

FILE NO. C5-87-1684

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary
Action against DAVID J. GHERITY,
a Minnesota Attorney,
Registration No. 140181

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

Respondent admitted service of the Director's February 5, 2002, petition for revocation of probation and for further disciplinary action on May 8, 2002 (Petition). On June 3, 2002, respondent served the Director with his answer to the petition, which the Director filed on June 20, 2002.

This matter came on for hearing on February 19, 2003, before the undersigned, appointed as Referee by the Supreme Court, in St. Paul, Minnesota. The Director's Office appeared by Betty M. Shaw, Senior Assistant Director. Respondent appeared *pro se*.

Before commencement of the hearing respondent made an oral motion for a continuance. Respondent stated that he was represented by counsel Richard Koch who was not present and could not be reached at his office or by cell phone. The motion for continuance was denied. Richard Koch had made no appearance in this matter nor had respondent notified this Referee or counsel for the Director's Office that he was not proceeding *pro se*. Respondent then made an oral motion that the petition be dismissed because of procedural irregularities. That motion was denied. Respondent then made an oral motion that the petition be dismissed based on improper *ex parte* contacts by the

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Director's Office with Ronald Kilgore (the complainant) and Laura Kallested (a witness in the criminal trial). That motion was also denied.

The Director presented 18 exhibits and respondent testified on his own behalf. Based upon the evidence adduced at the hearing, respondent's answer to the petition, the record, briefs and arguments, the undersigned makes the following:

FINDINGS OF FACT

Prior Discipline

1. Respondent was admitted to practice law in Minnesota on October 15, 1982.
2. During the period November 1986 through January 1987, respondent harassed and assaulted a former girlfriend and violated an order for protection the former girlfriend obtained against him. That conduct resulted in a misdemeanor conviction for Violation of an Order of Protection following a jury trial. In March 1987 respondent tossed a chemical igniting device toward the home of individuals with whom he had had an altercation. Respondent was charged with Arson but pled guilty to Disorderly Conduct. The Disorderly Conduct charge was continued for one year and then continued for a second year for dismissal subject to conditional probation (Exhibits 1, 3 and 4).
3. By order dated May 23, 1988, the Supreme Court determined that respondent's conduct, taken together, demonstrated a degree of indifference to his legal obligations that reflected adversely on his fitness as a lawyer and violated Rules 3.4(c) and 8.4(b), Minnesota Rules of Professional Conduct (MRPC). The Court placed respondent on two years probation, the terms of which included a comprehensive psychological evaluation and report to the Director's Office, successful completion of his criminal probation arising from one or more of the above-cited incidents, and cooperation with a supervising lawyer to be appointed by the Director's Office (Exhibit 5).

4. In May 1988, respondent was involved in an incident involving a woman with whom he was then having a relationship and the woman's estranged husband. Initially, both the woman and her estranged husband signed statements that led to the imposition of assault charges against respondent. In November 1988, however, both the woman and her estranged husband signed affidavits by which they attributed the incident to a "misunderstanding" and the assault charges were dismissed (Exhibits 6 and 7).

5. In June 1988, in connection with the criminal charges leading to respondent's May 23, 1988 disciplinary probation, respondent was examined by a court psychologist, who diagnosed respondent with a bi-polar disorder and chemical dependence. The psychologist recommended that respondent begin receiving psychiatric treatment in the form of both medication and psychotherapy. Respondent completed an outpatient chemical dependency treatment program in or about July 1988 and began taking prescribed anti-depression medication in or about August 1988. Respondent did not, however, begin his psychotherapy sessions until May 1989 (Exhibits 6 and 7).

6. By Supreme Court order dated September 25, 1989, respondent was publicly reprimanded and his disciplinary probation was extended (Exhibit 8). The public reprimand and probation extension were based on the conduct described above, in addition to respondent's role in the delayed appointment of the lawyer supervisor required by the May 23, 1988, order, his late arrival for an unrelated court proceeding on behalf of a client in December 1988, and his practice during the period April through August 1989 while suspended for failure to pay his attorney registration fee.

7. On October 4, 1989, the Supreme Court issued an amended order by which it specified that the date to which respondent's probation was extended was May 23, 1991 (Exhibit 9).

8. In January 1989, respondent was involved in an altercation with two women. Both women suffered minor injuries as a result of the altercation. Respondent was initially charged with a misdemeanor; however, the charges were continued for dismissal and were ultimately dismissed in November 1989 (Exhibits 10 and 11).

9. In December 1989, respondent's probation officer reported that respondent's compliance with the terms of his criminal probation was below acceptable standards because he had not reported regularly, verified his community service hours or Alcoholics Anonymous attendance, or established regular employment or financial stability. In January 1990, the District Court extended respondent's criminal probation (Exhibits 10 and 11).

10. By Supreme Court order dated January 2, 1991, the terms of respondent's disciplinary probation were modified, based on the conduct described above and based further on respondent's failure to appear for a pre-trial on behalf of his client Robert Koivula and failure to refund to Koivula \$500 of his retainer as agreed. The modifications to respondent's disciplinary probation included a prohibition against respondent's solo practice of law absent further order of the Supreme Court, and restitution of at least \$500 to Robert Koivula and submission to arbitration of any claim he might make for retention of some portion of Koivula's retainer. The Court's January 2, 1991 Order further provided that respondent could petition, anytime after May 23, 1991, for an order terminating probation, upon a showing that he had successfully completed his criminal probation, complied with the terms of his disciplinary probation and was psychologically fit to represent clients without supervision (Exhibit 12).

11. On March 20, 1991, the Supreme Court issued an order permitting respondent to represent up to ten clients in his solo capacity. The Order further provided that if respondent wished to represent more than ten clients, he had to

associate with one or more other attorneys who had accepted joint responsibility for the representation (Exhibit 13).

12. Since his last public discipline, respondent has received two private admonitions. On September 21, 1992, respondent received an admonition for failing to promptly comply with a notice from the Court of Appeals to correct deficiencies in an appeal he had filed for a client in violation of Rules 1.3, 3.4(c) and 8.4(d), MRPC (Exhibit 14). On December 31, 1996, respondent received an admonition for threatening to reveal an alleged affair in order to gain a settlement in a civil matter in violation of Rule 4.4, MRPC (Exhibit 15).

Misconduct Currently Before the Court

13. The facts of the present misconduct are set forth in Exhibit 17, an unpublished opinion of the Minnesota Court of Appeals (C8-01-1086 filed August 13, 2002). They are:

“Ronald Kilgore and Laura Kallestad each rented apartments on the 26th floor of a Minneapolis apartment building. At about midnight on October 29, 2000, Kilgore was awakened by Kallestad’s calls for help from the hallway outside his apartment. When Kilgore opened his apartment door, he saw Kallestad lying on the hallway floor with Gherity standing over her and kicking her. Kilgore asked Gherity what was going on. In response, Gherity rushed at Kilgore, chased him out to the balcony of the apartment building, placed his hand around his throat, forced him against the railing of Kilgore’s 26th-floor balcony, and repeatedly punched him. After a struggle, Kallestad helped Kilgore break free from Gherity, and they ran back into the apartment and another resident of Kilgore’s apartment called 911.”

14. On June 20, 2001, following a trial by jury, respondent was convicted of Fifth Degree Assault and Disorderly Conduct, both misdemeanors (Exhibit 16).

15. Judge Kathryn Quaintance sentenced respondent to 90 days in jail, 75 days of which would be stayed subject to a one-year probation that included the following requirements: (a) a full chemical health evaluation; (b) a mental health assessment; (c) anger management counseling approved by the probation department;

(d) no contact with the victim or the victim's building; (e) no same or similar misconduct; (f) and a \$100 fine (taking into account his transportation costs); and (g) restitution as determined by the probation department subject to a hearing on any disagreement as to the amount of restitution (Exhibit 16).

16. The Minnesota Supreme Court denied respondent's petition for further review of the Minnesota Court of Appeals decision (Exhibit 18).

17. During the period from approximately June 2000 to sometime in 2002, respondent resided in Arizona. Respondent is now "temporarily" residing in Minnesota, but expects to relocate to either Arizona or California once these proceedings are concluded (Resp. Test.).

18. During the period from approximately June 2000 to sometime in 2002, respondent was working in Arizona full-time for an individual who was then incarcerated for murder. Respondent is not licensed to practice law in Arizona and did not perform legal services for anyone, including his employer. Respondent served as a "litigation manager" and "personal consultant" for the individual and hired and "supervised" four Arizona lawyers on that individual's behalf. Respondent was paid \$60,000 a year for his services (Resp. Test.).

19. Respondent testified that approximately three years ago he suffered a depressive episode for which his family physician prescribed medication. Respondent did not notify the Director of his depression until at least January 31, 2003, did not inform the Director of the name of his family physician, did not provide specific information regarding his depression or how the depression may have contributed to the misconduct now before this Referee and did not provide the Director with an authorization to speak with, or obtain records from, his family physician (Resp. Test.).

20. Respondent also testified that he was involved in a motorcycle accident sometime before the incident leading to his first public discipline which resulted in head injuries and plastic surgery. Respondent claimed that that old injury might

explain his pattern of misconduct (Resp. Test.). Respondent provided no medical evidence or corroborative evidence for his claimed injury.

CONCLUSIONS OF LAW

1. Pursuant to Rule 19, Rules on Lawyers Professional Responsibility, respondent's June 20, 2001 criminal conviction (Exhibit 16) for the conduct that is the subject of the pending petition constitutes conclusive evidence that respondent engaged in that conduct.

2. Respondent's conduct violated Rules 8.4(b) and (d), Minnesota Rules of Professional Conduct (MRPC) and the Court's probation orders.

3. Respondent's extensive prior disciplinary and criminal record constitutes a pattern of misconduct and is an aggravating factor in this matter.

4. Respondent's claims that others are largely responsible for his misconduct, as well as his failure to accept personal responsibility for the events that have led to his various disciplinary and criminal proceedings, are aggravating factors in this matter.

5. Respondent's last-minute claim that head injuries he suffered in a motorcycle accident several years ago contributed to his prior and current misconduct was not sufficiently developed as to constitute a mitigating factor. Respondent's last-minute testimony regarding an alleged depressive episode sometime in 2000 was not sufficiently developed as to constitute a mitigating factor.

6. Respondent offered no other meaningful claims of mitigation.

RECOMMENDATION FOR DISCIPLINE

The Court and attorney discipline systems have given respondent repeated opportunities to put his life and work in order. Respondent has been on supervised probation for almost 15 years. Despite these efforts to allow respondent an opportunity to rehabilitate himself professionally, respondent has failed to comply with the terms of the Court-ordered probation and petition for removal from probation. Now he is before

this Court again for the fourth time, having been convicted of Assault and Disorderly Conduct. All of respondent's prior public disciplines have involved acts of violent criminal conduct and/or a failure to comply with conditions imposed upon him as a result of that criminal conduct. Respondent's pattern of conduct demonstrates that he does not possess the character and/or fitness to be a licensed Minnesota attorney. It is recommended that respondent be disbarred from the practice of law.

In addition, the undersigned recommends that, pursuant to Rule 16(e), RLPR, respondent continue suspended from the practice of law pending final determination of the disciplinary proceeding by the Supreme Court.

Finally, respondent should be required to comply with the notification provisions of Rule 26, RLPR, and should be assessed costs and disbursements under Rule 24, RLPR.

Dated: February 21, 2003.



DAVID E. CHRISTENSEN
JUDGE OF THE DISTRICT COURT
REFEREE APPOINTED BY THE SUPREME COURT

MEMORANDUM

Respondent was first disciplined as an attorney by an Order of the Supreme Court dated May 23, 1988 (Exhibit 5). The Referee in that matter found that respondent had committed an offense of Assault in the Fifth Degree on November 10, 1986, Disorderly Conduct on December 16, 1986 and March 28, 1987, and Violation of an Order for Protection on January 8, 1987. The Referee further found that respondent's conduct demonstrated a degree of indifference to his legal obligations which reflected adversely on his fitness as a lawyer.

Since the incidents in 1986 and 1987, respondent has had a long disciplinary history. (See Exhibits 1 through 15.) He has been continuously on probation since 1988. Respondent, in his proposed findings of fact, conclusions of law, and recommendation for discipline, states "Respondent has been on supervised probation for almost 15 years. During which he has suffered numerous personal problems. The majority of the

professional disciplinary problems arise from problems in his personal life unrelated to the practice of law and the majority of the criminal allegations against the Respondent have resulted in dismissal.”

It would seem to this Referee that 15 years is more than enough time to get one's life in order. The conduct which is the subject matter of this hearing is similar in nature to that which occurred in the first disciplinary proceeding. Considering the similarity of offenses and the length of probation, this Referee recommends that respondent be disbarred.

D.E.C.