

FILE NO. A14-0570

STATE OF MINNESOTA

IN SUPREME COURT

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

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

The above-captioned matter was heard on July 21, 2014, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Kevin T. Slator appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Respondent Duane A. Kennedy appeared and was represented by Eric L. Newmark throughout the proceedings. The hearing was conducted on the Director's February 27, 2014, petition for revocation of probation and for further disciplinary action (petition).

- The Director presented the live testimony of Christa Daily. Respondent testified at the hearing and also presented the live testimony of Eric J. Olson. The undersigned Referee received Director's Exhibit 1, consisting of tabs 1 through 10, without objection by respondent. Respondent later offered, and the Referee received, pursuant to stipulation of counsel, Respondent's Exhibit One, the written criminal complaint in the case of the *State of Minnesota vs. Stephanie Ann Prose*.

The Director was directed to submit proposed findings and a brief by August 8, 2014. Respondent was directed to do the same by August 15, 2014. The Director was permitted to submit a reply brief by August 21, 2014. The Referee's findings of fact,

conclusions of law and recommendation are due to the Supreme Court no later than August 22, 2014.

Respondent admitted all of the factual allegations of the petition and denied the rule violations. The findings and conclusions made below are based upon respondent's answer to the petition, the documentary evidence the parties submitted, the testimony presented, the demeanor and credibility of respondent and the other witnesses as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony. If respondent admitted a particular factual finding made below, then even though the Director may have provided additional evidence to establish the finding, no other citation will necessarily be made. For each factual finding made below, the undersigned evaluated the relevant documents and testimony, accepted as credible the testimony consistent with the finding and did not accept the testimony inconsistent with the finding.

Based upon the evidence as outlined above, 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 1, 1976. Respondent has practiced law full-time, continuously since 1976, including as an Assistant Olmsted County Attorney from 1978-86 (R. test.). Respondent currently practices law as a solo practitioner in Rochester, Minnesota (R. test.).
2. Fifty to sixty percent of respondent's current law practice is in criminal law (R. test.). In the past, 100% of respondent's law practice was in criminal law (R. test.).
3. Stephanie Ann Prose is a former Minnesota juvenile probation officer (R. ans.).
4. Bo Thomas Williams was on probation in 2012 as a result of a prior criminal conviction (R. ans.).

5. In April 2013 Prose was charged in Olmsted County District Court with criminal sexual conduct between her and Williams in violation of Minn. Stat. § 609.344, subdiv. 1(m), and misconduct of a public officer or employee in violation of Minn. Stat. § 609.43(2) (Ex. 1, Tab 1; R. ans.). Prose was a juvenile probation officer at the time (R. ans.).

6. Williams was under the supervision of Dodge Fillmore Olmsted community corrections (R. ans.). Prose was not assigned as Williams' probation officer.

7. Prose retained attorney Christopher W. Coon to represent her against the criminal charges described above (R. ans.).

8. Williams retained respondent to pursue a civil claim against Prose (Ex. 1, Tab 2; R. ans.).

9. On July 12, 2013, respondent faxed a letter to Coon (Exhibit 2) stating he was representing Williams (Ex. 1, Tab 2; R. ans.). Respondent wrote in part, "The only good resolution for Ms. Prose is a dismissal, where she has a right to expungement. I demand settlement for \$300,000.00." Respondent asked Coon to "move promptly" if Prose was interested in respondent's offer. Coon did not respond to respondent's letter.

10. On July 17, 2013, respondent faxed another letter to Coon (Ex. 1, Tab 3; R. ans.). Respondent reminded Coon of respondent's offer, and that accepting it "could result in dismissal of the criminal complaint against Ms. Prose, with a right of expungement" (Ex. 1, Tab 3; R. ans.). Coon did not respond to respondent's letter, but submitted a copy of it and respondent's July 12, 2013, letter to the Director's Office along with a complaint against respondent (R. ans.).

11. On July 29, 2013, respondent faxed another letter to Coon (Ex. 1, Tab 4; R. ans.). This was after complaints were received about this matter by the Director, but before respondent received notice of the investigation (R. ans.). Respondent wrote in part as follows:

If Mr. Williams can settle with Ms. Prose, he may decide to ask the prosecutor to dismiss, and he may decide to not testify against her. In that event, she would not be convicted and could acquire expungement.

12. Coon did not respond to respondent's letters (R. ans.).

13. Christa Daily is an Assistant Mower County Attorney who was assigned to prosecute Prose in Olmsted County to avoid a conflict of interest (Daily test.).

14. Coon sent copies of the letters from respondent to Daily shortly after he received them and while the *State vs. Stephanie Ann Prose* case was pending but not yet scheduled for trial (Daily test.).

15. Daily reviewed the letters. She testified that she concluded that they so severely adversely impacted Williams' credibility that the State could not effectively move forward with the case. Daily therefore decided to offer Prose a dismissal of the felony criminal sexual conduct charge if Prose would plead guilty to the gross misdemeanor misconduct of a public official charge (Daily test.). Prose agreed (Daily test.). Prose ultimately pled guilty to that charge, and the original felony charge was dismissed (Ex.1, Tabs 1,5,6; R. ans.).

The Referee finds that Respondent's letters to Coon contributed to Daily's decision to offer a plea to a reduced charge at least because they alerted defense counsel Coon that Williams may be an uncooperative witness and may have been willing to barter his testimony in exchange for a price, and therefore these caused prejudice to the administration of justice. Respondent's letters, while prejudicial to the administration of justice, did not however necessarily "gut" the criminal case nor constitute the primary or compelling reason for Daily's decision to reduce the charge, for these reasons:

- a) Daily's observed demeanor and credibility at the hearing.
- b) Respondent's letters were unlikely to have been admitted into evidence at the criminal trial to impeach Williams if he had testified. There was no way for Daily to have known conclusively if Williams was aware of or had

authorized Respondent's letters, or in fact would or would not have cooperated in his testimony at a trial.

- c) Williams was always likely subject to impeachment, apart from the letters, due to his criminal record and probationary status, and would not have been reasonably solely relied upon by the prosecution as a particularly reliable, credible, substantial witness.
- d) Resp. Exh. 1, the criminal complaint, indicates other significant evidence against Prose, even without trial testimony from Williams, because:
 - 1. Both Prose and Williams gave incriminating admissions to law enforcement that could have been used as impeachment or possibly direct evidence;
 - 2. Williams' wife or girlfriend reported to law enforcement the relationship between Prose and Williams, and could have likely testified about her knowledge; and
 - 3. The hotel where the relationship was conducted by Prose and Williams was identified.

In summary, Daily's decision to offer the plea bargain was substantially influenced by Respondent's letters, but does not appear to have been solely motivated by the letters. Therefore the Referee concludes that prejudice to the criminal prosecution was intended by Respondent and actually resulted from his letters.

16. Respondent's letters to Coon, and in particular the third letter, were intended to convey an offer from Respondent that in exchange for a money payment from Prose, Williams would decide not to testify against Prose in the criminal case. It is disingenuous to argue that Prose would pay \$300,000.00 in exchange for promised consideration that was intended to be insubstantial or ineffective.

17. Respondent's professional misconduct was intended to cause substantial prejudice to the administration of justice in the *State vs. Stephanie Ann Prose* matter, and a degree of prejudice so resulted.

18. By June 19, 2013, order, the Minnesota Supreme Court publicly reprimanded respondent and placed him on probation for two years. *In re Kennedy*, 831 N.W.2d 912 (Minn. 2013). The discipline was based upon (1) respondent's conflict of interest by representing the defendant in a criminal matter, even though he represented a witness in that matter, resulting in his disqualification from representing the defendant, and (2) failing to inform another client of a settlement offer in a criminal matter unless the client resolved the outstanding attorney fee balance due to respondent, in violation of Rules 1.4(a)(1), (2) and (3), and (b), 1.9(a), 1.17(a)(2), and 8.4(d), Minnesota Rules of Professional Conduct (MRPC). Among the conditions of respondent's probation was that he shall abide by the MRPC.

19. Respondent's conduct in this matter occurred after he was placed on probation by the Minnesota Supreme Court and violated the terms of his probation.

20. Respondent testified at the evidentiary hearing in this matter that he: (1) did not violate the MRPC in this matter; (2) did not cause any harm to the public or to the legal profession; and (3) is not remorseful.

CONCLUSIONS OF LAW

1. Respondent's conduct violated Rule 8.4(a) and (d), MRPC.
2. Respondent's commission of professional misconduct while on public probation aggravates the sanction for respondent's misconduct.
3. Respondent's prior discipline aggravates the sanction for respondent's misconduct.
4. Respondent's failure to acknowledge the wrongful nature of his misconduct, his lack of regret or remorse for his misconduct, and his steadfast claim

that his misconduct was proper and justified, aggravates the sanction for respondent's misconduct.

5. Respondent's substantial experience in the practice of law, especially criminal law, aggravates the sanction for respondent's misconduct.
6. There is no factor that mitigates the sanction for respondent's misconduct.
7. The Referee's Memorandum attached hereto is made part hereof.

RECOMMENDATION FOR DISCIPLINE

1. That respondent Duane A. Kennedy be suspended from the practice of law, ineligible to apply for reinstatement for a minimum of 90 days.
2. That the reinstatement hearing provided for in Rule 18, Rules on Lawyers Professional Responsibility (RLPR), not be waived.
3. That reinstatement be conditioned upon:
 - a. Compliance with Rule 26, RLPR;
 - b. Payment of costs, disbursements and interest pursuant to Rule 24, RLPR;
 - c. Successful completion of the professional responsibility examination pursuant to Rule 18(e), RLPR;
 - d. Satisfaction of continuing legal education requirements pursuant to Rule 18(e), RLPR; and
 - e. Proof by respondent by clear and convincing evidence that he has undergone moral change, that he is fit to practice law and that future misconduct is not apt to occur.

August 22, 2014

BY THE COURT:



BRUCE W. CHRISTOPHERSON
SUPREME COURT REFEREE

REFEREE'S MEMORANDUM

The evidence in this matter is not significantly disputed, apart from that part of the Daily testimony noted in Finding No. 15. There appears to be scant Minnesota disciplinary precedent exactly on point.

Essentially the case first boils down to whether Respondent intended to extract a civil financial settlement in exchange for a promise of non-cooperation by his client in the prosecution of a separate criminal case. The Referee finds affirmatively. The next question becomes whether the action constituted a violation of the Minnesota Rules of Professional Conduct, and if so what sanctions are appropriate.

The gravamen of Respondent's actions was not the degree of actual harm that *resulted* to the criminal prosecution, but rather the harm that Respondent *intended*. The Respondent's letters, particularly the third letter, clearly indicate an offer for a quid pro quo: in exchange for Prose paying \$300,000.00, Respondent would advise Williams to not cooperate in the criminal case by deciding not to testify. The unmistakable intent was to work substantial prejudice to the state's criminal case by defying expected court orders.

Alleged victims sometimes refuse to cooperate with prosecutors in various ways, or sometimes offer sentencing recommendations contrary to prosecutors' wishes, all for their personal reasons. However such actions fall far short of, and do not in any way equate with, an officer of the court, who is bound by the Rules of Professional Conduct, offering to foster disobedience of expected court processes and orders for financial gain. The true test is whether such offers or attempts are made, and not whether the offers are accepted, nor whether they result in actual substantial prejudice.

Bruce W. Christopherson
Referee