

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against DAVID G. DeSMIDT,
a Minnesota Attorney,
Registration No. 139749.

**PETITION FOR
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 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 15, 1982. Respondent currently practices law in Minneapolis, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

A. On June 9, 1994, respondent was issued an admonition for failing to inform a client about the cancellation of a hearing, failing to protect the client's interests at a hearing and failing to cooperate with the Director's investigation of that client's complaint. Respondent's conduct violated Rules 1.3, 1.4, and 8.1(a)(3), Minnesota Rules of Professional Conduct (MRPC), and Rule 25, RLPR, as those rules existed prior to the 2005 amendments to the MRPC.

FIRST COUNT

Michelle Alwin Matter

1. Michelle Alwin retained respondent on or about September 5, 2006, to obtain a modification of an order for long term foster care in an effort to have her minor children returned to her. The parties did not sign a written retainer agreement. Respondent agreed to undertake the representation for a nonrefundable flat fee of “at least fifteen hundred to two thousand dollars.” Respondent agreed to accept payments but told Alwin that he could not begin working on her case until she made at least the first payment.

2. Alwin paid respondent \$200 in cash on September 5, 2006. On September 11, 2006, Alwin wrote respondent a check for \$250. On November 20, 2006, Alwin wrote respondent a check for \$200. On February 1, 2007, Alwin wrote respondent a check for \$200. Respondent did not place any of Alwin’s payments into his trust account even though some of the funds were unearned at the time of receipt and represented fees for future services which should have been deposited in respondent’s trust account in the absence of a written fee agreement countersigned by Alwin.

3. On November 14, 2006, respondent filed Alwin’s motion requesting modification of a February 26, 2003, order for long term foster care. Alwin’s request for modification was based on her alleged change in circumstances—mainly that she had achieved sobriety. On November 20, 2006, the state filed responsive pleadings in opposition to Alwin’s motion.

4. The court heard Alwin’s motion on February 1 and March 28, 2007. Other than Alwin’s own testimony concerning her sobriety, respondent did not offer any additional evidence of Alwin’s sobriety, the existence of a sober support network of

persons, or identification of any persons that could act as a support to her in parenting the children.

5. On May 17, 2007, Alwin's motion was denied. Respondent and Alwin disagreed with the court and determined to appeal the decision.

6. With court approval, the appeal was undertaken by respondent in his capacity as a public defender.¹

7. On June 18, 2007, respondent filed a notice of appeal and appellant's statement of the case with the Court of Appeals. On June 28, 2007, the Court of Appeals issued an order scheduling Alwin's oral argument on an expedited basis stating, "Because the appeal involves the district court's determination of child custody, the case shall be given priority for scheduling." Respondent did not inform Alwin of the court's June 28 order nor did he provide her with a copy thereof.

8. On June 29, 2007, respondent ordered a transcript of the hearings. On July 11, 2007, the requested transcripts were provided to respondent.

9. Despite not filing the appeal for 33 days following the district court's order denying Alwin's motion, it was not until after he had filed the notice of appeal that respondent conducted detailed research to determine whether case law supported overturning the district court's decision. Respondent concluded that no support could be found and determined to abandon the appeal. Respondent did not communicate the results of his research to Alwin. Respondent did not communicate his intent to abandon the appeal to Alwin.

10. Respondent did not formally withdraw the appeal; instead, he resolved not to file an appellant's brief, which was due on August 14, 2007, as the means to abandon the appeal.

¹ At the time, respondent occasionally worked for the public defender's office.

11. Respondent did not inform Alwin that he had abandoned the appeal, despite her repeated efforts to contact him to determine the status of the appeal.

12. On August 22, 2007, the Court of Appeals, noting that no brief or motion for extension of time to file a brief had been filed, denied oral argument and directed Alwin to file a brief by September 4 or face dismissal of the appeal. The August 22 order stated, in part, "Failure to comply may result in the imposition of sanctions, including dismissal of the appeal." Respondent did not inform Alwin of the Court's August 22 order nor did he provide her with a copy thereof.

13. In September 2007, respondent informed Alwin that he had filed an appeal and that the public defender's office was covering the fee.

14. On September 12, 2007, the Court of Appeals dismissed Alwin's appeal by reason of appellant's failure to file a brief or timely move for an extension of time to file a brief. The Court noted, "It appears the appeal has been abandoned." Respondent did not inform Alwin of the Court's September 12 order nor did he provide her with a copy thereof.

15. Beginning in September 2007 to February 2008, Alwin called respondent approximately every other week to determine the status of her appeal. Respondent returned approximately one out of five messages Alwin left for him and often waited six weeks or more to do so.

16. Respondent did not candidly inform Alwin of the status of her appeal; rather, respondent would indicate to Alwin that he would check on the matter and get back to her or falsely tell her he was waiting to hear from the Court. Respondent knew the appeal had been dismissed.

17. On February 19, 2008, respondent falsely informed Alwin that he "just found out a couple of days ago, [she] lost [her] appeal." Alwin understood

respondent's statement to mean that the Court of Appeals agreed with the district court's decision to deny her motion for reunification.

18. On July 29, 2008, Alwin called respondent after she could not locate a record of her appeal. During their phone conversation on July 29, 2008 (more than ten months after the appeal was dismissed), respondent informed Alwin that the Court of Appeals requested a brief and that he did not submit the brief as he had decided not to pursue her appeal. Respondent further told Alwin, "I probably should've told you sooner, but I didn't and that's that."

19. Respondent's conduct violated Rules 1.3, 1.4, 1.5(a) and (b), 1.15(c)(5), 1.16(d), 4.1, and 8.4(c) and (d), MRPC.

SECOND COUNT

Jessica Slobodzian Matter

20. In February 2006, Jessica Slobodzian retained respondent to seek the expungement from her criminal record of three misdemeanor convictions. The retainer agreement called for the advance payment of a \$1,000 nonrefundable fee plus \$250 for filing fees. Neither respondent nor Slobodzian signed the retainer agreement. Slobodzian's funds were not placed into respondent's trust account. Slobodzian's check to respondent for \$1,252 was dated February 21, 2006.

21. On April 14, 2006, Slobodzian's petition for expungement was filed with the court. On June 22, 2006, the court held a hearing on Slobodzian's petition. On July 19, 2006, the court's order granting Slobodzian's petition for expungement was signed. The order, however, mistakenly expunged only two of the three convictions.

22. In October 2007, Slobodzian learned of the error when one of the convictions appeared on her record during a background check in connection with an application for employment. Slobodzian subsequently notified respondent on

October 12, 2007. In November 2007, respondent contacted the judge's clerk and advised the clerk of the error.

23. On January 2, 2008, respondent left his private law practice and joined the Hennepin County Public Defender's Office. Respondent continued his representation of Slobodzian.

24. In January 2008, respondent advised Slobodzian that he would seek an amended order. Respondent, however, was advised by the judge's clerk that the case file could not be located and suggested respondent draft an amended order or a new order.

25. On March 13, 2008, respondent explained to Slobodzian what he planned to do to have the error corrected, i.e., draft another order for the court's signature. Respondent further indicated that copies of the final paperwork would be sent to Slobodzian.

26. From April 14, 2008, through June 4, 2008, Slobodzian left approximately 25 messages for respondent. Respondent failed to return her calls with the exception of an unsuccessful attempt to reach Slobodzian on April 22, 2008. Respondent claims to have left a message for Slobodzian on that date.

27. On September 4, 2008, nearly 11 months after learning of the error, respondent submitted a proposed expungement order to the court.

28. On September 10, 2008, the court filed its new order. The order was not mailed to respondent until October 2, 2008, and respondent subsequently forwarded it to Slobodzian on October 9, 2008.

29. Respondent's conduct violated Rules 1.3, 1.4(a), 1.5(b), and 1.15(c)(5), 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.

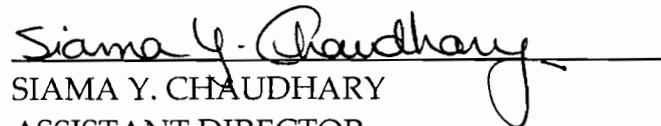
Dated: March 19, 2010.



MARTIN A. COLE
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY

Attorney No. 148416
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218
(651) 296-3952

and



SIAMA Y. CHAUDHARY
ASSISTANT DIRECTOR
Attorney No. 350291