

FILE NO. A12-1101
STATE OF MINNESOTA
IN SUPREME COURT

In Re Petition for Disciplinary Action
against LORI MAE MICHAEL,
a Minnesota Attorney,
Registration No. 312149.

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

The above-entitled matter came on for hearing on October 4, 2012, before the undersigned Judge of District Court, acting as Referee by appointment of the Minnesota Supreme Court.

Kevin T. Slator appeared on behalf of the Office of the Director of Lawyers Professional Responsibility.

Lori M. Michael (hereinafter referred to as respondent) appeared in person, representing herself.

Received into evidence during the hearing were Exhibits 1-16 offered by the Director, and Exhibits R5, R6, R7, R14, R15, R18, R19, R20, R23, R25, R26, R27, R29, R30, R40, R41, R42, R43, and R44 offered by the respondent. Respondent's exhibits that were withdrawn or not admitted into evidence were R1-R4, R8-R13, R17, R21-22, R24, R28, R31-32, and R45.

The testimony of Erin L. Kuester was submitted by deposition by agreement of the parties.

The Court having considered the testimony adduced at hearing, on consideration of the exhibits, arguments of counsel, and briefs submitted, and upon all of the files and records herein, the undersigned Referee does hereby make the following:

FINDINGS OF FACT

1. Respondent graduated from law school in 2000 and was admitted to practice law in the State of Minnesota on October 26, 2001 (R. test.).

2. Respondent's legal practice experience between 2001 and 2008 was as follows: Judicial Law Clerk (Summer 2001 and January 2002 to March 2003), Assistant Rochester City Attorney (June 2005 to November 2005), and Assistant General Counsel for the Prairie Island Indian Community (PIIC) (February 2006 to February 2007) (R. test.; R. Answ.).

Minto/Collins Matter

3. In 2008, respondent was retained by Wayne "Shadow" Minto and Elizabeth Collins (referred to collectively as "Minto") to represent them in tribal court in a child welfare matter involving their grandchild, C.C., who was born on May 29, 2006. Matthew K. Begeske represented C.C.'s mother, T.C., and Jessica L. Ryan represented the PIIC's Family Services Department (R. test.; Minto test.). Minto sought to intervene in the child welfare proceeding and also to gain visitation rights (Minto test.).

4. On September 3, 2009, the Honorable B. J. Jones, judge of the PIIC's tribal court, ordered physical custody of C.C. returned to T.C. in order to "start a gradual reunification process" (Ex. 5). Judge Jones removed C.C. from T.C.'s custody on October 22, 2009, however, based on allegations that C.C. had been abused. C.C. was placed with a third party at that time (Ex. 5).

5. Respondent commenced a CHIPS action in Dodge County District Court on behalf of Minto based on "concerns that [Judge Jones] has made a mistake and not listened to their concerns" (Ex. 5). As noted below, on November 9, 2009, the Hon. Lawrence E. Agerter dismissed the petition and referred the matter back to tribal court (Ex. 5; R. Answ., p. 10).

6. In November 2009, Judge Jones considered Minto's motion for visitation rights with C.C. during the Thanksgiving holiday. Begeske and Ryan objected to the motion as procedurally deficient (Ex. 1).

7. In an order dated November 13, 2009, Judge Jones noted that respondent failed to properly serve the motion on the other parties, but partially granted Minto's request for visitation (Exs. 1, 5). The court also appointed David W. Jacobsen, an attorney, to serve as guardian ad litem for C.C. (Exs. 1, 5; Jacobsen test.).

8. Judge Jones expressed concern about "a concerted effort by [Minto and respondent] to circumvent [the tribal] Court's jurisdiction" by filing a dependency action in district court when the tribal court still had jurisdiction over C.C. Judge Jones also expressed concern that respondent had filed a copy of a transcript from a confidential tribal court proceedings in state court (Ex. 1).

9. After Judge Jones issued the November 13, 2009, order, respondent emailed Judge Jones (via the PIIC clerk of court), Begeske, Ryan, and Minto on November 25, 2009. Respondent's email closed with the following sentence: "If this was any other party, I would ask, would the court be treating them the same?" (Ex. 2.)

10. In response to respondent's email, Judge Jones amended the November 13, 2009, order on November 25, 2009. Judge Jones found respondent's behavior "contemptuous" for alleging judicial bias in the email to the court and fined her \$100 (Ex. 1).

11. Respondent appealed Judge Jones' November 13, 2009, order to the PIIC court of appeals, which heard the matter on November 14, 2009. The tribal court of appeals dismissed the appeal as moot on December 10, 2009 (Ex. R42).

12. In December 2009, Judge Jones considered several requests by the parties, including a petition by Minto to be appointed as C.C.'s guardian, and a motion by Begeske (on behalf of T.C.) to disqualify respondent as counsel for Minto. Begeske alleged that respondent had a conflict of interest because, while she was counsel for PIIC in 2006, respondent handled a dependency/neglect action involving T.C. when T.C. was a minor and pregnant with C.C. (Ex. 14).

13. In an order dated December 30, 2009, Judge Jones disqualified respondent as counsel for Minto (in tribal court only) based on Rule 1.9, Minnesota Rules of Professional Conduct (MRPC), and *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720 (Minn. 1983). Judge Jones also reversed an earlier denial of Minto's motion to intervene in the child welfare matter and allowed Minto to become a party to the proceeding (Ex. 3).

14. On March 22, 2010, Jacobsen made a motion to the tribal court to be dismissed as guardian ad litem (Ex. 5). After a hearing held on March 25, 2010, Judge Jones dismissed Jacobsen (Ex. 6).

15. During the March 25, 2010, hearing, Begeske asked the court to address respondent's alleged violations of the court's December 30, 2009, order. Judge Jones issued an order to show cause on March 29, 2010, and scheduled a hearing for April 8, 2010 (Ex. 7).

16. Respondent attended the April 8, 2010, hearing by phone after the court denied her request for a continuance. Minto attended and participated in the hearing by phone, but the phone connection was accidentally terminated before the hearing was completed. Begeske and Ryan attended the hearing in person (Exs. 9, 15; R. test.; Minto test.).

17. Begeske alleged that respondent had continued to act as counsel for Minto after being disqualified by: (1) emailing Jacobsen on March 21, 2010, to try and persuade him not to resign as guardian ad litem (Ex. 4); and (2) contacting Assistant Goodhue County Attorney Erin L. Kuester in January 2010, stating Minto and Collins were respondent's clients, and to urge Kuester to prosecute T.C. for alleged abuse against C.C. (Kuester test., pp. 11-14).

Email to Jacobsen

18. Respondent submitted an affidavit to the tribal court dated April 7, 2010, to oppose Begeske's motion (Ex. 8).

19. Respondent acknowledged emailing Jacobsen, but stated it was "for his eyes only" (Ex. 8, p. 3). Respondent argued the email was confidential and should not have been disclosed to Judge Jones based on several different legal theories, including the attorney-client privilege under Fed. R. Evid. 502 (Ex. 9, p. 5).

20. Respondent asserted the email was also protected because it contained information provided to her by Minto "in preparation for litigation in Minnesota State Judicial Courts" and "in potential preparation of an appeal." Respondent also cited "nondisclosure agreement" form language that appears at the end of each of her outgoing emails as another reason Jacobsen should not have forwarded the email to Judge Jones (Exs. 8; R15).

21. Judge Jones found respondent's attorney-client privilege argument to be "specious," and found respondent in contempt of court. Judge Jones again fined respondent \$100 (Ex. 12, p. 3).

22. Respondent's claim that her email to Jacobsen was covered or protected by either the attorney-client privilege, work product doctrine, common interest privilege, etc., lacked a good faith basis in fact or law.

Contact with Erin Kuester

23. During the April 8, 2010, hearing, Ryan accused respondent of contacting Kuester after respondent was disqualified and claiming she represented Minto in tribal court. Respondent denied the allegation, and accused Ryan of "deliberately misleading the court." (Ex. 9, p. 8.)

24. Respondent also asserted that, even if she did contact Kuester in January 2010, such contact was authorized because she was representing Minto "in state court." In respondent's answer to the petition for disciplinary action and in her testimony at the evidentiary hearing, she claimed she was preparing a "defamation and libel lawsuit" against PIIC, Ryan, and a PIIC social worker, and "could not disclose potential litigation" during the April 8, 2010, hearing (R. test.; R. Answ., ¶4.d).

25. Respondent only told Kuester she was representing Minto, without identifying that the representation was limited to a possible defamation lawsuit in federal court (R. Answ., ¶4.d). Kuester testified that, had she known respondent was not representing Minto in the matter involving C.C., she would have listened to what respondent had to say but would not have engaged in an "in-depth" conversation with her about the case (Kuester test., pp. 10-11).

26. During the April 8, 2010, hearing, Judge Jones asked Ryan to obtain a letter from Kuester about when the phone call from respondent occurred (Ex. 9, p. 8). Kuester submitted a letter to the court dated April 9, 2010, stating she did not recall the exact date of the call, but that it occurred in "mid-January 2010" (Ex. 10).

27. Kuester testified that respondent offered to send her an audio recording of a phone call between T.C. and a PIIC social worker (Ex. 10). Kuester said her office received the recording as an attachment to email received on January 14, 2010, from sshadowminto@aol.com (Ex. 10, p. 3). Minto testified that this is his email address (Minto test.). Kuester stated the recording was received just prior to her decision to send a "decline of prosecution" letter that she sent on January 15, 2010 (Ex. 11; Kuester test., p. 16). Respondent acknowledged Kuester told her "she would make sure the letter got mailed the next day" (Ex. 13).

28. Immediately after the April 8, 2010, hearing, respondent phoned Minto. Minto told respondent that respondent "could have been wrong" about the date respondent contacted Kuester. However, respondent decided to wait to correct her statement to see if Kuester sent a letter to Judge Jones (R. Answ., p. 16).

29. After Kuester sent a letter to Judge Jones on April 9, 2010 (Ex. 10), respondent realized she "could have been wrong" about the date she contacted Kuester. Respondent decided not to correct her statement to Judge Jones, however, because she had already begun the process to appeal the contempt order to the tribal court of appeals (R. Answ., p 16).

30. Respondent did not acknowledge or correct her April 8, 2010, statement to Judge Jones until she filed a notice of appeal with the tribal court of appeals on May 14, 2010 (R. Answ., p. 18; Ex. R15).

31. In an order dated April 23, 2010, Judge Jones found that respondent's email to Jacobsen and phone call to Kuester violated the court's December 30, 2009, order and Rule 1.16(d), MRPC. Judge Jones also found that respondent's denial during the April 8, 2010, hearing that she contacted Kuester in January 2010 was false and violated Rule 3.3(a)(1), MRPC. Judge Jones found respondent in contempt of court on both issues and fined her \$200 as to each contempt finding (Ex. 12).

32. Respondent's statement during the April 8, 2010, tribal court contempt hearing that she contacted Kuester in December 2009 was knowingly false. In addition, respondent did not correct the statement until May 14, 2010, when she filed a notice of appeal with the tribal court of appeals (Ex. R15; R. Answ., p. 18). Respondent never corrected the false statement directly with Judge Jones.

33. On June 18, 2010, counsel for PIIC filed a motion for dismissal of respondent's appeal and for costs, fees, and sanctions against respondent, asserting the appeal was frivolous. On July 16, 2010, the tribal court of appeals dismissed the appeal as frivolous without explaining the basis of the decision (Pet. ¶13; R. Answ., ¶13). The court did not impose sanctions against respondent.

CONCLUSIONS OF LAW

1. Respondent's conduct in falsely stating in court on April 8, 2010, that her conversation with Kuester occurred before respondent was disqualified from representing Minto and Collins violated Rules 3.3(a)(1) and 8.4(c) and (d), MRPC.

2. Respondent's conduct in continuing to represent Minto and Collins after being disqualified from representation by the court on December 30, 2009, violated Rules 1.16(d), 3.4(c), and 8.4(d), MRPC.

3. Respondent's conduct in questioning the court's impartiality in email dated November 25, 2009, violated Rule 8.4(d), MRPC.

4. Respondent's conduct in attempting to justify or excuse her March 21, 2010, email to Jacobsen and her January 14, 2010, phone call to Kuester with legal theories or arguments that lacked a good faith basis in fact or law violated Rules 3.1 and 8.4(d), MRPC.

5. Respondent's inexperience in the law is a mitigating factor.

6. Respondent's lack of remorse is an aggravating factor.

7. Respondent's failure to recognize, acknowledge, and take responsibility for her conduct is an aggravating factor.

8. No evidence of other mitigating or aggravating factors was presented.

RECOMMENDATION FOR DISCIPLINE

This Referee recommends that respondent be indefinitely suspended, that the reinstatement petition and hearing requirements contained in Rule 18(a) through (d), RLPR, *not* be waived, and that respondent may petition for reinstatement no sooner than 60 days from the date respondent's suspension takes effect. It is further recommended that if respondent is suspended and then reinstated that such reinstatement be conditional upon respondent being on probation and that her work be supervised by another attorney for a period of time.

Dated: November 7, 2012.

BY THE COURT:



DAVID E. CHRISTENSEN
SUPREME COURT REFEREE

MEMORANDUM

This matter arises out of respondent representing the paternal grandparents in a child protection matter in tribal court. As a result of her actions in tribal court, she was found in contempt of court four times and on each occasion ordered to pay a fine. The conduct giving rise to the findings of contempt are set forth in the findings above and need not be discussed further here, other than to note that it is difficult to imagine that such conduct would benefit her clients.

While not mentioned in the findings above, respondent's exhibits and her failure to follow instructions in this matter have resulted in this referee making a recommendation for discipline more severe than might otherwise be the case, considering the fact that respondent has no prior disciplinary history.

In the present matter, the parties were directed at the conclusion of the hearing to send to the referee by email a copy of their proposed findings of fact, conclusions of law, and recommendation for discipline, and, in addition, to send to the referee by U.S. mail an original copy of above information together with any brief they might wish to file. They were further advised that the original copies would be sent on to the Supreme Court by this referee along with entire file. In response to this directive, the referee received from respondent by email a document entitled "Findings of Fact Conclusions of Law and Order" which is a hodge-podge of proposed findings, argument and citations. Contrary to instructions, the referee received nothing from respondent by U.S. mail.

Respondent's conduct in this matter appears similar to some of the conduct in tribal court. Respondent's exhibit R40 indicates that opposing counsel filed with the tribal court of appeals a motion to dismiss respondent's appeal (see exhibit R15) "for failure to comply with the most fundamental requirements of the law: failure to timely file Opening Brief; failure to properly request additional extensions; failure to properly

identify and serve parties to the proceeding; failure to caption the matter properly; and violation of various fundamental provisions of the Judicial Code." While not ruling on individual allegations, respondent's appeal was dismissed by the tribal court of appeals as frivolous by order dated July 14, 2010.

Having heard all to the testimony in this matter, read the exhibits and briefs in this matter, this referee concludes that respondent has violated the Rules of Professional Responsibility in a variety of ways. Although her inexperience was noted as a mitigating factor, that does not excuse the conduct, and the profession would be well served if respondent's practice in the future were closely supervised for a period of time to insure that her clients are better served.

DEC