

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against MATTHEW THOMPSON NIELSEN,
a Minnesota Attorney,
Registration No. 230698.

**PETITION FOR REVOCATION OF
PROBATION AND FOR FURTHER
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition pursuant to Rule 12(a), Rules on Lawyers Professional Responsibility, and pursuant to this Court's October 23, 2012, order in the matter.

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 23, 1992. Respondent currently practices law in Fairmont, Minnesota.

INTRODUCTION

By October 23, 2012, order, this Court publicly reprimanded respondent and ordered respondent placed on probation for a period of two years. A copy of the Court's order is attached as Exhibit 1.

Respondent's discipline was based upon disclosing confidential information and failing to take action to correct the disclosure, failing to communicate with a client, making misrepresentations to that client, and failing to provide successor counsel with documents after respondent withdrew from representation, in violation of Rules 1.4, 1.6(a), 1.16(d), 4.1, and 8.4(c) of the Minnesota Rules of Professional Conduct (MRPC).

Among the conditions of respondent's probation was the following:

- b. Respondent shall abide by the Minnesota Rules of Professional Conduct.

Respondent has committed the following unprofessional conduct warranting revocation of probation and further public discipline:

FIRST COUNT

Roger L. Schwieger Matter

1. Respondent represented Roger L. Schwieger in a declaratory judgment action concerning the coverage limits of an insurance policy issued by Grinnell Mutual Reinsurance Company (“Grinnell”) to Burnell Voss. Voss had agreed to feed and care for cattle owned by Schwieger and Schwieger’s daughter, Amy Streit. In 2008, 125 to 130 of the cattle died from poisoning.

2. On May 20, 2011, the court heard cross-motions for summary judgment on whether Schwieger’s claims against Voss were covered under his insurance policy with Grinnell.¹ Respondent told Schwieger it was not necessary to attend the hearing and neither he nor Streit did so.

3. On August 26, 2011, United States Magistrate Judge Franklin L. Noel ruled in Schwieger’s favor. Grinnell appealed to the Eighth U.S. Court of Appeals.

4. On July 16, 2012, the Eighth Circuit reversed and remanded the case to federal district court with instructions to enter summary judgment in favor of Grinnell. *Grinnell Mutual Reinsurance Company v. Schwieger*, 685 F.3d 697 (8th Cir. 2012).

5. Respondent filed a petition for rehearing on July 26, 2012. The Eighth Circuit denied the petition on August 16, 2012.

6. Sometime in fall 2012, respondent told Schwieger the Eighth Circuit’s ruling was adverse to him but did not give him a copy of the opinion. Respondent did not tell Schwieger (or Streit) the case was remanded for entry of a summary judgment in favor of Grinnell and that the case was, therefore, essentially final. Instead, respondent led Schwieger to incorrectly believe Magistrate Judge Noel had some discretion to rule when the case was returned to him.

¹ The lawsuit began in Minnesota state court but was removed to federal court for Minnesota.

7. On September 13, 2012, Magistrate Judge Noel issued an order for judgment in favor of Grinnell and dismissed the case with prejudice. Respondent did not provide a copy of the order to Schwieger until several months later, as described below.

8. On October 23, 2012, the clerk of court entered a cost judgment against Schwieger and the other defendants in the amount \$919.65. Respondent did not inform Schwieger of the cost judgment until later and paid the judgment himself.

9. Respondent led Schwieger to believe that he would be returning to court to argue the case again in front of Magistrate Judge Noel. Again, respondent told Schwieger he did not need to attend the purported hearing. Respondent misled Schwieger, however, as no hearing was scheduled and Judge Noel had already dismissed the case with prejudice or would soon do so, as instructed by the Eighth Circuit.

10. Sometime in spring 2013, Schwieger asked a lawyer friend to check on the status of his federal court case. Schwieger's friend told him the case was closed and provided Schwieger with the court orders.

11. Sometime after June 25, 2013, respondent provided a purported copy of Judge Noel's September 13, 2012, order to Schwieger. However, the purported order was, in fact, a retyped replica of the actual order. The purported order was identical to the actual order except that it was dated June 25, 2013, instead of September 13, 2012. Respondent's purpose in altering the date on the order was to conceal the fact that respondent had significantly delayed informing Schwieger of the dismissal of his case.

12. On July 17, 2013, respondent wrote to the federal court administration and copied Schwieger on the letter but not counsel for Grinnell. Respondent stated, "According to my records, or my belief, I attended an oral hearing on or about January 18, 2013. Judge Noel then issued an "Echo Order" which was essentially the same Order as his Order of September 13, 2012." Respondent asked the clerk of courts

why this order, which respondent said was purportedly issued on June 25, 2013, did not appear on the Public Access to Court Electronic Records (PACER) system. Respondent stated, "Clearly by my records we are lacking upwards of 8 months of potential entries." Respondent asked that his letter be treated as a "formal request of issuance of the revised PACER."

13. Respondent's statements to the clerk of court that he attended a hearing on January 18, 2013, and that Judge Noel issued an order dated June 25, 2013, were false. Respondent's statements were intended to conceal the fact that no hearing had taken place on January 18, 2013, that no order had been issued on June 25, 2013, and that respondent had significantly delayed informing Schwieger of the dismissal of his case.

14. Respondent's conduct violated Rules 1.3, 1.4(a)(2) and (3), 3.3(a)(1), 4.1, 8.4(c) and (d), MRPC, and the probation order.

SECOND COUNT

Kari Jo Anderson Matter

15. Kari Jo Anderson retained respondent in August 2006 to represent her in a workers' compensation matter. Anderson injured her back in January 25, 2006, at work at Trimont Health Care Center.

16. On March 3, 2008, respondent filed an Employee's Claim Petition with the Minnesota Department of Labor and Industry, Workers' Compensation Division (DOLI). The petition sought "permanent total disability" and other benefits for Anderson.

17. During several periods of time over the course of respondent's representation of Anderson between 2006 and 2014, respondent either did not keep Anderson reasonably informed about the status of her case or did not promptly comply with Anderson's reasonable requests for information, or both.

18. In early July 2011, Anderson met with respondent and they discussed settlement. Respondent told Anderson he would contact her after the meeting with possible settlement figures. On July 12, 2011, Anderson emailed respondent and wrote, "Matt ~ It's been a week since our meeting. Do you have some facts/figures/formulas on paper for me to see?" Respondent replied a few minutes later: "Sorry, I will see where that is. I dictated right after you left." Respondent did not follow up with Anderson.

19. Anderson wanted to be reimbursed for approximately \$2,500 in out-of-pocket expenses she had paid for prescriptions, medical visits, and mileage to medical appointments and Independent Medical Evaluations. This total included \$1,605 Anderson paid for two MRIs of her lumbar spine that were done at Consulting Radiologists on April 16, 2007, and April 7, 2009. The employer/insurer's Independent Medical Evaluation physician, Jeffrey C. Dick, M.D., cited these MRIs in his November 1, 2012, IME report to the employer/insurer's attorney, James Manahan. The total also included mileage to reimburse Anderson for traveling to the IME with Dr. Dick and to a vocational rehabilitation evaluation at the request of the employer/insurer in November 2012.

20. Respondent told Anderson to keep track of the expenses. Anderson did so, and gave respondent an itemized list of expenses from September 2006 to January 2013. As described below, on several occasions respondent either told Anderson or led her to believe she would be reimbursed for the expenses when her case concluded, and he continued to tell Anderson that even after the case had settled in May 2013.

21. On January 10, 2013, respondent and Anderson exchanged the following email about settling Anderson's case:

RESPONDENT: I am stalled out at 35K. [Manahan] says that is as high as they will go, otherwise trial. Based on our conversation I presume I can take it, but I would like

your official say so. *The bills will all be paid.* (Emphasis supplied.)

ANDERSON: If that is all you can push for, I will take the 35k. No trial. *And they pay my outstanding bills* (Emphasis supplied.)

RESPONDENT: I will get it done. Next step is for me to generate a settlement agreement. . . . *Get me your bills in the next 10 days or so for inclusion."* (Emphasis supplied.)

ANDERSON: Thank you Matt. I am SO happy this is coming to an end. I've waited a long time to see the light at the end of the tunnel.

22. Anderson's case settled with a Stipulation for Full, Final and Complete Settlement that respondent and Anderson signed on April 15, 2013. Respondent did not provide a copy of the agreement to Anderson. As described below, Anderson obtained a copy herself after she discharged respondent in February 2014. An Award on Stipulation (an order to pay pursuant to the terms of the Stipulation) was issued by a compensation judge and served on the parties on May 15, 2013.

23. On June 5, 2013, Anderson emailed respondent. Anderson thanked respondent for sending the settlement check to her, and added:

Just have a couple quick questions for you? *When do I receive the money for my expenses that were submitted?* and---when can I get the final paper copy of the settlement? Please let me know.

(Emphasis supplied.)

Respondent replied a few minutes letter:

I am awaiting a final executed document, so once I have you will get. I will check on the reimbursement check. You should have that already. Please let me know if you do not receive it one week from today. Then I would have to do some legal stuff vs. Diamond, which I don't want to do because it is a pain in the neck.

(Emphasis supplied.)

24. Anderson did not hear from respondent again, so she emailed him on June 13, 2013. She wrote, "I have received nothing. Now what? Thanks." Respondent replied on June 14, 2013. Respondent said, in part:

Thanks for the note. I was out all day yesterday in a mediation. Here is what I will do:

- 1) Contact Manahan and inquire as to where it is;
- 2) If he gives a 'check is in the mail' answer, I will have him put it in writing so that I can hold it against him/Diamond;
- 3) If funds not received or no actual answer given, I will file a motion for the funds, plus penalties as against Diamond.

If it gets to number 3, it is a very long administrative process because it is sort of one step above an attorney trying to get fees, which is the bottom of the barrel. Often these matters are just done on paper through affidavits and document submissions. So there would probably not be an actual hearing for you, but there would be a hearing or two that I would have to attend.

I will endeavor to keep you updated with each step.

25. Anderson did not hear from respondent again, so she emailed, "Any news?" to him on June 20, 2013. Respondent replied on June 21, 2013:

Finally got Manahan to return a call yesterday evening. I had left several once he was back. He says he will let me know right away, but does not why [sic] there would be a delay. I left him one a few minutes ago which indicated that if I did not have information from him by Monday afternoon that I would begin the process of a motion and penalties. So past step one and between two and three.

Respondent's statement that he spoke to Manahan on June 20, 2013, was false and intended to mislead Anderson.

26. Anderson did not hear from respondent, so she emailed him on June 27, 2013, and asked, "Could you please update me on what's happening?" Respondent replied shortly after:

Awaiting the 'checks in the mail' letter which is what Diamond is indicating. I gave them 10 business days from Tuesday two days ago to receive check. I gave five for the letter. In each case the deadlines are to be met before I make my motion.

(Emphasis supplied.) Respondent's statement that Diamond Insurance Group "indicated" it would send a "check's in the mail" letter was false and intended to mislead Anderson.

27. Anderson did not hear from respondent again, so she emailed him on July 23, 2013. Anderson wrote, "I hate to even ask but am curious if you got a response to your letter you sent on work comp?" Respondent replied shortly after: "That was not much of a response. It is on the starting gate of the roller coaster."

28. Anderson did not hear from respondent again, so she emailed him on September 24, 2013. Anderson asked, "Any news? Am anxiously waiting to hear something. Any talk with Manahan or work comp? Thanks." Respondent did not respond, so Anderson re-sent the email on September 27 and October 8, 2013.

29. Also on September 27, 2013, Anderson submitted a complaint against respondent to the Director's Office. On October 8, 2013, the Director's Office sent a copy of the complaint to respondent along with a notice of investigation (NOI). The final sentence of the NOI states, "Please note that the filing of an ethics complaint does not in itself terminate an attorney-client relationship."

30. Respondent replied to Anderson on October 8, 2013, and apologized for not responding earlier. Respondent told Anderson there was a telephone pretrial in her case on October 21, 2013. Respondent described the hearing as "not so much of a 'pre-trial' as it is a q and a as to why this has not been paid." Respondent's statement

was false, as there was no hearing scheduled. Anderson replied shortly after, "ok, keep me posted please."

31. On October 25, 2013, the Director received respondent's response to Anderson's complaint. The response contained the following:

Mrs. Anderson's case took an unusual amount of time to conclude. Chief among the issues in concluding the matter was receiving various releases from Medicare/Medicaid evidencing no payable interests. So from time of settlement until payment was several, several months. At present we are awaiting payment for her taxable costs associated with her Workers' Compensation claim.

32. Respondent's statement that he was "awaiting payment for [Anderson's] taxable costs associated with her Workers' Compensation claim" was false. As described above, Anderson's workers' compensation claim was settled on a full and final basis on or shortly after April 15, 2013, with the execution of a Stipulation for Full, Final and Complete Settlement. Anderson's employer/insurer agreed to pay certain medical and related expenses totaling \$1,305.07, which it did by the end of May 2013. The stipulation provided that "any remaining costs to be borne by the Employee."

33. Anderson did not hear from respondent again after his e-mail dated October 8, 2013, so she emailed him on January 22, 2014. Anderson wrote:

I have not heard from you since October. Could you please provide me with an update on my work comp case? I would also like to get the final paper copy of my settlement that took place last May. Please provide me with that. I am waiting to receive my return of medical expenses and am curious when this is going to take place? Please update. Thanks.

34. Respondent did not respond to Anderson's January 22, 2014, email, so she re-sent it on January 30, 2014. Respondent and Anderson exchanged email on that day. Respondent wrote:

Sorry for my late response. I have been out of the office since last Wednesday afternoon. I did not realize that I was still retained by you, in

light of your complaint. I have confirmed that I am still retained in the eyes of the board. As such, I will again pursue your cost benefits.

ANDERSON: I have not released you from my case, although I'll admit that the thought has been there. All I want is my final expenses paid and my final paperwork given to me. Let's get this done so I can move on in my life, not to mention yours. There is no reason why these things have not been done. I'd appreciate getting this done.

RESPONDENT: Thank you. I will try to turn this around as quickly as I can.

35. Out of frustration with respondent's lack of progress, on February 7, 2014, Anderson wrote to Manahan, the Minnesota Department of Labor's Workers' Compensation Division (DOLI), and to Kerry Scherer, a representative from the insurer, Diamond Insurance Company.

36. On February 14, 2014, Manahan wrote to DOLI (with copies to respondent and Anderson) and reported that the insurer had issued a check in the amount of \$1,305.07 payable to respondent on May 23, 2013. Manahan also said, "I have left a number of voicemails and sent an email to Mr. Neilsen [sic] to confirm whether he received this check but he has not responded as of today." Manahan said the employer/insurer had "timely paid costs pursuant to the stipulation."

37. On February 25, 2014, Anderson, along with her husband, met with respondent. Anderson asked for a copy of the settlement agreement she signed. Respondent gave Anderson a copy of an agreement, but it was the wrong agreement as it included a provision for reimbursement to Anderson for her out-of-pocket expenses. Anderson told respondent it was not the same as the document that she obtained from DOLI, which contained no reimbursement to Anderson. Respondent then gave Anderson a copy of the actual settlement agreement signed by Anderson and approved by OAH. Respondent also paid Anderson the full amount of her out-of-pocket expenses, plus interest.

38. Respondent's conduct violated Rules 1.3, 1.4(a)(2), (3), and (4), 4.1, 8.1(b), 8.4(c) and (d), MRPC, and the probation order.

WHEREFORE, the Director respectfully prays for an order of this Court revoking respondent's probation, suspending respondent's license to practice law or imposing otherwise appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: Oct. 21, 2014.



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