

FILE NO. A09-1656

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against RICHARD J. COLEMAN,
a Minnesota Attorney,
Registration No. 136141.

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

The above-captioned matter was heard on January 22, 2010, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court.

Robin J. Crabb appeared on behalf of the Director of the Office of Lawyers Professional Responsibility ("Director").

Respondent Richard J. Coleman ("Respondent") appeared *pro se*.

The hearing was conducted on the Director's Amended Petition for Disciplinary Action ("Pet.") which was filed pursuant to leave of Court on December 3, 2009. Scott Armstrong submitted his testimony by deposition, and Richard J. Coleman testified in person. Both parties submitted exhibits. The parties were directed to submit proposed findings of fact, conclusions of law, a recommendation for appropriate discipline, and brief on or before February 5, 2010. The Director timely submitted said documents. Respondent submitted his proposed findings on the afternoon of February 12, 2010.

The Referee received into evidence Exhibits 1, 2, 4, 5, 6, 8, 9 and 11-27. At the conclusion of the hearing, the Director withdrew Exhibits 3, 7 and 10. Since both parties have referred to Exhibit 3 in their proposals, the Referee is including it with the documents submitted. The parties agree that the correct date on Exhibit 3 should be November 9, 2007. The Respondent submitted five packets of unmarked exhibits which relate to his unfiled motion for summary judgment.

Upon all the files, records, and proceedings herein, and the evidence submitted at the hearing, the Referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in the state of Minnesota on May 7, 1982.

2. Respondent executed a fee agreement with Scott Dennis Armstrong ("Armstrong") and Ehren Morhman ("Mohrman") for representation in their criminal matters on September 15, 2006. Both Armstrong and Mohrman were arrested and charged with possession of controlled substances and possession of a firearm after police stopped a car which contained both men and the contraband. The arrest occurred on August 26, 2006.

3. Prior to the execution of the fee agreement, Armstrong and Mohrman met with respondent for thirty to forty minutes. During that meeting, respondent did not discuss the readily foreseeable conflicts which would arise in the dual representation as a result of representing both men. Neither Armstrong nor Mohrman signed a consent to the dual representation at that time.

4. Armstrong was arrested on October 30, 2006, on a different charge. Armstrong was in custody at various penal institutions continuously between October 30, 2006, and at least April 21, 2008.

5. An omnibus hearing was held in both the Armstrong and Mohrman cases on June 26, 2007, at which respondent presented several motions challenging the legality of the arrest. Armstrong was aware of the omnibus hearing, and was very interested in hearing the results of that hearing. On October 12, 2007, the court issued an order denying each of those motions.

6. Armstrong wrote a letter dated November 30, 2007, and sent that letter to Judge Smith. In that letter, Armstrong complained that respondent had not communicated with him, and that respondent had not yet notified him of the results of

the omnibus hearing. Respondent did not notify Armstrong of his receipt of the omnibus order or the court's denial of respondent's motions until at least December 5, 2007, greater than six weeks after the order had been filed.

7. In November 2007, First Assistant Kandiyohi County Attorney C. J. Crowell ("Crowell") presented a written plea offer to Mohrman, through respondent. One of the terms of that plea offer was that Mohrman would be required to testify truthfully at Armstrong's trial. Respondent continued to represent both Armstrong and Mohrman.

8. Armstrong pled guilty to possession of controlled substances on January 28, 2008. In the course of making that plea, Armstrong indicated, in response to the court's limited questioning, that he consented to the conflict of interest arising from respondent's representation of both him and Mohrman.

9. Mohrman, through respondent, accepted Crowell's plea offer on January 28, 2008.

10. On or about February 14, 2008, Armstrong withdrew his plea of guilty.

11. Subsequently, Crowell conducted further investigation in relation to the arrest. Crowell determined that a man named Robert Snelson purchased the firearm on behalf of Armstrong.

12. Respondent communicated the new information concerning Snelson to Armstrong sometime in March 2008. At that time, Armstrong told respondent that he would testify that the firearm had been sold to Mohrman prior to the arrest. Armstrong stated to respondent that he could produce a bill of sale confirming the sale to Mohrman.

13. On or before April 15, 2008, respondent told Crowell that Armstrong would testify that he sold the firearm to Mohrman. Crowell wrote a letter to the judge dated April 15, 2008, copying respondent, in which she stated the expected testimony of Armstrong and Mohrman, and expressed her belief that the dual representation of

Armstrong and Mohrman resulted in an unwaivable conflict of interest. Respondent received a copy of this letter.

14. Crowell wrote a second letter to respondent, dated April 17, 2008, in which she again expressed her opinion that the dual representation led to an unwaivable conflict of interest.

15. Respondent appeared on behalf of Armstrong on April 21, 2008. At that time, he stated that Armstrong would testify that Mohrman bought the gun from him. A few moments later in the same hearing, respondent indicated to the court that Mohrman would testify that he had no knowledge of the gun.

16. During the April 21, 2008, hearing, Armstrong indicated that he wished to fire respondent because of respondent's conflict of interest and lack of communication. Shortly thereafter, respondent moved to withdraw. That motion was granted.

17. Respondent did not, at any time, obtain informed consent, confirmed in writing, to the conflict of interest from either Mohrman or Armstrong.

18. Respondent represented Michelle McGuire in a criminal matter before the Tenth District Court in Isanti County. He filed a certificate of representation on behalf of McGuire on March 22, 2007. A portion of the certificate of representation reads, "I understand that I cannot withdraw from the representation unless said withdrawal is approved by the court after hearing on a written motion to Rule 7.03 [sic] Minnesota General Rules of Practice."

19. Rule 703 of the Minnesota General Rules of Practice requires that a lawyer who has entered a certificate of representation in a criminal case withdraw by written motion only. The lawyer must file the motion, and serve it by mail or personal service upon the client and the prosecutor. The withdrawal is effective when the attorney files proof that the order has been served on both the client and the prosecutor.

20. On May 2, 2007, respondent appeared in court on behalf of McGuire. McGuire did not appear. As a result of McGuire's failure to appear, respondent orally

moved to withdraw. Respondent did not obtain a written order from the court, and did not serve any written order upon his client or the prosecutor.

21. McGuire's case was subsequently set for trial on October 1, 2007. Respondent did not receive any written notification of that court date, and did not appear. Another attorney who was present at the hearing, Dan Adkins ("Adkins"), contacted respondent by telephone from the hearing. Adkins notified respondent that McGuire's case was before the court, and that the court wanted to know why respondent was not present. Respondent indicated to Adkins that he believed that he had withdrawn from representation.

22. Between that telephone conversation and October 8, 2007, respondent did not contact the court, McGuire, or opposing counsel.

23. On October 5, 2007, respondent received a message from his answering service which read, "Gwen Williams (763) 689-8366. If his case Michelle McGuire is still on for Monday morning. Received on: 3:33 p.m. Oct. 5, 07[.]"

24. Respondent received the message after business hours on October 5, 2007, a Friday. Respondent did not contact his client, the prosecutor, or the court prior to the hearing on October 8, 2007.

25. Respondent did not appear at McGuire's rescheduled trial on October 8, 2007.

26. Judge P. Hunter Anderson, the judge who was assigned to McGuire's case, sent a letter to the Director of the Office of Lawyers Professional Responsibility on October 16, 2007, in which he complained about respondent's non-appearance. A copy of the letter was sent to respondent.

27. A notice of investigation concerning the above facts was sent to respondent on November 5, 2007.

28. Respondent submitted a written motion to withdraw in this matter on November 13, 2007. Respondent's motion to withdraw was granted.

Aggravating Factors

29. Respondent has an extensive disciplinary history, including three admonitions, a stipulated private probation, and a stipulated public reprimand and probation, all of which have been issued since 2001:

a. On July 16, 2001, respondent was issued an admonition for failing to place client funds into a trust account, in violation of Rule 1.15(a), Minnesota Rules of Professional Conduct (MRPC), as interpreted by Lawyers Professional Responsibility Board (LPRB) Opinion No. 15.

b. On July 16, 2001, respondent was issued another admonition for failing to place client funds into a trust account, in violation of Rule 1.15(a), MRPC, as interpreted by LPRB Opinion No. 15.

c. The Director submitted a petition for disciplinary action against respondent, dated September 30, 2003. On March 11, 2004, respondent stipulated to a public reprimand and two years' probation. That disposition was imposed by the Court on May 14, 2004. The conduct which led to the discipline included the following:

(i) In one client matter, respondent left the courtroom during a first degree murder trial, and made inaccurate statements to a representative of the Director with regard to whether he had filed a writ of mandamus, in violation of Rules 5.3(a) and 8.4(d), MRPC.

(ii) In another client matter, respondent failed to appear in court on several occasions, even after being contacted by court personnel to remind him that he was scheduled to appear, in violation of Rules 1.3, 3.2, 3.5(h), and 8.4(d), MRPC.

(iii) In another client matter, respondent failed to deposit client funds into his trust account, failed to inform his client of two court dates,

and failed to appear at two court dates, in violation of Rules 1.3, 1.4, 1.15(a), 1.16(d), 3.2 and 8.4(d), MRPC.

(iv) In another client matter, respondent failed to deposit client funds into a trust account, failed to attend a meeting with the client, and thereafter failed to respond to any attempts at communication from the client, in violation of Rules 1.5(b) and 1.16(d), MRPC, and Rule 1.15(a), MRPC, as further interpreted by Opinion 15.

(v) In another client matter, respondent failed to place client funds into a trust account, and failed to respond to a client's multiple requests for communication due to his belief that his representation of the client had ended, in violation of Rule 1.15(a), MRPC, as interpreted by LPRB Opinion No. 15.

(vi) Respondent failed to cooperate with the Director's investigation of these matters, in violation of Rule 8.1(a)(3), MRPC, and Rule 25, Rules on Lawyers Professional Responsibility (RLPR).

d. On May 26, 2004, respondent was issued an admonition for failing to place an advance retainer into a client trust account, failing to represent a client diligently, and failing to communicate with a client, in violation of Rules 1.3, 1.4, and 1.15(a), MRPC.

e. On August 29, 2007, respondent stipulated to two years' private probation in relation to the following conduct:

(i) Respondent represented a client in a Wisconsin criminal matter without being licensed in Wisconsin, failed to notify his client of a court date, failed to appear at that court date, and failed to respond to numerous client requests for information, in violation of Rules 1.3, 1.4, 3.2, 3.4(c), and 8.4(d), MRPC. This activity took place during the period of the previous probation.

(ii) Respondent failed to respond to client requests for information, failed to advise his client of a trial date, and failed to appear at the trial date, in violation of Rules 1.3, 1.4, 3.2, and 8.4(d), MRPC.

(iii) Respondent failed to cooperate with the Director's investigation of these matters, in violation of Rule 8.1(b), MRPC, and Rule 25, RLPR.

30. Respondent committed the bulk of the current misconduct while on probation. Respondent was on probation between August 29, 2007, and August 28, 2009. During that period, respondent failed to supply Armstrong with the order from the omnibus hearing, and represented both Armstrong and Mohrman while their interests were adverse. In addition, the two McGuire hearings which respondent failed to attend were scheduled for October 1, 2007, and October 8, 2007. Attorneys who are placed on probation are expected to demonstrate renewed commitment to ethical conduct. Respondent's conduct in these two cases is reminiscent of his past misconduct, especially in respect to his failure to communicate with his clients and failure to appear at court dates.

31. Respondent committed misconduct in the Armstrong matter while under investigation from the Director. Respondent's statements during a court proceeding dated January 28, 2008, confirm that he was aware of the pending investigation. The most severe conflict of interest occurred between mid-March 2008 and late April 2008, after respondent was aware that his actions were under scrutiny.

32. Respondent has failed to acknowledge the misconduct. Respondent has steadfastly refused to entertain any possibility that his conduct may have strayed from the requirements of the MRPC.

33. Respondent has not expressed remorse.

34. As a result of the misconduct, Armstrong was deprived of his choice of counsel. Armstrong and Mohrman paid \$10,000 for the joint representation. After

respondent withdrew from Armstrong's case, Armstrong had to be appointed a public defender because he did not have sufficient funds to hire a private attorney.

35. As a result of the misconduct, McGuire appeared in court twice without an attorney. Her criminal case was delayed, and she was deprived of her choice of counsel.

Mitigating Factors

36. The Referee finds that respondent did not establish any mitigating factors.

CONCLUSIONS OF LAW

1. Respondent violated Rule 1.4(a)(3), MRPC, by failing to inform Scott Armstrong of the results of the omnibus hearing until more than six weeks after the order was issued. The order was issued October 12, 2007, and respondent did not inform Armstrong of the results of the hearing until at least December 5, 2007.

2. Respondent violated Rule 1.7(a)(2), MRPC, in that representing Armstrong and Ehren Mohrman in the same criminal matter gave rise to a significant risk that the representation of each client would be materially limited by the lawyer's responsibility to the other. This risk existed from the beginning of the representation, when neither man admitted to the presence of the firearm in the car. The risk increased in November 2007, when Mohrman was offered a plea deal which required him to testify truthfully at the hearing of Armstrong. Respondent did not seek or obtain informed consent, confirmed in writing, from Armstrong or Mohrman.

3. Armstrong's January 28, 2008, statement on the record at his plea hearing does not constitute "informed consent, confirmed in writing," and in any event, was untimely.

4. Respondent did not otherwise seek or obtain any informed consent, confirmed in writing, from Armstrong.

5. Respondent violated Rule 1.7(a)(1), MRPC, in that he continued to represent Armstrong and Morhman after November 2007, when Mohrman was offered a plea bargain which required him to testify truthfully at the trial of Armstrong. The requirement that Mohrman be available to testify at Armstrong's hearing rendered the representation of Mohrman and Armstrong directly adverse.

6. Respondent violated Rule 1.7(a)(1), MRPC, in that he continued to represent Armstrong and Mohrman after March 2008, when he received notice that Armstrong intended to testify in a way that would incriminate Mohrman. Respondent was aware at that time that Mohrman claimed to have no knowledge of the gun, and that Mohrman was obligated to testify at Armstrong's trial. The accounts of Mohrman and Armstrong were mutually exclusive. Armstrong's testimony would directly incriminate Mohrman, and Mohrman's testimony was inconsistent with Armstrong's testimony. Respondent could not fully advise either Armstrong or Mohrman without compromising his representation of the other. After respondent discovered that Armstrong and Mohrman intended to testify inconsistently, the representation of each client was directly adverse to each other, and the conflict of interest was therefore unwaivable. Even if the conflict could have been waived, respondent did not seek or obtain written confirmation of informed consent.

7. Respondent violated Rule 1.3, MRPC, in that he failed to represent McGuire in a diligent manner. Respondent failed to obtain a written order after his May 2007 withdrawal, and failed to promptly secure his withdrawal after the court informed him that the case was still pending. Further, he failed to contact his client, the court, or the prosecutor to confirm his status on the case or to communicate his withdrawal.

8. Respondent violated Rule 1.4(a)(3), MRPC, in that he failed to communicate with his client the fact of his withdrawal, either on the purported

withdrawal pursuant to the May 2007 motion, or after he became aware that his client appeared in court on October 1, 2007.

9. Respondent violated Rule 1.16(c), MRPC, in that he failed to comply with the law regarding withdrawal in a criminal matter, after filing a certificate of representation. Respondent did not adhere to the requirements contained in Rule 703, Minnesota General Rules of Practice, when he made an oral motion to withdraw from the McGuire representation, failed to obtain a written order to that effect, and failed to contact his client, the court, or the prosecutor regarding his withdrawal.

10. Respondent violated Rule 1.16(d), MRPC, in that he failed to take steps reasonably practicable to protect his client's interests following termination of representation. Respondent did not contact his client following the May 2007 oral motion to withdraw to communicate that he no longer represented her. Respondent did not contact McGuire following the October 1, 2007, court date to inform her that she was no longer represented. Respondent did not attempt to obtain a continuance to allow McGuire to obtain other counsel.

11. Respondent violated Rule 3.4(c), MRPC, in that he knowingly disobeyed an obligation under the rules of the tribunal. Respondent testified that he is aware of the requirements contained in Rule 703, Minnesota General Rules of Practice, but did not comply with them.

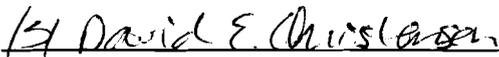
12. Respondent violated Rule 8.4(d), MRPC, in that he engaged in conduct prejudicial to the administration of justice. Respondent's actions caused McGuire's case to be delayed, and caused the court hearing her case to reschedule her trial at least once.

13. Respondent has demonstrated that probation will not sufficiently protect the public. He has been on probation four out of the last six years, but has still committed misconduct similar to that he has committed before.

RECOMMENDATION FOR DISCIPLINE

Due to his extensive disciplinary history, refusal to acknowledge the misconduct, the similarity of this misconduct to respondent's previous misconduct, and the remaining aggravating and mitigating factors, the Referee recommends that respondent be suspended for six months, and be placed on supervised probation for two years upon his return to the practice of law.

Dated: February 19, 2010.



HONORABLE DAVID E. CHRISTENSEN
SUPREME COURT REFEREE

MEMORANDUM

This matter comes before the Referee upon a petition for discipline filed by the Director against respondent. The conduct complained of occurred while respondent was on probation and involved two Defendants who had been represented by respondent, that is Armstrong and McGuire. After the matter was assigned to this Referee, respondent brought a motion to dismiss, alleging that service was improper. Respondent having actual knowledge of the petition and having filed an answer in regard thereto, the motion to dismiss was denied. Thereafter, reference was made to a motion for summary judgment made by the respondent, and the Director filed a brief in response to said motion. No motion for summary judgment was ever filed with the Referee.

At the conclusion of the hearing in the matter on January 22, 2010, both parties were given until February 5, 2010, to file proposed findings, conclusions, a recommendation and a brief. Said documents were timely filed by the Director. On February 9, 2010, this Referee notified both parties by email that no documents had been received from respondent. On the morning of February 12, 2010, this Referee prepared a draft of the findings and conclusions and in mid-afternoon received by email from respondent his proposed findings. That document was accompanied by a cover letter indicating that he had not requested an extension of time because he feared such a request might be an ex-parte communication. This Referee is skeptical of this explanation since both parties and the Referee had agreed that email was an acceptable method of communication.

The petition for discipline contains a number of alleged violations, two of which this Referee considers to be serious. The first of those is the conflict of interest between Armstrong and Mohrmann. Defending two defendants, both of whom have been charged with possession of the same controlled substance and a handgun, is dubious at best. Continuing that representation after a plea offer is made to one of the defendants wherein that defendant is offered a plea agreement which would require that he testify honestly against the other defendant is inexcusable without extenuating circumstances which this Referee cannot imagine. The situation only became worse when it was learned that the defendants took opposing views in regard to possession and/or

ownership of the handgun. It is difficult to understand how any attorney would not recognize that continued representation of both clients was improper.

The second serious violation involved the McGuire matter. Respondent claims he orally withdrew from representing McGuire when she did not make a court appearance. No record was made of the withdrawal and no notice of the withdrawal was given to McGuire. For a period of time respondent did not receive any notices in regard to the McGuire matter which was set on for trial on October 1, 2007. Respondent did not receive notice of that trial date and at the request of the Court, another attorney contacted respondent by telephone and told him the matter was before the Court. Respondent took no action in regard thereto and the case was continued until October 8th. On October 5th, the judge's office left a message with respondent through his message service inquiring if the McGuire case was still on for Monday morning. Respondent did not respond to the inquiry until after a complaint was filed with the Director. While failing to file a written withdrawal may be a technical violation of the rules, it becomes a major violation when counsel is advised of a trial date and makes no effort to clarify the situation.

D.E.C.