STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. C1-87-1357

In Re Petition for Disciplinary
Action Against DAVID T. ERICKSON,
an Attorney at Law of the
State of Minnesota.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE

The above-captioned matter came before the undersigned for hearing on January 3 and February 1, 2002, at the Minnesota Judicial Center, St. Paul, Minnesota. Timothy M. Burke appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Respondent David T. Erickson appeared *pro se* and was personally present throughout the proceedings.

On or about January 24, 2002, respondent served and filed a motion to dismiss this matter, which the parties argued at the hearing on February 1 and the undersigned took under advisement. At the conclusion of the hearing on February 1, the Director was instructed to make any additional submissions by noon on February 13, 2002, and respondent was instructed to make any additional submissions by noon on February 19, 2002.

Based upon the evidence adduced at the hearing, the briefs and arguments relative to Respondent's motion, and upon all of the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in Minnesota on October 17, 1969. Respondent currently practices law in Excelsior, Minnesota. His office mailing address is P.O. Box 580, Excelsior, MN 55331.

2. Respondent resides at 19101 Highway 7, Minnetonka, MN 55345, and he has lived there since the 1960's.

3. Respondent testified he also spends a significant amount of time at 4892 Rutledge, Prior Lake, MN 55423, although he does not consider this address a second residence.

4. On or about October 25, 1999, Respondent's daughter, Shelli Koehnen, filed a complaint with the Office of Lawyers Professional Responsibility alleging Respondent took out a credit card in her maiden name and failed to pay the charges incurred on the card.

5. On October 27, 1999, the Director mailed Respondent notice of investigation of the complaint by his daughter. The notice was mailed to Respondent's home address of 19101 Highway 7, Minnetonka, Minnesota 55345. The notice requested Respondent to provide his complete written response within 14 days. Respondent failed to respond.

6. By letter dated November 18, 1999, and sent by certified mail, the Director requested Respondent to provide his response to the complaint. Respondent did not pick up the certified mail, but contacted the Director's Office by telephone on December 3, 1999. The Director's assistant spoke with Respondent on December 7, 1999, at which time Respondent stated he had not received a copy of the complaint because his address had changed. That same day, the Director mailed a second copy of the complaint and notice of investigation to Respondent at his business address.

7. On December 14, Ms. Koehnen called the Office of Lawyers Professional Responsibility and sought to withdraw her complaint.

8. On December 17, 1999, the Director received a letter from Respondent which did not respond to Koehnen's allegations in the complaint and notice of investigation, but merely stated:

> "This letter is in response to your request. I reviewed your letter and complaint. I understand that Shelli Ann Kochnen [sic] did not complain to your office. This is a family matter where things were said in the heat of anger.
> This matter has been resolved and there is no need for further attention."

9. By letters dated December 29, 1999, the Director informed both Koehnen and Respondent that the file would remain open and requested Respondent provide his written response to the allegations of the complaint within an additional ten days. The letter to Respondent was sent to Respondent's business address. Respondent did not respond.

10. By letter dated January 14, 2000, the Director again requested Respondent to provide his response to the complaint. The letter was sent to respondent's Excelsior address. Respondent did not respond.

11. On February 17, 2000, the Director served Respondent by mail with charges of unprofessional conduct and a notice of pre-hearing meeting to be held March 7, 2000, at 9:30 a.m. at the Director's Office. The notice and the accompanying cover letter both stated that Rule 9(b), Rules on Lawyers Professional Responsibility (RLPR), required Respondent to serve on the Director an answer to the charges of unprofessional conduct at least seven days before the pre-hearing meeting. The documents were addressed to Respondent's business address. Respondent did not serve an answer to the charges and failed to appear at the pre-hearing meeting.

12. On March 20, 2000, the Director issued a notice and petition for disciplinary action in the above-captioned matter. The Director made multiple attempts to effect personal service. Each attempt was made at Respondent's home address in Minnetonka. Attempts were made on March 20, 21, 23, 28 and 30 and May 18 and 19, 2000. Each was unsuccessful.

13. On July 5, 2000, the Director sent a copy of the notice and petition to Respondent's Minnetonka address by first class mail. Respondent failed to answer the petition or to respond to the July 5 letter.

14. On August 22, 2000, the Supreme Court suspended Respondent from the practice of law pursuant to Rule 12(c), RLPR, as an attorney who had a pending disciplinary case who could not be found within the State for service.

15. On or about September 20, 2000, Respondent filed a petition to vacate his suspension. On November 13, 2000, the Supreme Court stated that Respondent's suspension would be lifted if within ten days Respondent filed a valid address for personal service and a signed acknowledgement of service of the petition.

On December 5, 2000, Respondent filed and served by mail on the Director his answer to the petition for disciplinary action. Respondent did not list an address on his

December 5 cover letter. The return envelope and the answer listed Respondent's address as respondent's Excelsior business address.

Although Respondent never filed an acknowledgement of service nor is there any evidence he filed an address for personal service, he was evidently reinstated as a licensed attorney. A review of the computerized listing of attorneys indicates he is currently licensed as a practicing attorney.

16. On December 20, 2000, Respondent was deposed by the Director.

On January 4, 2001, the Director requested Respondent to provide certain information and documents addressed at the deposition no later than January 18, 2001. The letter was sent to Respondent's Minnetonka, Excelsior and Prior Lake addresses and to 600 West 78th St., Richfield, MN. Only the letter to the Richfield address was returned. Respondent did not respond.

When no response was received, the Director sent a follow up letter requesting the information within two weeks. This letter was sent by certified mail, return receipt requested, to Respondent's business address in Excelsior, his home address in Minnetonka, and to the Prior Lake address where Respondent sometimes stays. On February 6, 2001, the letter was received at the Prior Lake address and the signed receipt was returned to the Director.

17. By letter dated March 1, 2001, the Director again informed Respondent that the Director had not received any of the information or documents requested in the Director's January 4 and January 29 letters. Enclosed and served upon Respondent with the March 1 letter was a Request for Production of Documents pursuant to Minn. R. Civ. Pro. 34. The March 1 letter was sent by certified mail, return receipt requested, to Respondent's Minnetonka, Excelsior and Prior Lake addresses. On March 16, 2001, receipt of the letter was signed for at Respondent's Excelsior address.

18. By letter dated February 13, 2001, but received by the Director on March 15, 2001, Respondent provided some, but not all, of the documents requested in the March 1, 2001,

Request for Production of Documents. Respondent's letter identified his address as Box 580, Excelsior, Minnesota, his business address.

19. By letter dated April 18, 2001, the Director requested Respondent to provide the information and documents requested in the Director's January 4 letter which Respondent had not yet provided. The letter was sent by both first class mail and certified mail, return receipt requested, to Respondent's Minnetonka, Excelsior and Prior Lake addresses. The letters sent by first class mail were not returned. Respondent did not respond.

20. By letter dated April 25, 2001, the Director requested Respondent to sign and return an authorization for credit card records enclosed with that April 25 letter no later than May 7, 2001. The letter was sent by both first class mail and certified mail, return receipt requested, to Respondent's Minnetonka, Excelsior and Prior Lake addresses. The letters sent by first class mail were not returned. Respondent did not respond.

21. By letter dated May 3, 2001, the Director informed Respondent that the Director had received no response to the Director's April 18 letter and again requested Respondent to provide the information and documents requested in the Director's January 4 letter. The letter was sent to Respondent by both first class mail and certified mail, return receipt requested, to Respondent's Minnetonka, Excelsior and Prior Lake addresses. The letters sent by first class mail to Respondent's Minnetonka and Excelsior addresses were not returned. Respondent did not respond.

22. By letter dated May 8, 2001, the Director informed Respondent that the Director had received no response to the Director's April 25 letter and requested Respondent to provide at that time the executed authorization requested in that April 25 letter. The letter was sent by both first class mail and certified mail, return receipt requested, to Respondent's Minnetonka, Excelsior and Prior Lake addresses. The letters sent by first class mail were not returned. Respondent did not respond.

23. On September 6, 2001, the Director served by mail on Respondent an Amended and Supplementary Petition for Disciplinary Action. Pursuant to Rule 13(b), RLPR, Respondent

had 20 days to serve and file his answer. Respondent did not serve or file an answer to the amended and supplementary petition.

24. On October 4, 2001, the Director served Respondent by mail with interrogatories, requests for production of documents, and requests for admissions. Pursuant to the Minnesota Rules of Civil Procedure, Respondent had 30 days to respond. Respondent did not respond for approximately 47 days, until November 21, 2001.

25. On November 14, 2001, the undersigned referee had a telephonic scheduling conference with Respondent and Timothy Burke, attorney for the Director. Discovery problems were informally discussed. Respondent agreed to answer all outstanding discovery within a short time. The undersigned discussed the automatic operation of Minn. R. Civ. Pro. 36 by which requests for admissions are deemed admitted unless timely denied or objected to. The Order following the conference, however, did not memorialize either Respondent's agreement to provide all requested discovery or my comments on the self-executing nature of Rule 36 requests for admissions.

26. On November 21, Respondent filed his answers to outstanding discovery. He denied all but seven of the Director's Requests for Admissions, but neither sought leave to file his answers after the thirty days normally allowed to respond nor moved to avoid the operation of the Rule deeming admitted all requests not timely denied. Respondent failed to answer some interrogatories and failed to produce any of the requested documents. By letter dated November 26, 2001, the Director informed Respondent that he had not responded to some of the discovery requests and that Respondent's responses to some requests were insufficient, and requested Respondent to provide full and complete responses to all requests. Respondent did not respond.

27. On November 30, 2001, the Director served and filed a motion to compel discovery. The motion was scheduled for a telephone hearing on December 17, 2001. Pursuant to Minn. Gen. R. Prac. 115.04(b), Respondent's response was due December 10, 2001. Respondent failed to serve or file any responsive papers. By letter dated December 3, 2001, the Director invited Respondent to contact the Director's Office to discuss Respondent's discovery

responses. Respondent failed to respond until December 14, 2001, the Friday before the scheduled Monday hearing By order filed December 17, 2001, the Referee ordered respondent to provide no later than 12:00 noon on December 19, 2001, interrogatory answers signed under oath, a waiver for credit card records, and all documents regarding the credit card company's lawsuit against Respondent. Respondent complied with this order.

28. At the initial scheduled hearing, January 3, 2002, the Director stated he did not have Ms. Koehnen available to testify, but sought a ruling that the matters asserted in his Requests for Admission (*see* Findings # 23 and 24, *supra*) were deemed admitted. Because the undersigned had not memorialized the discussion relative to the operation of Minn R. Civ. Pro. 36 in the Scheduling Order and because the prejudice of possible disbarment grossly outweighed the prejudice of a continuance to allow the Director to subpoena Ms. Koehnen, the undersigned denied the Director's motion and granted a continuance to arrange for Ms. Koehnen's attendance and testimony at the hearing. At the second hearing date, February 1, 2002, the Director stated he had been unable to locate Ms. Koehnen for service of a subpoena to testify. At the end of the Director's case, he dismissed the allegation that Respondent had engaged in unprofessional conduct by obtaining a credit card under false pretenses.

29. The Director has proven by clear and convincing evidence that Respondent repeatedly and intentionally failed to cooperate with the Director's investigation into alleged misconduct by Respondent.

30. Respondent has a disciplinary history as follows:

a. On June 25, 1982, Respondent received a warning for failing to appear at an appellate pre-hearing conference, failing to inform the court that he would not appear, and failing to file a notice of withdrawal.

b. On November 17, 1987, the Minnesota Supreme Court suspended Respondent for 30 days followed by 4 years probation for failing to file his state and federal tax returns. *In re Erickson*, 415 N.W.2d 670 (Minn. 1987).

c. On October 15, 1993, the Supreme Court suspended Respondent for 60 days for neglecting client matters, failing to maintain proper trust account books and records, using his trust account as a personal business account, and failing to cooperate with the disciplinary investigation. *In re Erickson*, 506 N.W.2d 628 (Minn. 1993).

d. On June 29, 1994, Respondent received an admonition for bringing a motion in bad faith, failing to respond to multiple requests for payment of a sanction, and failing to timely pay the sanction.

e. On February 12, 1996, Respondent received an admonition for improperly depositing nonrefundable flat fees in his business account, failing to cooperate with the conditions of his probation, and failing to respond to the Director's requests for information.

31. Respondent's prior discipline and the facts proven in the current proceeding show a pattern of non-cooperation with the Director. In the 1993 suspension case, the Referee found that Respondent had failed to cooperate with the Director by failing to respond to seven letters (one misaddressed) requesting books, records, and other information. Similarly, the 1996 admonition arose out of Respondent's repeated failures to respond to the Director's inquiries and requests for information necessary to supervise his probation and to investigate other allegations against Respondent.

CONCLUSIONS OF LAW

1. Respondent's conduct in intentionally failing to cooperate with the disciplinary process violated Rules 8.1(a)(3) and 8.4(d), MRPC, and Rule 25, RLPR.

2. Respondent's lengthy disciplinary history, which includes two public disciplines and includes misconduct substantially similar to that found above, aggravates Respondent's misconduct.

3. Respondent has offered no evidence in mitigation of his misconduct.

4. Rule 8(a), RLPR, authorizes the Director, upon reasonable belief that professional misconduct has occurred, to investigate the alleged misconduct whether or not a complaint has been made. Where no outside complaint has been made, however, the Director can commence an investigation only with the prior approval of the Executive Committee of the Lawyers Professional Responsibility Board. In the instant case, the Director's investigation did not commence upon the Director's "sole initiative", but followed the complaint by Respondent's daughter. Respondent cites, and the Referee can find, no authority that the later withdrawal of the complaint requires the Director to seek approval of the Executive Committee to *continue* an investigation. Such a rule would also be unwise since it would operate to transfer the power to resolve investigations of alleged misconduct from the Director, charged with operating in the interests of "the public, the lawyer complained of and the profession as a whole", Rule 2, RLPR, to the complaining party who may appropriately be motivated by his or her own self interests. Allowing the private settlement of the complaining person and the involved attorney to interfere with or halt an ongoing investigation would not be in the interest of the public or the profession.

5. Service by mail of the Petition for Disciplinary Action was proper under Rule 12(c), RLPR. The fact that Respondent could be found for personal service in litigation brought by the company that issued the credit card in his daughter's name does not negate the seven attempts to serve as indicated by the Affidavit of Non-Service accompanying the Petition for Disciplinary Action that formed the basis for mailed service under Rule 12(c).

6. The fact that the allegations of misconduct underlying this proceeding involve a family member and did not arise out of an attorney-client relationship does not insulate it from investigation and, if proven discipline, under the Rules of Professional Conduct. *See* Rule 8.4 (b), (c), and (h); In re Scallen, 269 N.W.2d 834, 841 (1978) ("The dictates of the Code of Professional Responsibility follow an attorney wherever he or she may travel and govern the attorney's every activity."); In re Perry, 494 N.W.2d 290, 295 n.5 ("Even if no attorney client relationship were found [in respondent's dealings with his mother's trust], respondent would still be subject to discipline under Rule 8.4. This court has stated in no uncertain terms that ethical

rules bind attorneys in all that they do, professional and otherwise." *Citing* Scallen, *supra* at 841-42.)

7. Respondent's January 24, 2002, motion to dismiss this matter is denied.

RECOMMENDATION FOR DISCIPLINE

The undersigned recommends:

1. That David T. Erickson be publicly reprimanded for his misconduct in failing to cooperate with the Director.

2. That Respondent be placed on unsupervised probation for a period of four years subject to the following conditions:

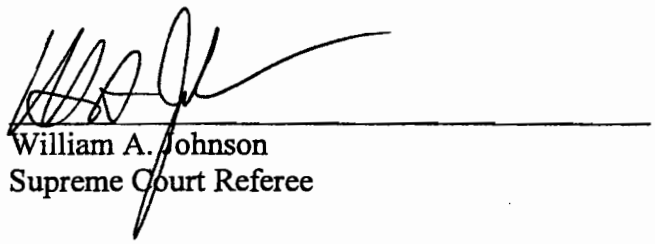
   a. Respondent shall abide by the Minnesota Rules of Professional Conduct.

   b. Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation and promptly respond to the Director's correspondence by the due date. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct which may come to the Director's attention. Upon the Director's request, Respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation.

3. That Respondent pay $900 in costs pursuant to Rule 24(a), RLPR, and disbursements pursuant to Rule 24(b), RLPR.

4. The attached memorandum is incorporated herein.

Dated: February 25, 2002.



William A. Johnson
Supreme Court Referee

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
Against DAVID T. ERICKSON,
an Attorney At Law of the
State of Minnesota

FILE NO. C1-87-1358

MEMORANDUM

This attorney discipline matter raises the difficult question of the appropriate discipline for an attorney's unprofessional failure to cooperate with the Director of the Lawyers Professional Responsibility Board in investigating a complaint which was ultimately dismissed. The Director recommends a 2-month suspension followed by 2 years unsupervised probation. The undersigned recommends a public reprimand and 4 years unsupervised probation for two main reasons. First, has already been suspended for three months during this proceeding because he could not be found for service of the petition. Second, the extent of Respondent's non-cooperation, while sufficient to warrant discipline, was not so egregious as to require suspension.

This case arose in October 1999 when Respondent's daughter, Shelli Koehnen, filed a complaint with the Lawyers Professional Responsibility Board claiming that Respondent had taken out a credit card in her name, incurred charges, and failed to pay the bills. On October 27 and November 18, 1999, the Director mailed Respondent notice of the investigation and requested his written response. The Respondent called the Director's office on December 7 and indicated that he had not received a copy of the complaint because his address had changed. Another copy was sent to the Respondent at his business address in Excelsior.

On December 14, 1999, Ms. Koehnen called the office of Lawyers Professional Responsibility and sought to withdraw her complaint. Three days later the Director received a letter from Respondent which stated in full:

> "I reviewed your letter and complaint. I understand that Shelli Ann Kochnen (sic) did not complain to your office. This is a family matter where things were said in the heat of anger.
>
> "This matter has been resolved and there is no need for further attention.
>
> "Thank you for your cooperation."

The Director promptly responded by letter dated December 29, 1999, stating he would not dismiss the proceeding and the file remained open. He also requested, again, that Respondent provide a written response to the allegations of the Complaint. Respondent never replied to this letter or to a follow up letter dated January 14, 2000. On February 17, 2000 the Director served Respondent by mail with charges of unprofessional conduct and a notice of a pre-hearing meeting to be held March 7, 2000. Respondent did not reply to this letter or appear at the pre-hearing meeting. On March 20, the Director issued a formal notice of Petition for Disciplinary Action and sought to have Respondent served at his home in Minnetonka. Service was unsuccessful, despite seven different visits by the process server to Respondent's home. On July 5 the Director sent a copy of the Notice of Petition to Respondent at his home address. Respondent failed to answer or respond to that letter.

On August 22, pursuant to the rule providing for immediate suspension of attorneys subject to disciplinary proceedings who cannot be found in the State, the Supreme Court suspended the Respondent from the practice of law. About a month later, September 20, 2000, Respondent filed a petition to vacate his suspension. On November 13, 2000, the Supreme Court ruled the Respondent's suspension would be lifted within

10 days if Respondent filed a valid address for personal service and a signed acknowledgement of service of the Petition. The record is not completely clear, but it appears that Respondent was subsequently reinstated to the practice of law without providing either the address for service or acknowledgement of service. Respondent did, however, file and serve his answer to the Petition.

Respondent was deposed by the Director on December 20, 2000. On January 4, 2001, the Director requested Respondent provide certain information and documents that were addressed at the deposition no later than January 18. When no response was received the Director sent follow up letters in February and March. By letter dated February 13 but not received until March 15, Respondent provided some, but not all of the documents requested. The Director then sent four more letters requesting information from Respondent, none of which were responded to. On September 6, 2001, the Director served an Amended and Supplementary Petition for Disciplinary Action which included the allegations of non-cooperation.

On October 4, 2001, the Director served Respondent with written interrogatories, request for production of documents, and request for admissions. Respondent eventually answered these discovery requests, but only after an informal scheduling conference with the Referee where the discovery issues were discussed and the Director's subsequent motion to compel discovery.

It is impossible to view Respondent's behavior in this case as anything other than an attempt to ignore the Director's investigation, presumably because Respondent felt it was inappropriate. This constitutes a violation of Rule 8.1(a)(3), MRPC, providing that a lawyer may not knowingly fail to respond to the Director's demand for information in a

disciplinary investigation, but must either provide the information sought or make a good faith challenge to the demand.

The challenging issue in this case is what the appropriate discipline should be where the alleged misconduct underlying the investigation was never proven, and has now been dismissed. While consistency is a goal in professional discipline cases and prior decisions can offer guidance in determining appropriate sanctions, each case must be examined individually with discipline imposed that is appropriate to its unique circumstances. In re Bernard, 534 N.W.2d 274, 274-75 (Minn. 1995); In re Ruffenbach, 486 N.W.2d 387, 390 (Minn. 1992). "The determination of the appropriate measure of discipline for an attorney is necessarily subjective. Because each case involves a different factual setting, different violations, and mitigating or aggravating circumstances, prior disciplinary law is helpful only through analogy and the facts of each individual case must be carefully examined." In re Boyd, 430 N.W.2d 663, 664-65 (Minn. 1988).

Viewed in this light, four cases seem particularly helpful. In In re Cartwright, 282 N.W.2d 548 (Minn. 1979) and In re Thedens, 557 N.W.2d 344 (Minn. 1997), the Supreme Court imposed 6 month suspensions on attorneys for their repeated refusals to cooperate with disciplinary authorities concerning ethics complaints against them. In Cartwright, four of the five complaints against the attorney which generated the investigation were ultimately dismissed. The Court specifically found, however, that Respondent's repeated refusal to cooperate with the disciplinary authorities concerning the ultimately dismissed ethics complaints constituted independent unprofessional conduct. Id. The Court imposed a 6-month suspension for this offense and for the

attorney's misconduct in obtaining a loan from a cousin and asserting false and groundless defenses in the cousin's suit to collect that loan.

In Thedens, the Court held that although the attorney's failure to timely file Federal and State income tax returns and his neglect of a single client matter did not merit a substantial period of suspension, his failure to attend a panel hearing pursuant to Rule 9, RLPR, coupled with less serious habitual lateness in responding to the Director's request for information, justified a 6-month suspension.

In In re Terrazas, 581 N.W.2d 841 (Minn. 1998) and In re Stanbury, 614 N.W.2d 209 (Minn. 2000), the Court publicly reprimanded lawyers who failed to cooperate with the Director of the Office of Lawyers Professional Responsibility, and placed them on 2 years unsupervised probation. In Terrazas, the Court noted that at least one of the causes of the attorneys' misconduct was difficulty in managing his temper, and the Court ordered anger management treatment. It also noted that Terrazas did not completely fail to cooperate with the Director and appeared remorseful for his misconduct.

In Stanbury the Court noted that the attorney had four prior admonishments for misconduct, had been publicly reprimanded for failing to satisfy a judgment against him for computer research fees and had been suspended for 30 days for stopping payment on a check for a court filing fee. Notwithstanding the attorney's continued failure to cooperate with the Office of Lawyers Professional Responsibility, the Court adopted a public reprimand and 2 years unsupervised probation as appropriate discipline.

Viewing these cases, it appears that a public reprimand and an extended period of probation is appropriate discipline for Respondent's misconduct. While a case could well be made for a period of suspension, the undersigned does not view Respondent's non-

cooperation as so complete as to require suspension as a sanction. Additionally, Respondent was suspended by the Supreme Court from late August to early December 2000 as an unserved attorney subject to disciplinary action. This suspension can be viewed as direct result of his failure to cooperate with the Director in the early stages of this case. Thus the sanction of suspension has already been imposed upon Respondent.

Respondent's prior disciplinary record, however, remains a significant concern. Two prior disciplinary acts were based at least in part on Respondent's earlier failures to cooperate with the Director. Given the rehabilitative goal of attorney discipline, this is a cause for grave concern. Accordingly, the undersigned has recommended a longer period of unsupervised probation than is normally imposed in similar cases. The hope is that with this longer period of supervision Respondent will be able to put his professional life in order and comply with the rules of Lawyers Professional Responsibility.

W. A. J.