

FILE NO. A11-125

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against ANGELA MONTGOMERY MONTEZ,
a Minnesota Attorney,
Registration No. 322192.

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

The above-captioned matter came before the undersigned for hearing at the Minnesota Judicial Center on April 14, 2011. The Director of the Office of Lawyers Professional Responsibility (Director) appeared by Senior Assistant Director Cassie Hanson. Respondent Angela Montgomery Montez appeared *pro se*.

Based upon the evidence at the hearing and all the documents on file herein, the referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in Minnesota on October 25, 2002, Respondent is not admitted to practice law in any jurisdiction other than Minnesota. Almost all of her work as an attorney has been representing children in foster care. She sees herself as a public interest attorney, and has only represented private clients on two occasions.
2. Respondent currently resides in Omaha, Nebraska, and is employed as a research assistant for an organization called Building Bright Futures.
3. Better Future Adoption Services ("BFAS") is a non-profit organization that provides adoptive placement of orphaned and abandoned children. Agitu Wodajo is the executive director for BFAS.
4. In 2009, BFAS became involved in a defamation suit involving allegedly false statements made by former BFAS employees. Lori Gross, then the chair of the BFAS board of directors, recommended BFAS retain Respondent to represent it.

5. On June 15, 2009, Wodajo and Gross met with Respondent at BFAS's office and agreed upon the terms of the representation, which were memorialized in a written fee agreement. The agreement provided for a "total fixed fee of \$5000 payable in a 20% upfront retainer and equal monthly payments of \$1,000 for a period of 4 months." The fee agreement further provided that Respondent would provide BFAS with a monthly accounting of her time and expenses and that when Respondent's time and expenses exceeded the \$5,000 retainer, BFAS would be required to pay for Respondent's services at the rate of \$75 per hour.

6. On that same date, June 15, 2009, Gross prepared a check payable to Respondent in the amount of \$5,000 and annotated the check as "Atty Fees (4 months)". Wodajo testified she signed the check without reading it and assumed that it was made out for \$1,000, which was the initial 20 percent upfront payment required under the terms of the fee agreement.

7. Respondent testified that she could not remember where she deposited the \$5,000 she received from BFAS or how she disbursed the funds. She did not, however, place any portion of the BFAS funds in a trust account. She testified, in fact, that she had never maintained a trust account meeting the requirements of Rule 1.15, MRPC.

8. In early July 2009, Gross left the Board of BFAS. While reviewing financial transactions in which Gross had been involved, Wodajo discovered that Respondent had been issued a check for the full \$5,000 instead of the 20 percent set forth in the June 15, 2009, fee agreement. Wodajo scheduled a meeting with Respondent for July 13, 2009, in order to discuss return of the unearned portion of the retainer.

9. During the July 13, 2009, meeting Respondent and Wodajo disagreed about the issuance of the June 15 check. Wodajo told Respondent the original contract and payment of the full \$5000 was fraudulent; Respondent angrily denied any

wrongdoing. Wodajo decided to terminate Respondent as BFAS' attorney, and consulted with and retained attorney James Hanvik that same day to represent BFAS.

10. On July 14, 2009, Hanvik sent Respondent a letter terminating her representation of BFAS and informing her that he had been retained as successor counsel by BFAS. Hanvik instructed Respondent to send the client file to him, opined that Respondent had not earned BFAS's entire retainer, and requested an opportunity to discuss that issue with Respondent.

11. On July 23, 2009, Respondent responded to Hanvik's letter. She enclosed BFAS's file and stated her belief that she was entitled to retain the BFAS retainer.

12. On August 7, 2009, Hanvik wrote to Respondent and requested that she place the disputed portion of the retainer into a trust account. He suggested the fee dispute be submitted to the Hennepin County Bar Association fee arbitration panel.

13. By email to Hanvik dated August 17, 2009, Respondent stated, "I am in agreement with depositing \$2000 in trust pending a binding fee arbitration decision." Hanvik believed that Respondent's \$2,000 figure was arbitrary and that BFAS was in fact entitled to a much more substantial refund. Nonetheless, based on Respondent's email, Hanvik believed that Respondent was holding at least \$2,000 in a trust account pending fee arbitration.

14. Respondent did not deposit any portion of the BFAS retainer into a trust account.

15. On September 2, 2009, Hanvik submitted a petition to the Hennepin County Bar Association's fee arbitration program. The petition was accompanied by a "Binding Arbitration Agreement" signed by both Hanvik and Respondent stating, "We . . . agree to submit our legal fee dispute to the Hennepin County Bar Association's Legal Fee Arbitration Program for binding arbitration."

16. A fee arbitration panel held a hearing on November 20, 2009. During those proceedings, Respondent told Hanvik that she had placed \$2,000 of the BFAS

retainer in a trust account. As part of the fee arbitration proceedings, Respondent also produced for the first time a version of the June 15, 2009, fee agreement that purported to provide for a one time fixed fee of \$5,000 and for additional monthly payments of \$1,200. This was the first time that either Wodajo or Hanvik had seen this version of the June 15, 2009, fee agreement, and BFAS believed it to be fabricated.

17. On December 4, 2009, the fee arbitration panel awarded BFAS a \$3,250 refund of its retainer. In support of its determination, the panel stated, "The final award reflects the panel's determination that the reasonable fees earned by Respondent attorney were \$125.00 per hour at 14 hours total."

18. On December 7, 2009, Hanvik wrote to Respondent and requested payment on the fee arbitration award. Respondent did not initially respond to Hanvik's letter. Respondent later emailed Hanvik on January 5, 2010, and stated:

I advised you during our last telephone conversation that I would send the award amount to BFAS. Accordingly I will arrange for a check to be transferred to BFAS from the Waddell and Reed account. I will then need to arrange a payment next month for the remainder of the award. Please refrain from further correspondence on this matter.

To date Respondent has not paid the fee arbitration award despite her agreement to binding fee arbitration.

Respondent has repeatedly stated she has funds to pay the fee arbitration award, but has not done so in the 18 months that have elapsed since the award.

19. Respondent has identified a Waddell & Reed Financial Advisors mutual fund as the account where she held the BFAW funds in trust. She has three mutual fund accounts with Waddell & Reed: a joint account with her husband, a 529 education plan for her daughter, and an Individual Retirement Account in Respondent's name. Since at least January 1, 2009, Respondent's joint account with her husband has consistently had a balance of less than \$15. Respondent's joint account with her daughter has consistently had a balance of approximately \$4,000 to \$5,000. In calendar

year 2009, there were no deposits in that account in excess of \$25.00, nor were there any withdrawals.

20. There was more activity in the IRA account. In May 2009, the account showed a deposit of \$3487.37. The evidence shows this deposit was a check payable to Respondent from her prior employer, Children's Law Center of Minnesota. There were no deposits in this account from June 2009, the date Respondent received the retainer check from BFAS, through September 30, 2010. Various withdrawals were made from the account between August 2009 and September 30, 2010, reducing the value to approximately \$300.00. The withdrawals have been used for Respondent's living expenses during a period when she has not been employed.

21. Since the Director's investigation began in this case in January 2010, Respondent has made a number of representations to the Director that were false and inconsistent with the documentary evidence in this case.

22. Included with her letter to the Director dated April 11, 2010, and her May 18, 2010, submission to the Director, Respondent produced redacted statements for her Waddell & Reed IRA as verification that the BFAS funds were being held in that account. These redactions had the effect of concealing that the account was an IRA account. Specifically, Respondent made the following alterations:

- a. Respondent redacted the term "IRA FBO" from the title of the account that appears at the top, left hand corner of the Waddell & Reed statements;
- b. Respondent redacted the account number and the words "IRA Plan" that appeared under the account number;
- c. Respondent redacted the section entitled "Information about this Account" which discusses IRA contribution limits;
- d. Respondent redacted the "Retirement Contribution Summary" that identified the account to be an IRA;

e. Respondent redacted the "Account Activity" section commencing at the middle of the first page and continuing for two more pages which, by repeated references to "Premature Distributions" would have suggested this may be a retirement account; and

f. Respondent removed the page numbers from the upper right hand section that would have identified that there were multiple pages to the statement.

23. The undersigned rejects Respondent's testimony at the hearing that she did not alter the Waddell & Reed statements. Respondent's testimony she printed the statements off her online account with Waddell & Reed is not credible for several reasons:

a. But for the redacted references to any information which would have indicated the account was an IRA, the documents provided by Respondent are exact replicas of the documents the Director subpoenaed from Waddell & Reed and introduced into evidence;

b. Included with a letter to the Director dated April 11, 2010, Respondent provided a document that is clearly on its face an online account statement from Waddell & Reed. This document differs substantially from the redacted statements, by including information such as a URL and various subheadings for navigating the Waddell & Reed website.

c. No Waddell & Reed online statements were proffered at the hearing that were consistent with the format of the statements Respondent provided to the Director.

d. In a letter to the Director dated April 29, 2010, Respondent stated she did not maintain a "pooled-client trust account, i.e. IOLTA account", apparently because she did almost no private legal work and did not have funds from multiple clients. She asserted she did maintain "a mutual fund account for business expenses."

e. In a letter to the Director dated June 1, 2010, Respondent asserted:

“I have been very clear with this office that I do not regularly handle client funds and do not maintain a pooled client trust account. The account I have for business purposes is a MUTUAL FUND or money market account. As I read ruled [sic] 1.15 (o)(2) ‘trust account is an account denominated as such in which a lawyer or law firm holds on behalf or a client or third person(s) and is a money market account with or tied to check writing.’ Based on this definition I maintain a mutual fund account (also known as a money market account). ... Accordingly, I believe in good faith that the account with Waddell & Reed meets the criteria for a trust account.”

f. The alterations made were consistent with her characterization of the Waddell & Reed account as a business account and not an IRA.

The undersigned is persuaded that Respondent’s altering of the Waddell & Reed statements was done in order to mislead the Director and conceal her failure to place client funds in an appropriate trust account.

24. Respondent made repeated false representations to the Director regarding her deposit of the BFAS funds as follows:

a. In a letter to the Director dated April 11, 2009, Respondent stated that she had deposited \$2,000, which she viewed as the disputed portion of the BFAS retainer, into her Waddell & Reed account.

b. In a letter to the Director dated April 29, 2010, Respondent again stated she had deposited \$2,000 into a “mutual fund account for business purposes” and was holding it there pending outcome of the arbitration; and

c. In a letter to the Director dated June 1, 2010, Respondent stated that she had deposited the \$5,000 check from BFAS into the Waddell & Reed mutual fund account; and that \$2,000 was earmarked in the account for repayment of the arbitration award.

These statements were false since the only deposit activity into Respondent's Waddell & Reed IRA was made on May 4, 2009, one and a half months before she received the retainer check, and BFAS funds were not the source of that or any other of the deposits into that account. Respondent now admits she does not know where the retainer check was deposited or what became of the proceeds.

25. Respondent also made false representations to the Director in her April 29, 2010, letter by claiming that she was depositing additional funds into her Waddell & Reed IRA in order to cover the entire fee arbitration award. Respondent stated that she had been "adding funds to the" Waddell & Reed mutual fund account "as I am able to build the full arbitration award." This statement was false, however, since there was no deposit activity in Respondent's Waddell & Reed IRA after the May 4, 2009, deposit, and Respondent withdrew approximately \$3000.00 from the account in the second quarter of 2010. With fees and premature distribution withholding, the account was reduced to less than \$500.00 by June 30, 2010.

26. In her April 11 and June 1, 2010, letters to the Director, Respondent stated that she was unable to pay the fee arbitration award, because she was in the midst of a divorce and prohibited from depleting any of her assets, including the Waddell & Reed IRA into which she had deposited the \$2,000. In her June 1, 2010, letter, Respondent stated further that the source for that prohibition was "the court's order directing both parties not to deplete any assets that may be arguably considered marital property."

These statements were false because there were no district court orders in place at the time the fee arbitration decision was issued. In fact, the Summons and Petition Respondent prepared in her divorce proceeding were dated December 31, 2009, and were not filed until January 4, 2010, which was exactly one month after the fee arbitration award was issued. The only order from the divorce that has been produced at the instant hearing refers solely to issues involving the parties' children and is silent as to any property restrictions. There is no evidence the court ordered Respondent not

to withdraw funds from her Waddell & Reed IRA. Finally, despite her representations that she was prohibited from disbursing funds from her Waddell & Reed IRA, Respondent has, as discussed in the preceding Finding, disbursed substantially all of the funds in that account during the pendency of her divorce.

27. Respondent also made false representations to the Director about what kind of account she had with Waddell & Reed. In her April 29 and June 1, 2010, letters to the Director, Respondent stated that she maintained her Waddell & Reed IRA for "business expenses." In fact, the IRA account carried substantial tax penalties for early withdrawal making it particularly inappropriate for a business expense account. Other than Respondent's assertions, there is no evidence that any business expenses were paid out of the account. There is no evidence of any checks written on the account for business expenses; all withdrawals appear to be direct payments to Respondent.

28. Respondent also made false representations to the Director about the nature of her fee agreement with BFAS. Respondent attached to her April 29, 2010, letter to the Director a version of her retainer agreement with BFAS that was significantly altered from the version BFAS had received from Respondent. This altered retainer agreement read as follows:

A total fixed fee of \$5,000, ~~payable in a 20% upfront retainer and equal monthly payments of \$1,000 for a period of 4 months~~ + after 4 mos monthly payments of \$1,200.

Respondent omitted the language, "payable in a 20% upfront retainer and equal monthly payments of \$1,000 for a period of 4 months," and added the language, "+ after 4 mos monthly payments of \$1,200." Handwritten at the top of this agreement was the title "Example of Version 3." Respondent also presented this altered retainer agreement to the fee arbitration panel during the November 20, 2009, hearing.

29. The undersigned is persuaded Respondent altered the retainer agreement and presented it to the fee arbitration panel in order to mislead the panel regarding her

entitlement to the entire \$5,000 and then submitted the altered retainer agreement to the Director in order to conceal/excuse her failure to safe keep client funds. The undersigned cannot credit Respondent's theory that the altered contract was a change agreed to by Respondent and Ms. Gross at the time the original contract was agreed to and the retainer paid. First, the handwritten cross outs and added language are not initialed by either party as customary in late changes at the time of execution of the contract. Second, there is no plausible explanation for the language "Example of Version 3" at the top of an *executed* contract. Finally, while it is possible an oversight could leave BFAS with an executed copy of the original contract language while Respondent retains an executed copy of the altered contract language, any such mistake would be unusual enough to elicit fairly detailed recollections of the late negotiations and changes in the contract language; none was offered in the instant case.

30. On December 23, 2009, Hanvik submitted a complaint against Respondent to the Director. On January 12, 2010, the Director issued a notice of investigation that referred the matter for investigation to the Nineteenth District Ethics Committee (DEC) and directed Respondent to provide her written response to the complaint to the DEC.

31. Respondent did not, in fact, submit a written response to the complaint, but she spoke on at least one occasion with the DEC investigator, who did not insist Respondent also submit a written response.

32. On March 15, 2010, after receiving the DEC report and discovering that Respondent had not submitted a written response to the DEC, the Director wrote to Respondent and requested that she provide a written response within 14 days. The Director used Respondent's address of 6968- 90th St. South, Cottage Grove, MN 55106, which was Respondent's address listed with lawyer registration. Respondent failed to timely respond.

33. On April 5, 2010, the Director wrote again to Respondent to request her written response to the complaint.

34. By letter dated April 11, 2010, which the Director did not receive until April 16, 2010, Respondent produced her written response.

35. On April 20, 2010, the Director wrote to Respondent and requested that she produce certain additional documents and information in the matter by April 30, 2010. Respondent did not produce these materials. The Director also requested Respondent's appearance at a meeting with the Director on May 6, 2010.

36. On May 4, 2010, the Director wrote again to Respondent to request that she produce the documents and information that had previously been requested in the Director's April 20, 2010, letter. Later in the day on May 4, 2010, after the Director's May 4, 2010, letter to Respondent had been placed in the mail, the Director received a letter dated April 29, 2010, from Respondent.

37. Respondent appeared for the May 6, 2010, meeting in the Director's Office.

38. On May 7, 2010, the Director requested that Respondent produce account statements for her Waddell & Reed mutual fund and various documents from her divorce proceeding.

39. On May 18, 2010, the Director received various Waddell & Reed mutual fund account statements and some, but not all, of the requested divorce documents from Respondent.

40. On May 21, 2010, the Director wrote Respondent to request the missing divorce documents and various other documents and information, primarily concerning the activity in her Waddell & Reed mutual fund account. On June 8, 2010, the Director received a responsive letter from Respondent dated June 1, 2010.

41. On July 22, 2010, the Director wrote Respondent requesting that she (a) sign and return authorizations directed to Waddell & Reed to enable the Director to obtain comprehensive account statements for Respondent's mutual fund account, (b) produce the divorce documents that had been missing from Respondent's prior

submissions, and (c) state whether she had made any payments on the BFAS fee arbitration award. Respondent failed to respond to the Director's July 22, 2010, letter. The Director's July 22, 2010, letter was not returned by the post office.

42. On August 6, 2010, the Director wrote again to Respondent to request her response to the Director's July 22, 2010, letter. The letter was not returned by the post office. Although Respondent failed to provide a written response, she did advise the Director by telephone sometime in August 2010 that she was in the process of moving to Nebraska and that she would provide the Director with her new mailing address when she learned of it. Respondent did not, at that time, provide the Director with her new mailing address.

43. On August 16, 2010, as a result of Respondent's continuing failure to provide the requested documents, the Director requested, pursuant to Rule 8(c), Rules on Lawyers Professional Responsibility (RLPR), authorization from the Lawyers Board Chair to obtain a subpoena directed to Waddell & Reed. The Board Chair approved the Director's request on August 17, 2010, and, on September 21, 2010, the Director served a subpoena on Waddell & Reed's local agent.

44. On September 20, 2010, the Director wrote to Respondent a third time to request her response to the Director's July 22, 2010, letter. On September 27, 2010, the postal service returned the Director's September 20, 2010, letter as undeliverable. As a result, the Director contacted the postal service to determine whether Respondent had left a forwarding address. She had not. The Director contacted the lawyer representing Respondent in her dissolution proceedings and obtained Respondent's email address.

45. On September 27, 2010, the Director emailed Respondent copies of the Director's July 22 and September 20, 2010, letters. Respondent acknowledged receipt of the Director's email and, in response to the Director's subsequent request, provided her new mailing address in Omaha, Nebraska.

46. To date, however, Respondent has not provided a substantive response to the Director's July 22, August 6 or September 20, 2010, letters.

47. On November 15, 2010, the Director mailed charges of unprofessional conduct to Respondent at her new mailing address in Omaha, Nebraska. Respondent failed to provide an answer to the charges of unprofessional conduct in the time allowed by Rule 9(a)(1), RLPR, and the Director made a motion to the Panel Chair pursuant to Rule 10(d), RLPR, to bypass the Panel. After providing Respondent with additional time to respond and receiving no response, the Panel Chair granted the Director's motion pursuant to Rule 12, RLPR. All mailings, by both the Panel Chair and the Director were sent to Respondent's address in Omaha, Nebraska.

48. On January 12, 2011, Respondent was personally served with the Petition for Disciplinary Action at the Omaha address that she had provided to the Director on September 27, 2010.

49. Respondent failed to timely respond to the Director's requests for discovery, which were mailed to Respondent on February 10, 2011, to her address in Omaha, Nebraska. The Director's discovery requests were not returned by the post office. Respondent testified that she did not receive the Director's discovery requests. Respondent did, however, acknowledge receipt of correspondence from the Director mailed to her at the same address on February 8, 2011.

50. Respondent did not inform the Director of a third change of address. The Director first learned that Respondent had moved to a new address in Omaha, Nebraska, after Respondent informed the referee.

51. Respondent also failed to comply with the referee's pretrial orders. Respondent did not comply with the referee's orders dated March 23, 2011, and April 4, 2011, with regard to providing the Director with an answer to discovery requests or providing witness lists and exhibits. Respondent did not provide the Director with her exhibits until so requested by the Director on the morning of the referee hearing.

52. On August 25, 2008, Respondent was issued an admonition for failing to communicate to a client the scope of her representation and the basis and rate of her fee, and failing to obtain the client's consent to limit the scope of the representation, in violation of Rules 1.2(c) and 1.5(b), Minnesota Rules of Professional Conduct (MRPC). Respondent testified that this admonition arose out of the only private client she represented before agreeing to represent BFAS in the matter at hand.

CONCLUSIONS OF LAW

1. Respondent's conduct in failing to place an advance fee payment in trust, failure to safeguard client funds, failure to remit unearned client fees back to the client, and making false statements to the client and successor counsel that the disputed portion of the retainer would be placed in trust violated Rules 1.15(a) and (c)(4), 4.1, and 8.4(c) and (d), MRPC.

2. Respondent's failure to comply with a binding fee arbitration award violated Rule 8.4(i), MRPC.

3. Respondent's conduct in making repeated false statements to the Director and presenting altered documents to the Director and to a fee arbitration panel violated Rules 4.1, 8.1(a) and 8.4(c), MRPC.

4. Respondent's conduct in failing to cooperate in the Director's investigation and non-cooperation throughout the disciplinary proceedings, including disregard of the referee's scheduling orders, violated Rule 25, RLPR, and Rule 8.1(b), MRPC.

5. The attached Memorandum is incorporated herein.

RECOMMENDATION FOR DISCIPLINE

The undersigned recommends:

1. That Respondent, Angela Montgomery Montez, be suspended from the practice of law, ineligible to apply for reinstatement for a minimum of two years from the date of the Court's suspension order.

2. That Respondent be required to successfully complete the professional responsibility portion of the state bar examination within one year of the date of the Court's suspension order.

3. That Respondent comply with Rule 26, RLPR.

4. That Respondent pay \$900 in costs pursuant to Rule 24(a), RLPR, and \$341.03 in disbursements pursuant to Rule 24(b), RLPR.

5. That reinstatement be conditioned upon:

a. completion of the minimum period of suspension;

b. compliance with Rule 26, RLPR;

c. payment of \$900 in costs, plus \$341.03 in disbursements, pursuant to Rule 24, RLPR;

d. successful completion of the professional responsibility examination pursuant to Rule 18(e), RLPR;

e. satisfaction of the continuing legal education requirements pursuant to Rule 18(e), RLPR;

f. proof of payment of the fee arbitration decision in favor of BFAS;
and

g. clear and convincing evidence from Respondent that she is fit to practice law and that her misconduct is not apt to recur.

Dated: May 25, 2011.



William A. Johnson
Referee