

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary
Action against SUSAN A. YAGER,
a Minnesota Attorney,
Registration No. 196575.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

At the direction of a Lawyers Professional Responsibility Board Panel, the Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition.

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 28, 1988. Respondent currently practices law in Plymouth, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

On October 18, 2007, respondent was placed on two years' private probation, unsupervised, for pleading guilty to violating an order for protection, which had been issued in connection with her dissolution, in violation of Rules 3.4(c) and 8.4(b), Minnesota Rules of Professional Conduct (MRPC).

FIRST COUNT

1. In August 2010, police arrested three individuals who had been under surveillance and were suspected of being involved in a series of day time burglaries in Wright County, Minnesota.

2. Sean Macaloon was charged with possession of a firearm by an ineligible person, aiding and abetting burglary in the first degree (possession of a dangerous weapon), and aiding and abetting burglary in the second degree (a dwelling). Daniel Masloski and James Richardson were charged as co-defendants in the same series of burglaries.

3. Macaloon retained respondent to represent him in the criminal proceedings. Masloski was appointed a public defender, Jennifer Pradt, to represent him.

4. On November 4, 2010, respondent served and filed a motion for an omnibus hearing in Macaloon's matter, which the court scheduled to be heard on January 7, 2011. The issues to be addressed at the hearing included whether Macaloon qualified for the career offender sentencing enhancements and whether there was probable cause to continue with the prosecution. In particular, respondent questioned the veracity of a statement that Masloski had given to police while he was in custody implicating Macaloon in the burglaries. Respondent's notice of motion and accompanying memorandum did not list any witnesses who would be called to testify during the omnibus hearing.

5. The contested omnibus hearing in Macaloon's matter was one of several criminal matters scheduled to be heard in the same courtroom on the morning of January 7, 2011.

6. Macaloon had previously requested that Masloski attend the hearing with him on January 7, 2011. The two remained friends and had attended each other's prior hearings. Masloski was not aware that respondent intended to call him as a witness during the hearing.

7. Pradt was also present in the courtroom the morning of January 7 on an unrelated criminal matter. Pradt noticed Masloski's presence in the courtroom, but assumed that he was there on an unrelated matter. Since respondent had not sought

Pradt's permission to question Masloski or otherwise informed Pradt that she intended to call him as a witness, Pradt left the courtroom after the other criminal matter was completed.

8. Respondent was aware at all times that Pradt represented Masloski. Even though respondent saw Pradt in the courtroom on the morning of January 7, she did not seek Pradt's permission to question Masloski. Nonetheless, when the matter came before the court, respondent called Masloski as the sole witness during the omnibus hearing.

9. As a result of respondent's questioning, Masloski repeatedly incriminated himself on the witness stand without having been advised of his right to counsel. Most egregiously, Masloski testified that he had committed the burglaries and not Macaloon:

[BY RESPONDENT:]

Q. What did you put in the storage locker?

A. Stolen belongings from previous burglaries.

Q. And did you commit these burglaries?

A. Yes.

Q. Did Mr. Macaloon commit any of the burglaries?

A. No.

(Tr., p. 21, ll. 1-7.¹) At the time respondent questioned Masloski, the criminal charges against him remained pending.

10. Respondent continued to question Masloski until the court halted the proceedings after the prosecutor, Clifford Buccicone, noted that Masloski's counsel was not present:

¹ Transcript citations refer to the transcript from the January 7, 2011, contested omnibus hearing.

[BY RESPONDENT:]

Q. Did Mr. Macaloon -- no, skip that. Did you have stolen items in the back of your truck?

MR. BUCCICONE: Objection. Leading.

THE COURT: Sustained.

BY [RESPONDENT]:

Q. What was in the back of your truck?

A. Pardon me?

Q. What was in the back of your truck?

THE COURT: We need to stop for a second.

What day are we talking about? There's no foundation for what day.

[RESPONDENT]: The day of the arrest.

MR. BUCCICONE: And actually, Your Honor, I would suggest to the Court that we stop the hearing immediately.

THE COURT: Well, there is that, too.

MR. BUCCICONE: This defendant is a -- he's a defendant in this case and I don't see his counsel here. He's not my witness, so I don't know if counsel was notified.

THE COURT: Absolutely. Absolutely. I don't know the status of his case.

[RESPONDENT]: His public defender is -- was it Ms. Pradt?

THE COURT: His case hasn't been resolved yet, I take it?

[MASLOSKI]: No.

(Tr., p. 22, ll. 11-25 through p. 23, ll. 1-15.)

11. The court dismissed Masloski from the stand and refused to permit respondent to question him further since his right to counsel had been violated. The court then recessed in order to locate Pradt and make a record of respondent's conduct:

[THE COURT:] In chambers we talked about the ethical issues that this raised, at which time Ms. Pradt told me that her client had informed her that Mr. Masloski told [respondent] this morning that he was represented and in fact pointed out Ms. Pradt to [respondent] while Ms. Pradt was in the courtroom earlier this morning.

And as I said back in chambers, this raises tremendous ethical issues that need to be addressed.

(Tr., p. 32, ll. 16-25 through p. 33, l. 1.) As a result, the court filed an ethics complaint against respondent.

12. Respondent's conduct violated Rules 1.1, 4.2, 4.4(a) and 8.4(d), MRPC.

SECOND COUNT

13. Jonothon McKee was charged with burglary and assault. On or about December 15, 2010, McKee retained respondent to represent him in the criminal proceedings.

14. McKee was incarcerated and directed respondent to communicate directly with his mother. Respondent failed to provide status updates on McKee's criminal proceedings. As a result, McKee's mother had to contact respondent on more than one occasion in order to obtain information on McKee's behalf.

15. The criminal charges against McKee were ultimately dismissed. McKee had difficulty renting an apartment due to his criminal record. Sometime in August 2011, McKee, through his mother, retained respondent to expunge his criminal record. McKee's mother contacted respondent by phone and a legal fee was agreed upon, but it does not appear that the parties signed a written fee agreement.

16. Respondent scheduled a hearing and called McKee's mother to inform her of the hearing date. Respondent was unable to fill out the petition for expungement because she did not obtain basic information from McKee, such as his birthdate. Respondent also was unable to locate the court file number for the criminal case that was to be expunged despite having represented McKee on the matter in question. Respondent further was unable to contact either McKee or his mother to obtain this information, because she did not keep a record of their contact information.

17. Five days prior to the hearing, McKee's mother, at her own initiative, contacted respondent about the upcoming hearing. Respondent admitted that she did not have their contact information or the necessary information to fill out the petition for expungement. McKee's mother arranged for respondent to meet with McKee prior to the hearing.

18. Several days before the hearing, respondent met with McKee and advised him to fill out the incomplete forms and sign in front of a notary. Respondent did not advise McKee of any filing, service or notice requirements with regard to the upcoming hearing, which respondent herself had scheduled.

19. McKee tried to file the petition for expungement with the clerk of court but was informed that notice and a copy of the petition for expungement had to be provided to all affected law enforcement and other government agencies at least 63 days prior to the hearing. Due to the lack of notice, the hearing date was removed from the court's calendar.

20. Respondent appeared at the hearing and later blamed her appearance on McKee's failure to notify her that the hearing had been cancelled due to her failure to comply with the required notice provisions.

21. Respondent's conduct violated Rules 1.1, 1.3, 1.4 and 8.4(d), MRPC.

WHEREFORE, the Director respectfully prays for an order of this Court imposing 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: March 21, 2012.



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