

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary
Action against DUANE A. KENNEDY,
a Minnesota Attorney,
Registration No. 55128.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

At the direction of a Lawyers Professional Responsibility Board Panel, the Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition.

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 1, 1976. Respondent currently practices law in Rochester, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

A. On August 1, 2008, respondent was issued an admonition for failing to reduce a fee agreement to a writing signed by the client upon collecting a nonrefundable advance fee payment, failing to deposit an advance fee payment into a client trust account and failing to promptly reply to correspondence from the client.

B. On March 25, 2011, respondent was issued an admonition for failing to competently advise his client in a criminal matter.

FIRST COUNT

Conflict of Interest - *State v. Tottingham* Matter

1. On or about July 12, 2010, Anthony Tottingham was charged with a homicide which had occurred on July 7, 2010 (*State v. Tottingham*). Danielle Stoos was identified in the criminal complaint as Tottingham's girlfriend and an eyewitness to the shooting.

2. On or about July 19, 2010, respondent filed a certificate of representation of Tottingham.

3. On or about July 21, 2010, respondent requested the prosecution to provide discovery responses to respondent.

4. By letter dated August 2, 2010, respondent advised the prosecution that he represented Stoos in connection with *State v. Tottingham* and that Stoos was asserting her Fifth Amendment privilege not to testify although she had been subpoenaed to testify before a grand jury.

5. On August 3, 2010, the state filed a motion to disqualify respondent from representation of Stoos in *State v. Tottingham*.

6. During the August 4, 2010, hearing on the motion to disqualify respondent from representation of Stoos, the judge stated that respondent had a conflict of interest in representing both the defendant Tottingham and the eyewitness Stoos. Respondent then withdrew from representation of Stoos. Later that day, Stoos testified before the grand jury.

7. In June 2011, respondent began representation of Stoos in a probation revocation matter. Respondent represented Stoos through sentencing, which occurred on or about September 26, 2011.

8. On or about September 28, 2011, the prosecution filed a motion in *State v. Tottingham* to disqualify respondent from representation of Tottingham because

respondent's representation of Stoos created a conflict in his representation of Tottingham. Hearings on the motion were conducted on October 4 and 24, 2011.

9. During the October 24 hearing, Stoos declined to waive the conflict of interest. Additionally, Tottingham declined to waive his right to conflict-free representation, particularly in light of the fact that at least some of Stoos' testimony would be damaging to Tottingham.

10. The court disqualified respondent as counsel for Tottingham, who had to find another lawyer.

11. Respondent's conduct violated Rules 1.7(a)(2), 1.9(a), and 8.4(d), Minnesota Rules of Professional Conduct (MRPC).

SECOND COUNT

Refusal to Inform Client of Plea Offer - *State v. Matzke* Matter

12. Respondent represented Brennen Matzke in a criminal matter.

13. By letter to respondent dated December 6, 2011, the prosecutor made a settlement offer. Respondent received the letter on December 7, 2011.

14. That same day, respondent wrote to Matzke. The text of respondent's letter stated in its entirety:

I have received an offer to settle, that would reduce your prison time. The offer is only open for a few days, and then will be withdrawn.

I will review it with you when you bring in the attorney's fees that you [sic] are long past due. If you don't do so by 12-15-2011, their offer is withdrawn. You should respond promptly.

Respondent failed to enclose a copy of the prosecutor's letter which contained the offer and otherwise failed to communicate any of the terms of the offer.

15. In fact, the prosecutor's offer was not conditioned on Matzke paying attorneys' fees to respondent.

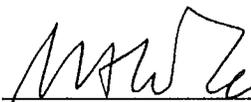
16. Additionally, respondent failed to advise Matzke that the offer was, by its terms, specifically open only until December 16, 2011.

17. Respondent did not communicate the terms of the prosecutor's settlement offer to his client until December 22, 2011, after the offer had expired.

18. Respondent's conduct violated Rules 1.4(a)(1), (2) and (3) and (b), and 8.4(d), MRPC.

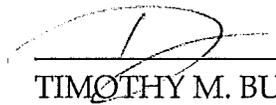
WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: Oct. 24, 2012.



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