

FILE NO. A08-1522  
STATE OF MINNESOTA  
IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against LISA JANE MAYNE,  
a Minnesota Attorney,  
Registration No. 308705.  
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**FINDINGS OF FACT,  
CONCLUSION OF LAW, AND  
RECOMMENDATION FOR  
DISCIPLINE**

The above-entitled matter came on for hearing on June 10, 2009, before the Honorable Warren E. Litynski acting as Referee by appointment of the Minnesota Supreme Court pursuant to the Director's August 21, 2008, Petition for Disciplinary Action. Appearing at the hearing were:

- Robin J. Crabb, on behalf of the Office of Lawyer's Professional Responsibility (Director);
- C. Peter Erlinder, Attorney for Respondent;
- Lisa Jane Mayne, Respondent.

Both parties submitted exhibits. Testifying at the hearing were Dr. Geoffrey Garwick, licensed clinical psychologist who has been treating Respondent, and Joua T. Thao, who has a Master's Degree in marriage and family therapy.

Mr. Thao was not qualified as an expert and the Referee finds his testimony to be irrelevant, except to show that Respondent consulted with Mr. Thao for the purpose of obtaining counseling.

Subsequent to the hearing, counsel for each party submitted proposed Findings of Fact, Conclusion of Law and Recommendation for Appropriate Discipline, the last of which was received on June 24, 2009, and the record closed. Return date to the Minnesota Supreme Court is no later than July 24, 2009.

**FINDINGS OF FACT**

1. Respondent was admitted to practice law in the state of Minnesota on May 11, 2001. (Petition for Disciplinary Action ("Pet."), p. 1, ¶ 2; Respondent's Amended Answer ("R. Ans.))
2. On December 26, 2007, Respondent was charged with Financial Exploitation of a Vulnerable Adult, a felony, in violation of Minn. Stat. § 609.2335, subd. 1(1). (Pet., p. 2, ¶ 1; R. Ans., p. 2.)
3. On June 11, 2008, Respondent pled guilty to the charge of Financial Exploitation of a Vulnerable Adult. (Pet., p. 2, ¶ 2; R. Ans., p. 2.)
4. On July 30, 2008, pursuant to Minn. Stat. § 609.52, subd. 3, Respondent was sentenced to eighteen months in custody of the Commissioner of Corrections for the State of Minnesota, stayed during the ten-year period of probation. As conditions of the probation, Respondent was required to make restitution to the victim in the amount of \$46,000, continue with mental health counseling, submit a written letter of apology, submit to DNA testing, serve 90 days in jail, have no contact with the victim, except in the presence of another adult, and pay a \$100 fine. (Pet., p. 2, ¶ 3; R. Ans., p. 2.)

5. The victim of the crime was Respondent's father, Donald Mayne, who is 76 and/or 77 years of age and in the stages of early Alzheimer's disease at the time of the offense. Respondent transferred approximately \$46,000 from the victim's bank account to a joint checking account in a series of transactions between July 2005 and May 2007. It was intended that Respondent would use the transferred money to pay her father's bills. Respondent did not use the money to pay the bills, but instead used that money for her own expenses. Donald Mayne was 77 years old and suffered from Alzheimer's disease. Donald Mayne was a vulnerable adult, as defined by statute, at the time the transactions took place. (Ex. 4, Felony Guilty Plea, pp. 9-13.)
6. On December 15, 2006, victim signed a Power of Attorney which authorized Respondent to have access to victim's financial assets.
7. Respondent's sister, in looking at victim's financial records, was concerned that Respondent was taking money she was not entitled to. As a result, Respondent's access by using the Power of Attorney was terminated in April of 2007.
8. In February 2008, which was subsequent to being charged but prior to entering a plea, Respondent contacted Dr. Garwick for treatment. He has no direct knowledge of Respondent's mental condition prior to that time. Any information Dr. Garwick has in relation to Respondent's mental state prior to February 22, 2008, has been obtained through conversations with Respondent. Any information Dr. Garwick has regarding Respondent's mental condition between February 22, 2008, and the present was gathered through Respondent's verbal accounts, direct observation of Respondent, and psychological tests administered to Respondent. (Garwick test.)
9. On or about February 22, 2008, Dr. Garwick diagnosed Respondent with Major Depressive Disorder, Recurrent, and Obsessive Compulsive Disorder. (Garwick test.; Ex. 9.)
10. The inability to determine right and wrong is not a major feature component of Major Depressive Disorder as it is defined in the DSM-IV-TR, nor is it a cardinal element of Obsessive Compulsive Disorder. The Referee finds that at all times relevant hereto Respondent had the ability to determine right from wrong. (Garwick test.)
11. Dr. Garwick believes that Respondent has made considerable progress in treatment. She came into the Ramsey County Mental Health program in the partial hospitalization program, which is thirty hours per week of treatment. This treatment lasted approximately two weeks. (Garwick test.)
12. Respondent currently attends day treatment with both Dr. Garwick and social worker Thao. Although Dr. Garwick normally sees her on a regular basis, Respondent has been absent for approximately one month. Dr. Garwick is not aware of any explanation for this absence. (Garwick test.)
13. Dr. Garwick and his student administered the Minnesota Multiphasic Personality Index (MMPI-2) to Respondent sometime between February 28, 2008, and March 14, 2008. As a result of Respondent's responses to that examination, Dr. Garwick issued a written report in

which he concluded that Respondent was not a reliable reporter of her psychological symptoms. (Garwick test.; Ex. 13.)

14. Because Respondent did not report her symptoms accurately, Dr. Garwick determined that the MMPI-2 test results were invalid. Dr. Garwick reported that Respondent had motivation to exaggerate her psychological difficulties. The test was taken a few months before Respondent pled guilty to her criminal charges. Because Respondent was motivated to report psychological symptoms which she did not experience, Dr. Garwick concluded that there was between an 80 percent chance and a 94 percent chance that her answers were unreliable. Dr. Garwick also concluded that attorney disciplinary proceedings would provide motivation to over report psychological symptoms. (Garwick test.; Ex. 13.)

#### **CONCLUSION OF LAW**

1. Respondent's intentional criminal conduct violated Rule 8.4(b) and (c), Minnesota Rules of Professional Conduct.

#### **RECOMMENDATION FOR DISCIPLINE**

- A. *Weyhrich* factors (*In re: Weyhrich*, 339 N.W.2d 274, 279, (Minn. 1983)).
  1. Admittedly Respondent established that she has been diagnosed with Major Depressive Disorder, Recurrent, and Obsessive Compulsive Disorder. This is a severe psychological condition. However, Respondent (1) has not established by clear and convincing evidence that the psychological disability caused the misconduct; and (2) she has produced no evidence that she had this psychological condition between July 2005 and May 2007 which was the time period during which the misconduct occurred. Dr. Garwick's statement that these psychological problems have apparently been in evidence for many years is lacking in foundation, and amounts to no more than a guess. The Referee found that Respondent had the ability to tell right from wrong. That in itself would eliminate a finding that Respondent came under the umbrella of *Weyhrich*.
  2. The misconduct was not arrested by treatment. The record is clear that Respondent did not commence treatment until after she was charged. Further, the evidence shows that it was the cutting off of Respondent's access to victim's funds that arrested the misconduct.
  3. While it appears that Respondent is making progress in her treatment, there is no way to determine whether that progress has arrested Respondent's propensity to steal money, whether it be from this victim or another.
  4. No one can tell at this time whether the misconduct is likely to recur. The only true test would be to give Respondent an opportunity to be tested in real life. Sometimes that works, and sometimes it does not.

## GENERAL MITIGATING FACTORS

A felony conviction generally warrants disbarment unless there are significant mitigating factors. *In re Koss*, 572 N.W.2d 276, 278 (Minn. 1997).

Even though Respondent could not meet the *Weyhrich* factors, she could be entitled to present factors that would support a reduction in discipline from disbarment to suspension.

## MITIGATING FACTORS

### 1. Remorse.

Respondent did not testify. However, at the time of her sentencing (Ex. 6, pp. 7 and 8), the sentencing judge evaluated Respondent's statement, and appears to have concluded that Respondent was not really remorseful. This Referee rejects mitigation based on remorse.

### 2. Psychological Disability.

In one case the Court stated that where a respondent had a psychological disability (depression), it would not mitigate as to intentional misappropriation, but it could be considered in mitigating the type of discipline. *In re Berg*, 741 N.W.2d 600, 605 (Minn. 2007). That seems to fit squarely within the framework of this case.

It would seem that this in and of itself would be sufficient mitigation to impose a discipline of suspension rather than disbarment.

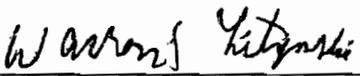
### 3. Other Factors.

In *In re Rooney*, 709 N.W.2d 263 (2006), the Minnesota Supreme Court noted a number of factors by way of mitigation, all of which are present in this case:

- A. No prior discipline.
- B. Restitution. It's not quite clear whether this is restitution that has already been paid, or is just the total sum. If it's the former, there is a real equal protection argument; i.e., those who can pay are not disbarred. In this case, Respondent owes some \$46,000 in restitution.
- C. Cooperation with the Director. Respondent has cooperated.
- D. Extraordinary stress. Respondent owned a home which was condemned and then foreclosed and sold, so she lost the only major asset she had. In addition, she also lost a garage (warehouse) full of items, which were apparently disposed of.
- E. Acknowledging personal problems that led to the misconduct and obtaining counseling to deal with them.

4. While it appears that the general rule for misappropriation results in disbarment, it appears, also, that the Courts are giving more empathy to cases where there are significant mental health issues..
5. It would be easiest in this case to follow the general rule and recommend disbarment. However, given the panoply of mitigating factors determined by this Referee, it is recommended that the Supreme Court order the following:
  - A. Indefinite suspension with leave to apply for reinstatement upon expiration of criminal probation, but in no case less than five years.
  - B. Pass the ethics portion of the Multi-State Bar Examination.
  - C. Pay costs of \$100.00.

Dated this 17 day of July, 2009.

  
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Honorable Warren E. Litynski