

**FILE NO. A14-1076**  
**STATE OF MINNESOTA**  
**IN SUPREME COURT**

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In Re Petition for Disciplinary Action  
against JOSEPH MICHAEL CAPISTRANT,  
a Minnesota Attorney,  
Registration No. 187112.  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
RECOMMENDATION FOR  
DISCIPLINE**

The above-captioned matter was heard on October 14, 2014, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. Julie E. Bennett appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Respondent Joseph Michael Capistrant failed to appear. The hearing was conducted on the Director's May 28, 2014, petition for disciplinary action. The Director presented the testimony of witnesses Craig A.B. Freeman and Randall Hedden. The Director also submitted exhibits which were admitted without objection. The respondent presented no evidence or testimony. The parties were directed to submit on or before November 4, 2014, proposed findings of fact, conclusions of law, a recommendation for appropriate discipline and a memorandum. The referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court no later than November 25, 2014.

In his answer to the petition for disciplinary action, respondent admitted certain factual allegations made by the Director, denied others, and denied any rule violations. 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 the witnesses as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony. If respondent's answer admits a particular factual finding made below, then even though the Director may

have provided additional evidence to establish the finding, no other citation will necessarily be made.

Based upon the evidence as outlined above, and upon all the files, records and proceedings, the referee makes the following:

#### **FINDINGS OF FACT**

1. On August 21, 2014, the parties were notified by email that the hearing in this matter was scheduled for October 14, 2014, at 9:00 a.m. On August 25, 2014, a scheduling order was mailed to the parties confirming October 14, 2014, at 9:00 a.m. as the date and time for the hearing.

2. Because respondent was not present, the undersigned waited until 9:15 a.m. on October 14, 2014, to commence the hearing.

3. Respondent did not appear for the hearing and did not contact the undersigned prior to the hearing to request the matter be rescheduled.

4. Respondent had not contacted the Director's Office at any time prior to the hearing to discuss a continuance or to indicate he would not be appearing.

5. Respondent did not appear during the course of the hearing.

6. On October 8, 2014, the Director filed a motion *in limine* precluding respondent from calling witnesses, and from presenting any evidence. The Director's motion was based on respondent's failure to provide a witness and exhibit list and also respondent's failure to respond to discovery. At the hearing, the Director requested statements about possible mitigation in the answer not be considered based on respondent's failure to provide a witness and exhibit list and failure to produce discovery responses. The Director's motions were granted.

7. Respondent was admitted to practice law in the State of Minnesota on October 16, 1987.

8. Denise Hedden operated Specialty Contracting Services, Inc., d/b/a ServiceMaster ("Specialty"), and Randall Hedden operated Superior Construction Services, Inc. ("Superior"). Respondent represented both Specialty and Superior. During the time of his representation, respondent was in possession of the Heddens' legal and other files necessary for the performance of his duties.

9. On or about October 15, 2012, the Heddens terminated their attorney-client relationships with respondent and retained attorney Craig A.B. Freeman as new counsel. Respondent's last day was on or before November 2, 2012. Respondent turned over some, but not all, of complainants' files to Mr. Freeman.

10. Mr. Freeman testified that between approximately October 15, 2012, and November 2, 2012, he rarely saw and had little interaction with respondent. Mr. Freeman further indicated that frequently respondent would come in late at night and place things on Mr. Freeman's chair to be discovered the following morning.

11. Randall Hedden testified that respondent was not authorized to perform any work and respondent was not authorized to retain the files after November 2, 2012.

12. Mr. Freeman and Mr. Hedden testified to the numerous attempts by numerous means and people to contact respondent by multiple methods seeking the return of the files.

13. By email dated November 30, 2012, Mr. Freeman identified four files as missing for respondent, and requested that respondent determine if he still possessed them. Respondent did not respond to Mr. Freeman's November 30, 2012, email and failed to produce the files.

14. By email to respondent dated December 5, 2012, Mr. Freeman followed-up the November 30, 2012, email request regarding the missing files and also identified another missing file. Respondent did not respond to Mr. Freeman's December 5, 2012, email and failed to produce the files.

15. On December 11, 2012, Jessica Christensen, a paralegal in Mr. Freeman's firm, wrote to respondent requesting a response regarding the missing files. Respondent did not respond to Ms. Christensen's December 11, 2012, letter and failed to produce the files.

16. On January 25, 2013, Mr. Freeman again wrote to respondent expressing his need for the clients' files. Mr. Freeman further stated that respondent's failure to provide the files was causing serious issues with resolving the clients' legal matters, and requested that respondent contact him to arrange for the transfer of the files. Respondent did not respond to Mr. Freeman's January 25, 2013, letter and failed to produce the Heddens' files.

17. On February 4, 2013, Mr. Freeman once again wrote to respondent regarding the missing files. Mr. Freeman identified respondent's nearly four-month lack of communication, renewed the Heddens' demand for the return of all files and documents in respondent's possession, and again requested that respondent contact him to arrange for the transfer of the Heddens' files. Mr. Freeman also noted that respondent had failed to respond to at least one direct request from Randall Hedden for a file and had failed to respond to another attorney's request for information pertaining to a matter respondent had previously handled for the Heddens. Finally, Mr. Freeman requested that respondent provide the files on or before February 15, 2013. Respondent did not respond to Mr. Freeman's February 4, 2013, letter or email, and failed to produce the files.

18. On February 18, 2013, the Heddens submitted written complaints to the Director's Office regarding respondent's failure to return their files.

19. On or about April 25, 2013, respondent returned the Heddens' missing files by leaving them outside the door to Freeman's office after hours.

20. Mr. Freeman testified respondent not only had the Superior and Specialty legal files but also the underlying office files. Mr. Freeman indicated respondent's

retention of the underlying files hampered his ability to assert his clients' claims because respondent had all of the supporting documentation needed to establish the claims.

21. In his answer, respondent admitted receiving the various requests for the files outlined in the Director's petition.

22. Further, in his answer respondent also admitted he did not return Specialty's and Superior's files until late April 2013.

23. In July 2009, respondent filed a construction lien in Wisconsin on behalf of Superior. The parties to the lawsuit entered into a settlement agreement. After there was a default on the settlement agreement, in August 2010 respondent commenced a foreclosure action in Sauk County Wisconsin Court.

24. The parties again reached a settlement agreement which respondent was to finalize.

25. On June 8, 2010, respondent's Wisconsin law license was suspended for failure to comply with continuing legal education reporting requirements. Respondent did not disclose to Superior the fact that his license to practice law in Wisconsin had been suspended. Respondent's license was not reinstated until June 2011.

26. As a result of the suspension of his Wisconsin license, respondent failed to finalize the settlement agreement in the construction lien matter and the court dismissed the matter due to a failure to prosecute.

27. In his answer, respondent admits he failed to finalize the settlement agreement.

28. Respondent admits he took no further action to protect his client's construction lien.

29. Thereafter, in early 2012, Superior was served a summons and complaint regarding the property which was the subject to Superior's construction lien.

30. Respondent did not respond to the summons and complaint. Superior was defaulted due to the lack of an answer, and judgment was entered against Superior. Superior, through new counsel, moved to vacate the judgment.

31. On February 13, 2013, the Wisconsin court issued a memorandum decision declining to vacate the default judgment, finding, in part, that: counsel for the opposing party sent respondent two letters, two emails and a voice mail prior to filing suit against Superior; respondent admitted he had received one letter from opposing counsel and chose to ignore it; respondent had seen the summons and complaint and took no action to instruct Superior with regard to the matter; and respondent's failure to act did not demonstrate excusable neglect.

32. Mr. Hedden testified that as a result of respondent's lack of diligence, his company went from being owed \$10,000 to owing \$10,000. Mr. Hedden stated there were further losses due to having to hire counsel in an attempt to undue the harm caused by respondent.

33. Mr. Hedden testified that he was not aware of the lapse in respondent's license until after the termination of the attorney-client relationship.

34. During the course of reviewing the February 18, 2013, complaint, the Director's Office became aware that respondent's Minnesota law license had been suspended for nonpayment of lawyer registration fees as of January 1, 2013.

35. On February 25, 2013, the Director's Office wrote to respondent notifying him of the suspension, advising respondent that practice while suspended for nonpayment of lawyer registration fees is unauthorized practice of law and a violation of Rule 5.5(a), Minnesota Rules of Professional Conduct (MRPC), and requesting that within 14 days respondent submit to the Director proof of payment of the lawyer registration fee and penalty. The Director's Office also requested an affidavit concerning respondent's practice of law since January 1, 2013.

36. Respondent did not respond to the February 25, 2013, letter from the Director's Office, did not provide the requested information, and failed to contact the Director's Office to request an extension of time in which to respond.

37. On March 19, 2013, the Director's Office again wrote to respondent regarding the nonpayment of lawyer registration fees, and the provision of an affidavit. The Director's Office requested a response within five days. Respondent did not respond to the March 19, 2013, letter from the Director's Office, did not provide the requested information, and failed to contact the Director's Office to request an extension of time in which to respond.

38. On March 4, 2013, the Director's Office sent to respondent a notice of investigation along with a copy of the complaint submitted by the Heddens. Although a response was due to the assigned district ethics committee (DEC) investigator within 14 days of the March 4, 2013, notice of investigation, respondent did not respond. Respondent did not contact the DEC investigator to request an extension.

39. On March 19, 2013, the DEC investigator wrote to respondent reminding him of his obligation to submit a written response to the complaint, and requesting respondent do so before the close of business on March 27, 2013. Respondent did not respond to the complaint and failed to contact the DEC investigator to request an extension of time in which to respond.

40. On April 1, 2013, the DEC investigator left a telephone message for respondent at the telephone number listed on respondent's website, again requesting the submission of a written response to the complaint before the close of business on April 5, 2013. Respondent did not respond to the complaint and failed to contact the DEC investigator to request an extension of time in which to respond.

41. On April 8, 2013, the DEC investigator again wrote to respondent reminding him of his obligation to comply with reasonable requests for information, informing respondent that failure to cooperate with a disciplinary investigation could

be independent grounds for discipline, and requesting a written response before the close of business on April 15, 2013. Respondent did not respond to the complaint and failed to contact the DEC investigator to request an extension of time in which to respond.

42. On May 20, 2013, the Director's Office wrote to respondent regarding the DEC investigation and invited respondent to provide a written response to the DEC investigator's report within two weeks.

43. On June 4, 2013, respondent contacted the Director by telephone to request a meeting and additional time in which to respond. A meeting was scheduled for June 6, 2013. Respondent was reminded that a written response to the complaint was still required.

44. On June 6, 2013, the Director met with respondent. During the course of the meeting respondent provided a document indicating that he had delivered the Heddens' files to Mr. Freeman on April 25, 2013. Respondent also agreed to provide, within two weeks, a response to the complaint, an affidavit regarding his law practice while fee-suspended, copies of his counseling records, and a copy of an affidavit filed with regard to a court proceeding discussed during the meeting with the Director's Office.

45. On June 20, 2013, respondent wrote to the Director's Office requesting a two-week extension of the time in which to respond to the complaint and stating that he was "in the process" of locating his counseling records. Along with the letter, respondent provided an affidavit regarding his law practice while fee-suspended and two affidavits relating to the court proceeding discussed during the June 6, 2013, meeting with the Director's Office.

46. The Director's Office left a telephone message on June 24, 2013, granting respondent the requested two-week extension. Respondent did not provide a response

to the complaint or provide his counseling records by the extended deadline, and failed to contact the Director's Office to request an extension of the time in which to do so.

47. On August 8, 2013, the Director's Office sent respondent a letter advising respondent that a response to the complaint and respondent's counseling records still had not been received. Respondent was asked to provide the requested information immediately.

48. On September 11, 2013, having not received the requested information from respondent, the Director's Office wrote to respondent reminding respondent of his obligation to produce information, identifying his deficiencies along those lines, and directing respondent to appear at a meeting in the Director's Office on September 19, 2013. Respondent was also directed to bring the previously requested information to the meeting. Respondent did not attend the September 19, 2013, meeting, did not produce the requested information, and did not contact the Director to provide an explanation or request that the meeting be rescheduled.

49. On April 22, 2014, the Director's Office served respondent with charges of unprofessional conduct and notified respondent that pursuant to Rule 9(a)(1), Rules on Lawyers Professional Responsibility (RLPR), he was required to answer the charges within 14 days.

50. Respondent did not provide an answer or otherwise communicate with the Director regarding the charges.

51. In his answer to the petition, respondent admits he did not cooperate in the disciplinary process.

52. Although respondent alluded to possible mitigation in his answer, mitigation was not considered due to respondent's failure to provide any evidence concerning mitigation, failure to provide a witness and exhibit list, and respondent's failure to respond to the Director's discovery requests.

### **Aggravating Factors and Claimed Mitigation**

1. Respondent has committed multiple acts of professional misconduct.
2. Respondent has substantial experience in the practice of law.
3. The Heddens were harmed by respondent's misconduct.
4. Respondent offered no evidence of any mitigation of his misconduct.

### **CONCLUSIONS OF LAW**

1. Respondent's failure to timely return the clients' files violated Rule 1.16(d), MRPC.
2. Respondent's failure to diligently pursue his client's legal matter violated Rules 20:1.3 and 20:8.4(d), Wisconsin Rules of Professional Conduct (WRPC).
3. Respondent's failure to communicate with his client regarding the status of the matter and the status of respondent's Wisconsin license violated Rules 20:1.4 and 20:8.4(c) and (d), WRPC.
4. Respondent's conduct in failing to cooperate with the disciplinary process violated Rules 8.1(b) and 8.4(d), MRPC, and Rule 25(a), RLPR.

### **RECOMMENDATION FOR DISCIPLINE**

Respondent has committed multiple acts of professional misconduct. Respondent failed to return his former clients' files in a timely manner, failed to act diligently and failed to cooperate with the disciplinary investigation.

Accordingly, the undersigned recommends:

1. That respondent Joseph Michael Capistrant be indefinitely suspended from the practice of law in the State of Minnesota, ineligible to apply for reinstatement for a minimum of six (6) months.
2. That respondent pay to the Director \$900 in costs, plus disbursements, pursuant to Rule 24, RLPR.
3. That respondent comply with the requirements of Rule 26, RLPR.

4. That pursuant to Rule 18, RLPR, respondent may petition for reinstatement and be required to demonstrate by clear and convincing evidence that:
- a. He has paid \$900 in costs, plus disbursements, pursuant to Rule 24, RLPR;
  - b. He has complied with the requirements of Rule 26, RLPR;
  - c. He has successfully completed and obtained a passing grade on the multi-state professional responsibility examination within one year from the date of the Supreme Court's suspension order pursuant to Rule 18(e), RLPR;
  - d. He has satisfied all continuing legal education requirements pursuant to Rule 18(e), RLPR; and
  - e. He is fit to practice law and his past misconduct is not likely to recur.

Dated: November 13, 2014.

  
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DAVID E. CHRISTENSEN

#### MEMORANDUM

Respondent filed an answer in this matter admitting that some of the violations of misconduct involving non-cooperation occurred, and alleged that they occurred as a result of his suffering from depression. He further stated that when suffering from depression he would not open his mail. After the assignment of a Referee, Respondent was given notice of an October 14<sup>th</sup> hearing date, both by email and U.S. Mail, the Order for Hearing being dated August 25<sup>th</sup>, 2014.

On September 4<sup>th</sup>, the Director served Respondent with discovery requests, and on October 8<sup>th</sup> the Director served upon Respondent, by U.S. Mail, a motion in limine to limit his testimony at the scheduled October 14<sup>th</sup> hearing because he had not responded to the discovery requests, and he had not complied with a provision in the Order for Hearing which required disclosure of witness and exhibit lists. A copy of the August 25<sup>th</sup> Order was attached to the motion in limine which was served upon Respondent.

Respondent did not comply with discovery requests, did not provide witness or exhibit lists and did not appear at the hearing on October 14<sup>th</sup>. Because Respondent failed to appear, this Referee is not in a position to judge his mental health. In view of the fact,

however, that it is the Respondent who is making the allegation of mental illness, it would seem prudent to require proof of mental competency before Respondent is allowed to practice law again, should he be suspended as is recommended herein.

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