent to contact her. Respondent did not reply. Denny sent two additional e-mails on February 8, 2010, to which respondent did not reply.

31. Denny filed an ethics complaint with the Director on March 16, 2010. Respondent, through two of his associate attorneys, proceeded to file an adversary complaint in Denny's ex-husband's Chapter 13 proceeding on April 21, 2010. Respondent voluntarily, and without a request from Denny, refunded \$2,075 to Denny, representing all of the fees that Denny had paid for work charged by Hobbs.

32. PBA subsequently withdrew from representing Denny in November 2010 after Denny failed to cooperate with discovery requests in the bankruptcy action and failed to pay new attorneys fees she had incurred.

Count Five: Failure to Supervise Non-Lawyer Staff

32. In the Canela matter, respondent directed a non-lawyer assistant to correct a previous billing error but did not follow through to confirm the billing error was in fact corrected, which resulted in an unauthorized charge to Canela's credit card.

33. In the Carlson matter, respondent failed to supervise a non-lawyer assistant's preparation and service of a subpoena. Respondent did not verify that his non-lawyer assistant had prepared cover letters to opposing counsel and the subpoenas were served without the required notice.

Aggravating & Mitigating Factors

34. On November 18, 2008, respondent was issued an admonition for communicating with a represented party about the subject matter of the litigation in violation of Rule 4.2, MRPC.

35. On February 27, 2007, respondent was issued an admonition for filing a lien against an opposing party's property and bringing a lawsuit without taking adequate and appropriate steps to determine whether there was a good faith basis for the lawsuit in violation of Rule 1.1, MRPC.

36. Respondent's history of prior discipline is an aggravating factor.

37. Respondent's history of *pro bono* work is a mitigating factor.

38. Respondent testified to various medical conditions, including epilepsy and diabetes and related medical treatment during the period in question but did not claim these conditions to be mitigating factors.

CONCLUSIONS OF LAW

1. Respondent's conduct in failing to timely remit client funds in the Pasch matter violated Rule 1.16(d), MRPC.

2. Respondent's conduct in failing to maintain complete and accurate billing records, charging clients' credit cards without authorization and after the representation had been terminated, and charging duplicate fees in the Canela and Palmer matters violated Rule 1.15(c)(3), MRPC.

3. Respondent's conduct in failing to comply with the notice requirements for serving a subpoena and obtaining evidence in violation of the rights of another in the Carlson matter violated Rules 1.1, 3.4(a), 4.4(a), and 8.4(d), MRPC.

4. Respondent's conduct in failing to diligently take remedial action to mitigate known neglect caused by an associate attorney over whom respondent had direct supervisory authority, and to diligently pursue a client

matter or respond to client communications in the Denny matter violated Rules 1.3, and 1.4, MRPC.

5. Respondent's conduct in failing to supervise non-lawyer staff violated Rule 5.3(b) MRPC.

6. Respondent's disciplinary history is an aggravating factor.

7. Respondent's *pro bono* record is a mitigating factor.

RECOMMENDATION FOR DISCIPLINE

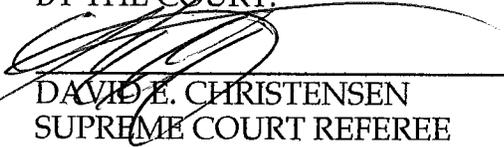
The undersigned recommends:

1. That respondent, Patrick C. Burns, be publicly reprimanded.

2. That respondent, Patrick C. Burns, pay \$900 in costs plus disbursements pursuant to Rule 24(a) and (b), RLPR.

Dated October 25, 2012.

BY THE COURT:



DAVID E. CHRISTENSEN
SUPREME COURT REFEREE

MEMORANDUM

The facts of this case are largely undisputed and respondent admits that his conduct in the Denny matter violated the rules. At issue is whether the other conduct of respondent rises to the level of actually violating the rules. It is the opinion of this referee that while any one or two of the complaints might not rise to the level of violations, the sheer number of complaints made to the Director in a relatively short period of time requires that they be viewed more seriously than usually might be the case.

The Director in this case argued for a public reprimand and probation while respondent argues for a private admonition. Because respondent has been the subject matter of two private admonitions in the past, this referee is recommending a public reprimand. Since it appears that respondent has made changes to his office procedures, which hopefully will avoid future complaints, no recommendation is being made for probation.

DEC