

FILE NO. A09-1861
STATE OF MINNESOTA
IN SUPREME COURT

In Re Petition for Disciplinary Action
against DENNIS R. LETOURNEAU,
a Minnesota Attorney,
Registration No. 62443.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATIONS**

The above-entitled matter came on for hearing on March 30, 2010, before the undersigned, Honorable Michael F. Fetsch, Referee, appointed pursuant to Rule 14(a) of the Rules on Lawyers Professional Responsibility (RLPR).

The Director appeared personally represented by Senior Assistant Director, Patrick Burns, Esq., 345 St. Peter Street, Suite 1500, St. Paul MN 55102-1218.

The respondent appeared personally represented by Edward F. Kautzer, Esq., Ruvelson & Kautzer, Chartered, 1600 West University Avenue, Suite 313, St. Paul MN 55104.

Prior to the commencement of testimony the Director's exhibits 1 through 74 and respondent's exhibits 101 through 127 were each received without further foundation pursuant to the parties' agreement.

The Director's Supplementary Petition for Disciplinary Action, which was previously allowed, was received as part of the record.

Based upon all records, file and proceedings herein, testimony of respondent, the other witnesses, i.e., Frederick Ennenga, Cheryl Lee Hauck and Thomas A. Gilligan, Esq., and the arguments of counsel, the undersigned makes the following:

FINDINGS OF FACT

FIRST COUNT

(The Ennenga Lawsuit)

1. On December 28, 1998, Kmart Pharmacies (Kmart) incorrectly filled a prescription for Frederick Ennenga (Ennenga) with a blood thinner (Coumadin) instead of the prescribed blood pressure medication (Cardura).

2. Kmart's mistake caused an aneurysm from which Ennenga collapsed on February 6, 1999, requiring his hospitalization and resulted in a number of physical and financial problems.

3. The Ennengas (Frederick and his wife Carol) in February 1999 retained Dennis R. Letourneau (respondent) to pursue damages caused by the incorrectly filled prescription.

4. On February 3, 2003, respondent had Heidi Scheppman (described as a Kmart pharmacist) and Mary Geronime (described as a Kmart pharmacist) personally served with the Summons and Complaint .

5. On February 9, 2005, Elizabeth Geer (described as a Kmart pharmacist) and on February 6, 2003, Kmart Pharmacies of Minnesota's agent for service, Andrea Mitlyng, were each personally served with the same Summons and Complaint (Exs. 2, 3).

6. On January 22, 2002, Kmart Corporation filed for Chapter 11 protection for itself and its related companies.

7. On March 26, 2002, Chief Judge Susan Pierson Sonderby, United States Bankruptcy Court, Northern District of Illinois, Eastern Division, issued its order, *inter*

alia, establishing times for filing claims and setting “Bar Dates” for claims on behalf of Kmart Corporation and its affiliated companies, including Kmart Pharmacies of Minnesota, Inc.

7. Kmart’s employees Scheppman and Geronime were not pharmacists as respondent alleged but rather were technicians. The pharmacist on duty was Elizabeth Geer.

8. The Ennengas’ suit against Geer was dismissed as time-barred in the order dated June 28, 2005, at which time the Court pointed out that respondent was late in filing his opposition to the Summary Judgment Motion and failed to file the “accompanying exhibits” referred to in his late fax filings. The Court also criticized plaintiffs’ counsel (respondent) for “. . . not abid[ing] by other scheduling order deadlines in this case and [because respondent] has served discovery late and has not completed discovery by the discovery cut-off deadline.”

9. Respondent was also dilatory in the prosecution of the Ennengas’ claim:
- (a) He filed the proof of claim with the bankruptcy court on May 1, 2003, after having been informed that the “Bar Date” was July 31, 2002.
 - (b) The Ennengas’ claim was “disallowed.”
 - (c) In the Hennepin County District Court litigation, before its dismissal, respondent had agreed, after the October 11, 2004 telephone conference call with the judge and opposing lawyers, to execute a Stipulation of Dismissal with regard to Elizabeth Geer but never did.

- (d) In the October 28, 2004 telephone conference call with the Court and counsel, respondent again agreed to execute and file the stipulation dismissing Elizabeth Geer. He did not.
- (e) In that telephone conference call of October 28, 2004, respondent also agreed to seek the lifting of the stay in the bankruptcy matter and advise the Court and counsel as to when the bankruptcy court might render a decision on the motion to lift the stay. Respondent did not execute the Partial Dismissal as agreed. Neither did he inform the Court and counsel of his efforts to lift the bankruptcy stay or of the bankruptcy court's response thereto.
- (f) Respondent did not respond to Kmart's discovery (interrogatories and production of document requests) until January 19, 2005, each of which were served upon respondent on September 23, 2004, almost three months late.
- (g) In the Hennepin County litigation, the parties opted for Creative Dispute Resolution. Respondent failed to complete the strike list for proposed mediators and failed to pay the CDR administrative fee. Therefore the dispute resolution never took place.
- (h) Respondent, facing a requirement that all discovery in the Hennepin County case must be completed by May 1, 2005, served interrogatories and demand for production of documents on opposing counsel on April 25, 2005. Because the rules allow thirty days to respond, the discovery could not be completed before the

court-imposed deadline.

- (i) Respondent served Notices of Taking Deposition for three Kmart employees on opposing counsel on April 25, 2005, at approximately 7:00 p.m., with the deposition to take place on April 27, 2005. Respondent gave defense counsel thirty-eight hours notice – just one business day – before the start of the first proposed deposition. Opposing counsel objected to the lack of “reasonable notice” which the rule requires.
- (j) Respondent was late, but just two days late, on his responses to defendants’ requests for supplemental discovery.
- (k) Respondent never sought to lift the bankruptcy stay, a prerequisite to continuing the Hennepin County litigation.
- (l) Respondent never did file the original exhibits, the exhibits to which his responses to the motions to dismiss and for summary judgment made mention.
- (m) Respondent without obtaining his clients’ consent waived their right to appeal the dismissal orders of June 28, 2005, in return for forgiveness of the \$600.00 in attorney’s fees awarded in the August 22, 2005, order.

9. Respondent’s conduct, described above, nullified any chance the Ennengas had to pursue their claims in Hennepin County District Court or in bankruptcy court.

10. Respondent did not inform his clients of the significant events in their litigation and failed to respond promptly to their inquiries. Specifically, respondent failed:

- (a) To inform the Ennengas promptly of Kmart's bankruptcy filing.
- (b) To provide information and the time requirements for filing proof of claim.
- (c) To inform Ennengas that the stay could be lifted, allowing the Hennepin County matter to proceed.
- (d) To inform the Ennengas:
 - (i) of his failure to serve Elizabeth Geer in a timely fashion;
 - (ii) that the defendants Scheppman and Geronime were not pharmacists;
 - (iii) that the claims against those technicians was likely to fail;
 - (iv) that defendants had moved for dismissal and summary judgment;
 - (v) that attorney's fees had been awarded;
 - (vi) that he gave up their right to appeal the dismissal order for forgiveness of the attorney's fees which were the direct result of his dilatory behavior;
 - (vii) failed to advise the Ennengas of the CDR requirement and its deadline;
 - (viii) failed to inform the Ennengas of his agreements to dismiss defendant Geer;
 - (ix) failed to inform the Ennengas of the time-lines critical to their claims, whether in state court or in bankruptcy court;
 - (x) failed to invite Ennengas to a hearing in District Court, potentially, and ultimately, dispositive of their claims.

11. Respondent was as cavalier with his clients' interests as he was of his duties to the Court and opposing counsel.

SECOND COUNT

(Failure to Cooperate)

1. On September 10, 2008, the Director mailed a notice of investigation to respondent requiring his response in fourteen days.

2. On September 29, 2008, having no response from respondent, the Director demanded by letter respondent's complete reply within a week, i.e. by October 6, 2008.

3. Respondent on October 9, 2008, contacted the Director, promising his written response by October 13, 2008.

4. On October 13, 2008, respondent called, promising his response by October 14, 2008.

5. On October 14, 2008, respondent called, without providing the promised responses, again promising his response by October 15, 2008, and a copy of the Ennenga file by October 16, 2008.

6. Since Respondent did not honor either commitment, the Director again wrote to respondent on October 20, 2008, demanding his response and a copy of the file no later than October 24, 2008, and reminding respondent of his duty to cooperate.

7. On October 23, 2008, respondent called, again needing until October 27 to comply.

8. On October 27, 2008, respondent told Director that he had prepared his response but could not deliver it. The Director then told respondent to mail his response which the Director received on October 29, 2008.

9. On October 30, 2008, the director requested additional documents and further explanations, requesting that respondent provide both in two weeks.

10. On November 25, 2008, the Director had not received the items due on November 13, 2008. The Director again wrote on November 25, 2008, again reminding respondent that his failure to cooperate could result in additional allegations of attorney misconduct.

11. The Director's November 25, 2008, letter required respondent to respond by December 2, 2008. Respondent again called. Respondent agreed to provide his response to the Director by December 5, 2008. It was not until January 16, 2009, that respondent replied to the Director's October 30, 2008, letter.

12. In the February 25, 2009, meeting with the Director, respondent agreed to provide the Director with, Ennenga retainer agreement, his telephone records for June 2005 to December 2005 and any other documents relating to his communications with the Ennengas and regarding opposing counsel's summary judgment motion, the hearing (June 9, 2005) thereon, the June 28, 2005, order dismissing the Ennengas' claim and his efforts in opposing the motions.

13. Again the date for production, March 18, 2009, passed without respondent's compliance. The Director's repeated letters and reminders during phone calls were again of no avail.

14. On November 29, 2009, the Director served interrogatories and request for production of documents on the respondent.

15. Despite numerous reminders in writing and by phone, the requested discovery was not provided until March 19, 2010, almost ninety days late.

16. Each of the above facts in the Findings of Fact was proven clearly and convincingly.

Prior Disciplinary History

1. Respondent's disciplinary history consists of:
 - (a) On February 20, 2001, respondent was issued an admonition for providing financial assistance to a client, failing to cooperate with the Director's investigation and practicing law while suspended for nonpayment of the attorney registration fee in violation of Rules 1.8(d) and 8.1(a)(3), Minnesota Rules of Professional Conduct (MRPC), and Rule 25, RLPR (Ex. 64).
 - (b) On April 21, 2003, respondent was placed on private probation for making a loan to a client and failing to cooperate with the Director's investigation in violation of Rules 1.8 and 8.1(a)(3), MRPC, and Rule 25, RLPR (Ex. 65).
 - (c) On April 13, 2006, the Supreme Court publicly reprimanded respondent for neglect of a client matter and failing to keep his client informed about her matter in violation of Rules 1.3 and 1.4, MRPC, and placed respondent on one year of supervised probation (Ex. 66).

CONCLUSIONS OF LAW

1. Respondent's failure to timely serve Elizabeth Geer with the summons and complaint in the state court litigation within the statute of limitations violated Rules 1.1 and 1.3, MRPC.

2. Respondent's failure to adequately explain to his clients the effect of Kmart's bankruptcy on the state court litigation, the defendants' motions for dismissal and summary judgment, the District Court's dismissal of their lawsuit, and his clients' appeal rights violated Rule 1.4(b), MRPC, as that rule read prior to October 1, 2005.

3. Respondent's failure to consult with his clients prior to agreeing to dismiss Elizabeth Geer from the state court litigation and agreeing to waive their right to appeal the June 28, 2005, order in exchange for forgiveness of the attorney's fees awarded violated Rules 1.2(a) and 1.4(a) and (b), MRPC, as those rules read prior to October 1, 2005.

4. Respondent's failure in the state court litigation to timely respond to discovery requests, complete arrangements for mediation, to abide by his agreement to dismiss Elizabeth Geer as a defendant, and to timely file responsive pleadings to the motions for summary judgment and dismissal violated Rules 1.1, 3.2, 3.4(c) and 8.4(d), MRPC.

5. Respondent's failure in the state court litigation to inform his clients of the defendants' motions for dismissal and for summary judgment, the hearing on those motions, the District Court's dismissal of their lawsuit, the award of attorney's fees against them, and respondent's agreement to waive their appeal rights in exchange for forgiving the \$600 attorney's fees award violated Rule 1.4(a) and (b), MRPC, as that rule read prior to October 1, 2005, and Rule 1.4(a)(3) and (b), MRPC, as the rule read after October 1, 2005.

6. Respondent's failure to either pursue alternative dispute resolution proceedings in the Kmart bankruptcy matter or to move the bankruptcy court for relief from the automatic stay violated rule 1.1, 1.3 and 3.2, MRPC.

7. Respondent's failure to cooperate with the Director's investigation of the Ennenga complaint and failure to timely respond to the Director's discovery requests in this matter violated Rules 3.4(d) and 8.1(b), MRPC, and Rule 25, RLPR.

RECOMMENDATIONS

1. That Respondent Dennis R. Letourneau be indefinitely suspended from the practice of law, effective immediately upon the issuance of the Supreme Court's decision.

2. That he be eligible to apply for reinstatement one year from the date of the Court's decision, if during that period he has sought professional help to address his chronic inability to perform his duties in a timely manner, if proves that he understands the root causes thereof and if has satisfactorily remedied the same.

3. That the requirements of Rule 18(a)-(c), RLPR, not be waived.

4. That respondent comply with the requirements of Rule 26, RLPR.

5. That respondent pay to the Director's Office \$900 in costs and an amount in disbursements to be determined in compliance with Rule 24, RLPR.

DATED: May 29, 2010

BY:



**MICHAEL F. FETSCH
SUPREME COURT REFEREE**