

FILE NO. A11-1052

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against DAVID LAWRENCE McCORMICK,
a Minnesota Attorney,
Registration No. 259500.

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

The above matter was heard on September 23, 2011, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Timothy M. Burke appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). John C. Brink appeared on behalf of respondent David Lawrence McCormick, who was personally present throughout the proceedings. The hearing was conducted on the Director's May 2, 2011, petition for disciplinary action.

The Director presented the live testimony of Barbara J. Deneen. Mr. McCormick testified at the hearing and presented the live testimony of Michael Grostyan, Jennifer Speas and Christopher Zipko. Director's Exhibits 1-14 (including Exhibit 4a) were received into evidence. Respondent's Exhibit 1 was received into evidence; Respondent's Exhibit 2 was offered but not received, and Respondent's Exhibit 3 was neither offered nor received.

At the conclusion of the hearing, respondent submitted a brief. Both parties were directed to submit proposed findings of fact, conclusions of law, a recommendation for discipline, and the Director was directed to submit a brief, on or before October 7, 2011. Respondent was directed to submit a reply brief (if any) by October 12, 2011. The Referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court not later than October 20, 2011.

In his answer ("R. ans.") to the petition for disciplinary action ("petition"), respondent admitted certain factual allegations, denied others, and denied any rule violations. However, during the hearing respondent admitted his conduct set forth below violated Rule 4.2, Minnesota Rules of Professional Conduct (MRPC). The findings and conclusions made below are based upon respondent's admissions, 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.

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 27, 1995 (R. test.).

Improper Contact with Party Represented by Counsel – Sherman and Thompson Matters

2. Respondent represented Robert Sherman in a homicide prosecution in Ramsey County District Court (petition, p. 3, ¶ 1; R. ans., p. 1, ¶ 1; Deneen test.; R. test.).

3. Robert Sherman had two co-defendants in the homicide matter. Michael Sherman, one of two co-defendants, was represented by Barbara Deneen, a public defender (petition, p. 3, ¶ 2; R. ans., p. 1, ¶ 2; Deneen test.; R. test.).

4. In February 2010, while represented by Deneen, Michael Sherman entered a plea agreement (petition, p. 3, ¶ 3; R. ans., p. 1, ¶ 3; Deneen test.; R. test.). Pursuant to the agreement, sentencing of Michael Sherman was deferred until after Michael Sherman testified at Robert Sherman's trial (*id.*).

5. On or about September 15, 2010, respondent's investigator, at respondent's request, met with Michael Sherman (petition, p. 3, ¶ 4; R. ans., p. 1, ¶ 4;

Deneen test.; Grostyan test.; R. test.). Although respondent knew at that time that the public defender's office represented Michael Sherman in the matter, respondent neither sought nor received Deneen's permission (or the permission of any other lawyer in the public defender's office) to communicate with Michael Sherman about the matter (petition, p. 3, ¶ 4; R. ans., p. 1, ¶ 4; Deneen test.; R. test.). Respondent's investigator took a statement from Michael Sherman about the facts in the matter which gave rise to the charges against both Michael Sherman and Robert Sherman (petition, p. 3, ¶ 4; R. ans., p. 1, ¶ 4; Dir. Exs. 2-3; Deneen test.; Grostyan test.; R. test.).

Aggravating Factors

6. Respondent has a history of prior discipline as follows:
 - a. By order filed March 7, 2006, respondent was suspended from the practice of law for a period of 90 days (effective 14 days from the date of the order) for neglecting client matters, failing to communicate with clients and failing to cooperate with the disciplinary investigation (Dir. Exs. 6-8).
 - b. On April 5, 2006, respondent was issued an admonition for neglecting a client matter, failing to appear at two hearings, failing to communicate adequately with the client, failing to refund any unearned portion of an advance fee payment and failing to cooperate with the disciplinary investigation (Dir. Ex. 9).
 - c. On November 8, 2006, respondent was issued an admonition for neglecting a client matter, failing to communicate adequately with the client, failing to inform the client of his suspension and failing to cooperate with the disciplinary investigation (Dir. Ex. 10).
 - d. By order filed March 16, 2007, respondent's suspension was extended indefinitely for agreeing to file an appeal on behalf of a client and then failing to properly file the appeal, which caused the appeal to be dismissed; for

advising the client that the client need not comply with the terms of the client's criminal probation while the appeal was pending, which caused the client, who relied on respondent's advice, to be sentenced to jail time and fined for not responding to the probation officer's attempts to contact the client; and for failing to cooperate with the disciplinary investigation (Dir. Exs. 11-12).

e. On March 13, 2009, respondent stipulated to the issuance of an admonition for failing to inform a client of his suspension in the required manner, failing to communicate adequately with the client and identifying himself as a lawyer while suspended (Dir. Ex. 13).

f. By order dated June 11, 2009, respondent was reinstated to the practice of law and placed on probation for a period of two years (Dir. Ex. 14, p. 2). Among the conditions of respondent's probation was the following (Dir. Ex. 14, p. 2):

(i) Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation, and shall promptly respond to the Director's correspondence by the due date. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct which may come to the Director's attention.

(ii) Respondent shall abide by the Minnesota Rules of Professional Conduct.

7. Respondent committed his current misconduct while on probation.

8. Respondent has substantial experience in the practice of law in general, and in criminal defense practice in particular (Speas test.). Since about 1999, respondent has practiced almost exclusively in the area of criminal defense (R. test.).

9. Respondent is familiar with his obligations under the Rules of Professional Conduct (R. test.).

10. Respondent offered no credible evidence that he regretted, or was sorry or remorseful for, the wrongful nature of his conduct. Respondent testified to his regret and his remorse for the effect (or potential effects) of his misconduct on himself. Although respondent admitted that he violated a Rule of Professional Conduct, much of respondent's testimony (and presentation generally) consisted of efforts to justify his misconduct. Respondent did not apologize for his misconduct or offer any recognition of the effect it had on others, other than stating that he wished he had not done it.

11. Respondent offered the testimony of two lawyers who testified to respondent's ability and character (Speas test.; Zipko test.). Both testified that respondent was an excellent lawyer whom each had observed to act ethically (*id.*). Speas limited her testimony about respondent's ethical behavior to the two or three matters in which Speas and respondent represented co-defendants. Zipko has been co-counsel with respondent and has observed respondent's legal work on only one matter. Although Zipko testified that respondent was a good attorney, Zipko also stated that part of being a good attorney is acting in compliance with the Rules of Professional conduct.

CONCLUSIONS OF LAW

1. Respondent's conduct violated Rules 4.2 and 8.4(d), MRPC, and the terms of the Supreme Court's June 11, 2009, order.

2. Respondent's history of prior discipline substantially aggravates the sanction for respondent's misconduct.

3. Respondent's commission of his current misconduct while on probation aggravates the sanction for respondent's misconduct.

4. Respondent's extensive experience in the practice of law in general, and in criminal defense practice in particular, aggravates the sanction for respondent's misconduct.

5. The character evidence that respondent offered does not mitigate the appropriate sanction to be imposed. This testimony simply stated that in a total of three or four matters respondent had acted ethically. Neither character witness testified about the totality of respondent's conduct and commitment, or lack thereof, to comprehensive ethical behavior.

6. There is no factor which mitigates the sanction for respondent's misconduct.

RECOMMENDATION FOR DISCIPLINE

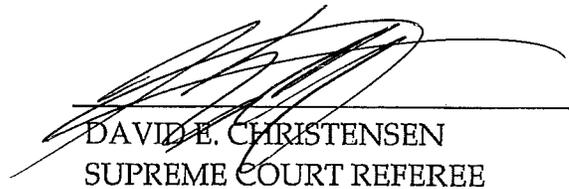
Respondent David Lawrence McCormick has again committed professional misconduct. Although standing alone the present misconduct may not warrant substantial suspension, the history of respondent's misconduct reveals a pattern of disregarding in a variety of ways his professional obligations. It is particularly troubling that, after undergoing a reinstatement proceeding in which he was required to prove by clear and convincing evidence both fitness to practice and that misconduct was not likely to occur in the future, shortly thereafter respondent committed misconduct which should be understood and avoided by a junior practitioner, much less an experienced lawyer with substantial experience in the pertinent area of law.

Based on the foregoing findings and conclusions, the undersigned recommends:

1. That respondent David Lawrence McCormick be suspended from the practice of law for a minimum of 60 days.
2. That Respondent comply with Rule 26, RLPR.
3. That Respondent pay costs, disbursements and interest pursuant to Rule 24, RLPR.

Dated: October 18 2011.

BY THE COURT:



DAVID E. CHRISTENSEN
SUPREME COURT REFEREE

MEMORANDUM

Respondent in this case had his investigator question a co-defendant of his client when the co-defendant was represented by a public defender. Respondent now admits that his action violated the rules of Professional Conduct. Although the conduct at first glance appears to be a relatively minor violation, it in fact caused considerable problems as evidenced by transcripts of pre-trial hearings before Judge Mott, which are contained in the Directors exhibits 5 and 6. This combined with respondent's lengthy disciplinary history resulted in this referee recommending a suspension from the practice of law as opposed to an admonition. This referee did not adopt the Director's recommendations that Respondent retake the professional responsibility exam or that he be required to apply for reinstatement since he has already done so on one occasion and in this instance would be more punitive than necessary.

DEC