

FILE NO. A10-1467
STATE OF MINNESOTA
IN SUPREME COURT

In Re Petition for Disciplinary Action
against JOSEPH D. O'BRIEN, JR.,
a Minnesota Attorney,
Registration No. 184810.

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

The above-captioned matter came on for hearing before the undersigned referee, appointed by the Minnesota Supreme Court, on February 17, 2011, in the Minnesota Judicial Center, St. Paul, Minnesota. Patrick R. Burns, First Assistant Director, appeared for the Office of Lawyers Professional Responsibility (hereinafter the Director). Respondent Joseph D. O'Brien, Jr. appeared *pro se*.

The allegations considered by the undersigned are those set forth in the Director's August 16, 2010, petition for disciplinary action. At the February 17, 2011, hearing an agreement was read into the record whereby respondent agreed to a 30-day suspension. It was specifically contemplated by the agreement read into the record that the terms of the agreement would be reduced to writing in a stipulation for discipline to be executed by the parties and submitted to the Supreme Court.

The Director promptly tendered the proposed stipulation to respondent but respondent declined to execute the stipulation unless certain changes were made. The Director declined to agree to respondent's proposed changes to the stipulation and brought a motion for the issuance of findings of fact, conclusions of law and recommendation for discipline. The undersigned, having considered the Director's motion, hereby makes the following:

FINDINGS OF FACT

1. In December 2009 Donald Mashak retained respondent for representation in two matters - the appeal of a harassment restraining order to the Minnesota Court of Appeals and the appeal of a conciliation court matter to district court. Prior to formally retaining respondent, Mashak expressed concern to him that he did not know if his previous counsel had done discovery in the appeal of the conciliation court matter and emphasized his desire that such discovery be conducted.
2. On December 28, 2009, respondent filed a notice of appeal and statement of the case with the Court of Appeals in the harassment restraining order matter.
3. On January 27, 2010, after receiving a response from respondent regarding issues raised by the court pertaining to whether the order appealed from was independently appealable, the Court of Appeals issued an order finding the lower court's order appealable and directing that, "The appeal shall proceed pursuant to the rules of civil procedure."
4. On February 14, 2010, Mashak sent respondent an email inquiring about discovery in the conciliation court appeal matter and expressing concern that the discovery be completed before the court-imposed deadline.
5. Starting in February 2010, Mashak repeatedly tried to contact respondent to discuss the status of his legal matters and to urge respondent to conduct discovery in the appeal of the conciliation court matter. Mashak was only occasionally successful in speaking with respondent and, on those occasions, respondent assured him that he would conduct the discovery requested.
6. Respondent did not conduct the discovery requested.
7. On March 10, 2010, the Court of Appeals issued an order finding that Mashak's brief in the matter was due on March 1, 2010, but that no brief or motion for an extension of time had been received. The court ordered that Mashak's brief be filed

on or before March 22, 2010, and directed that, as a sanction for the late filing of the brief, there would be no oral argument allowed.

8. Respondent did not provide Mashak with a copy of the March 10, 2010, order or otherwise inform him of the order.

9. On March 23, 2010, Mashak and another attorney who had volunteered to assist him in his dealings with respondent, John Remington Graham, met with respondent to discuss the status of Mashak's matters. Respondent assured Mashak and Graham that everything in both matters was in good order and that discovery in the conciliation court appeal matter would be sent out within the next two days. Respondent did not then tell Mashak of the March 10 Court of Appeals order or of the March 22 deadline for filing a brief with the Court of Appeals.

10. On March 31, 2010, the Court of Appeals issued an order finding that no brief had been submitted on behalf of Mashak and dismissing the appeal.

11. Respondent did not provide Mashak with a copy of the March 31, 2010, order or otherwise inform him of the order.

12. On April 6, 2010, Graham wrote to respondent on Mashak's behalf and asked that respondent provide Mashak with a copy of his client files.

13. On April 16, 2010, in a personal meeting with respondent, Mashak asked for the return of his client files.

14. On April 20, 2010, Graham again wrote to respondent on Mashak's behalf and again asked that respondent provide Mashak with a copy of his client files.

15. On May 4, 2010, Mashak submitted a complaint against respondent to the Director.

16. On May 12, 2010, the Director mailed to respondent a notice of investigation regarding the complaint of Don Mashak. That notice assigned the matter

to the Fourth District Ethics Committee (DEC) for investigation and requested a complete written response to the Mashak complaint within 14 days.

17. On May 14, 2010, in a series of telephone calls and emails exchanged between Mashak and respondent, Mashak again requested that his client files be returned to him.

18. On May 14, 2010, the Director withdrew the Mashak complaint from the DEC. That same day, in a telephone conversation with respondent, respondent was notified that he should send his response to the Mashak complaint directly to the Director's Office. During this telephone conversation, respondent stated that he would return Mashak's files to him that day.

19. On May 19, 2010, Mashak sent respondent an email again requesting the return of his client files.

20. On May 20, 2010, the Director forwarded additional information regarding the Mashak complaint to respondent and asked for detailed information regarding the return of Mashak's files to him.

21. On May 27, 2010, the Director's Office sent an email to respondent asking for a return telephone call so that the return of Mashak's files could be discussed. Respondent did not call in response to this email.

22. On June 7, 2010, respondent told the Director's Office that he had mailed his client files to Mashak by regular mail "last week." Respondent explained that he previously had unsuccessfully tried to have the files couriered to Mashak, but that the courier could not locate Mashak's address. During this telephone conversation, respondent said he would have a response to the notice of investigation in the mail by the end of the week (June 11).

23. On June 10, 2010, the Director left a message on respondent's voice mail asking that he fax a copy of the cover letter that accompanied the mailing of Mashak's files to Mashak. Respondent did not respond to this message.

24. On June 15, 2010, the Director wrote a follow-up letter to respondent, sent by email and U.S. mail. That letter noted that no response to the notice of investigation had yet been received, asked for additional information and documentation regarding the return of Mashak's files, and reminded respondent that failure to respond is a separate disciplinary offense. That letter requested a response within one week.

25. On June 15, 2010, respondent left what appears to be only a portion of Mashak's files in a car owned by Mashak.

26. Respondent has not provided a written response to the May 12, 2010, notice of investigation or the additional information requested of him in the Director's letter of June 15, 2010.

27. On July 15, 2010, the Director served charges of unprofessional conduct on respondent alleging the misconduct set forth above. Rule 9(a), Rules on Lawyers Professional Responsibility (RLPR), provides that, "Within 14 days after the lawyer is notified of the Charges, the lawyer shall submit an answer to the Charges to the Panel Chair and the Director and may submit a request that the Panel conduct a hearing."

28. Respondent did not submit an answer as required by Rule 9(a), RLPR.

29. On October 7, 2010, the Director served Interrogatories, Requests for Admissions, and Requests for Production of Documents on respondent. Respondent failed to timely comply with these discovery requests.

30. On January 13, 2011, the parties were ordered to file and serve witness and exhibit lists in this matter. Respondent failed to timely comply with this order.

31. On February 1, 2011, this Referee issued an order in these proceedings providing, among other things, that, "Respondent shall deliver to the Director responses to the Director's October 7, 2010, Interrogatories and Requests for Production of Documents not later than the end of the business day (5:00 p.m.) February 7, 2011" and, "Should respondent fail to deliver responses to the Director's Interrogatories and Requests for Production of Documents as directed above, his answer to the petition for disciplinary action in this matter shall be stricken and, pursuant to Rule 13(b), Rules on Lawyers Professional Responsibility, the allegations of the Director's petition for disciplinary action herein shall be deemed admitted."

32. Respondent failed to comply with the February 1, 2011, order in a timely fashion.

Aggravating and Mitigating Factors

33. There are aggravating factors present that warrant an enhanced level of discipline.

34. Respondent has acted in bad faith throughout these disciplinary proceedings by:

- Respondent never provided a response to the May 12, 2010, notice of investigation or the follow-up requests from the Director.
- Respondent failed to respond to the Director's discovery requests in a timely fashion.
- Respondent failed to comply with this referee's order of January 13, 2011, regarding the exchange of exhibit and witness lists.
- Respondent failed to comply with this referee's order of February 1, 2011, directing him to provide discovery responses by February 7.

- Respondent failed to respond to the Director's proffered stipulation for discipline for three weeks after it was tendered, despite respondent's own request that the process be expedited.
- Respondent has raised frivolous objections to the stipulation proffered by the Director, insisting that terms he originally wanted included now be removed and refusing to admit to the factual and legal basis for the imposition of discipline.

35. There are no mitigating factors present.

CONCLUSIONS OF LAW

1. Respondent's failure to comply with this Referee's February 1, 2011, order in a timely fashion warrants the striking of his answer to the petition for disciplinary action and it is so stricken. Pursuant to Rule 13(b), RLPR, the allegations of the Director's August 16, 2010, petition for disciplinary action are deemed admitted.

2. Respondent's conduct in failing to file a brief with the Court of Appeals on behalf of Mashak, failing to inform Mashak of the March 10 and 31, 2010, orders of the Court of Appeals, failing to respond to Mashak's requests for information regarding the status of his legal matters, failing to conduct discovery in the conciliation court appeal matter as promised, failing to return Mashak's files to him, and failing to cooperate in the disciplinary proceedings violated Rules 1.1, 1.3, 1.4, 1.15(c)(4), 1.16(d), 3.2, and 8.1(b), Minnesota Rules of Professional Conduct, and Rule 25, RLPR.

RECOMMENDATION

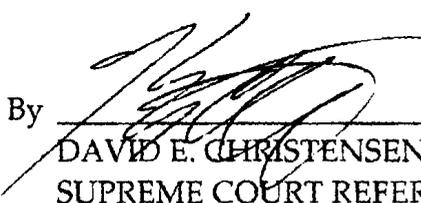
1. That respondent Joseph D. O'Brien, Jr. be indefinitely suspended from the practice of law, effective immediately upon the issuance of the Supreme Court's decision.

2. That he be eligible to apply for reinstatement ninety days from the date of the Court's decision.

3. That the requirements of Rule 18(a)-(c), RLPR, not be waived.
4. That respondent comply with the requirements of Rule 26, RLPR.
5. That respondent pay to the Director's Office \$900 in costs and an amount

in disbursements to be determined in compliance with Rule 24, RLPR.

Dated: 10 MARCH 27, 2011.

By 
DAVID E. CHRISTENSEN
SUPREME COURT REFEREE

MEMORANDUM

The referee in this matter is perplexed by the lack of interest on the part of Respondent. Although he filed an answer, for the most part thereafter he has failed actively participate in hearings. The referee traveled to the metro area for a hearing, only to find that the parties had resolved the matter the day before and respondent agreed to enter into a stipulation admitting violations of the rules and agreeing to discipline. He then failed to sign the stipulation and failed to participate in a phone conference held on March 22, 2011 which the referee scheduled to determine to proceed in view of the parties failure to sign the stipulation. Respondent not participating, it seems most practical to treat this matter as a default.

DEC