

FILED

August 20, 2021

**OFFICE OF
APPELLATE COURTS**

FILE NO. A21-0351

STATE OF MINNESOTA

IN SUPREME COURT

In re Petition for Disciplinary Action against
L.W. Frank, a Minnesota Attorney, Registration
No. 0031471.

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

The above-captioned matter was heard on July 19 and 20, 2021 at the Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Blvd., St. Paul, MN 55155, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. Timothy M. Burke, Esq. appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Eric C. Cooperstein, Esq. appeared on behalf of the Respondent. The Respondent L.W. Frank, Esq. was present throughout the hearing.

The hearing was conducted on the Director's Petition for Disciplinary Action, filed on March 17, 2021; and Respondent's Answer filed on April 5, 2021. The Director presented the live testimony of Sylvester Baune, Deborah Lingrey and Maribeth Lewis. Respondent testified and presented the testimony of Susan Bianchi, Hans Carlson and Ramona Keuhn. Pursuant to the agreement of the parties, the testimony of Lewis, Bianchi, Carlson and Keuhn was by remote video (Zoom). The exhibits offered into evidence, and whether each was received or not, are identified in the Appendix to these findings.

The parties submitted to the referee and filed with the court proposed findings of fact, conclusions of law and recommendation and a memorandum of authorities outlining their respective positions on August 3, 2021. The referee's findings of fact, conclusion of law and recommendation is due to the Supreme Court no later than August 20, 2021.

In this proceeding the Director bears the burden of proving professional misconduct by clear and convincing evidence. *In Re Severson*, 860 NW2d 658, 665 (2015). This standard “requires a high probability that the facts are true.” *In Re Lyons*, 780 NW2d 629, 635 (2010). Put differently, the Director must prove the allegations by “cogent and compelling evidence.” *In Re Strid*, 551 NW2d 212, 215 (Minn. 1996). The Director also has the burden of proving aggravating factors by clear and convincing evidence. When the Director has proven misconduct the burden shifts to the Respondent to prove any mitigating factors that have been alleged. *In Re Strunk*, 945 NW2d 379, 383 (Minn. 2020); *In Re Farley*, 771 NW2d 857, 861 (Minn. 2009).

In making the findings of fact and conclusions of law and recommendation herein the referee has given due regard to the respective burdens of proof of the parties as well as the referee’s determinations regarding the demeanor and credibility of the witnesses. For each factual finding made below, the undersigned evaluated the relevant documents and testimony, accepted as credible the testimony consistent with the finding and did not accept the testimony inconsistent with the finding.

Based upon the evidence as outlined above, and upon all the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

1. Frank was admitted to practice law in Minnesota on October 5, 1973. After three years working for another lawyer, he started a new law firm in Redwood Falls, Minnesota and has continued to practice at that firm, now known as Estebo, Frank and Munshower, through the rest of his career until his recent retirement.
2. His practice has focused on estate planning, probate, elder law, contracts and real estate. He has handled numerous probate matters over the course of his career, including reopening closed probates.

COUNT ONE-IMPROPER SOLICITATION OF CLIENTS

3. The Director argues that Frank's telephone contact with the Lecy's without a prior professional relationship violated Rule 7.3 of the Minnesota Rules of Professional Conduct (MRPC). Frank counters that the purpose of the phone call was to conduct research and that money was not a significant motive for the call.
4. In 2021, Redwood County Rural Telephone Company (RCRTC) was sold. Some of the owners of the RCRTC stock could not be located or were deceased, so the proceeds of the purchase of those shares were transferred to the State of Minnesota for the benefit of those owners pursuant to the unclaimed property statute. Minn. Stat. Chap. 345.
5. In 2016, Frank learned of the existence of unclaimed RCRTC assets. A client of Frank's had brought to him a RCRTC stock certificate issued to Joseph Hammerschmidt, who was deceased. The client wanted to know whether the stock certificate had any value. Frank therefore contacted Joseph Beran, who was the chief operating officer of RCRTC. Beran gave Frank the names of other RCRTC shareholders whose property had been turned over to the state pursuant to the unclaimed property statute. These shareholders included Hammerschmidt, Edward Holt, and Clara Pelzel. Beran also told Frank that the stock had sold at a range of \$32,000 per share when RCRTC was acquired in 2012.
6. Frank began to look for heirs of the owners of these stocks. An heir could potentially serve as a successor personal representative of a deceased owner's estate and obtain the right to collect the funds from the state for the estate to distribute to the rightful heirs.
7. Frank contacted people he believed may be descendants of the deceased shareholders to determine if they were willing to be a successor personal

representative to obtain the proceeds from the state and distribute them to the rightful heirs. Among others, Frank telephoned Steven and Douglas Lecy. The Lecy's were not a current or past client of Frank, and Frank did not have a prior professional relationship with them. Frank told the Lecy's of the unclaimed process from the sale of the RCRTC stock, that the Lecy's may be entitled to some of those funds, and that the Lecy's should contact their lawyer. Frank suggested that if their lawyer was not interested he would be willing to handle their matter.

8. It is undisputed that Frank initiated a phone call to the Lecy's to inquire whether they were aware of the unclaimed stock proceeds of Edward Holt. Frank suggested they contact their attorney and if their attorney couldn't handle the matter, his firm could assist them. The Lecy's did not hire Frank on the matter.
9. The referee finds no Rule 7.3(a) violation. Frank testified that the purpose of the phone call was to locate an heir to the Edward Holt Estate and to advise them of the unclaimed funds. Frank denied that a significant motive was his pecuniary gain.

COUNT II-HOLT MATTER

10. False Statement to Court. The Director makes four arguments. She first argues Frank's conduct in stating in the application for successor personal representative, Exh. 21(a) at page 430, that Vagle was a descendant of Holt with no reasonable basis in fact violated Rule 3.1 of MRPC. Frank counters that based upon his research it was reasonable for him to conclude that she could be part of the family tree.
11. In 1919, Edward A. Holt died intestate. When Holt died he had no surviving spouse or children and owned several shares of RCRTC stock.

His estate was probated in Redwood County and the Final Decree of Distribution was entered in June 1923. *See* Exhibit 21(a) at page 622. The RCRTC stock was not probated in the estate.

12. When the RCRTC stock was sold in 2012 no rightful heir to Holt's estate could be found, and therefore the stock was liquidated. The proceeds were turned over to the state pursuant to the unclaimed property statute.
13. Emilie Kuhn and her husband were clients of Frank. During a meeting with them on an unrelated matter Frank discovered that Emilie's maiden name was Holt and that she grew up in Echo, Minnesota. Based upon this information Frank asked Kuhn to be successor personal representative for the Edward Holt estate to collect the unclaimed assets for the estate. Kuhn declined but suggested her daughter, Kimberly Vagle as a possibility.
14. Frank arranged a meeting with Vagle in his office to discuss reopening the Edward Holt estate. At the meeting Frank asked Vagle to be the successor personal representative and she agreed. Frank advised Vagle that he could handle the matter on an hourly basis at \$250 per hour for which she would be personally responsible or a 25% contingent fee agreement. Vagle was unsophisticated in legal matters, had no experience in hiring lawyers and largely relied on Frank's advice in deciding what type of fee agreement was reasonable. Frank did not disclose that he had calculated the Holt stock was worth about one million (\$1,000,000) and that a single share in 1911 was worth more than \$160,000. Also, Frank did not disclose the significant amount of time that his office had previously spent working on the matter. Based upon his representations Vagle agreed to and signed the contingent fee agreement in which Frank was entitled to recover 25% of any amounts recovered.

15. Frank drafted and Vagle signed the application for her appoint as successor personal representative for the Estate of Edward Holt which had been closed for about 94 years. In that application, Frank inserted language in several paragraphs that Vagle was “a descendant of the Holt family.” In paragraph 5, Frank inserted language that “Kimberly Renee Vagle has priority under Minn. Stat. 524.3-203 for appointment as successor personal representative because she is a descendant of the Holt family...”
16. Frank argues that the phrase “Holt family” in the petition did not mean the Edward Holt family. Instead, it merely refers to any Holt family. This argument lacks merit and I reject it. The phrase “descendant of the Holt family” clearly means the family of the decedent Edward Holt. Edward Holt was the subject of the application and it is his descendants who have priority under Minn. Stat. 524.3-203.
17. Frank also argues that he conducted a reasonable investigation and therefore there was a reasonable basis for his statement that Vagle was a descendant of Edward Holt. Based upon his conversation with Emilie Holt Keuhn, Frank discovered that Keuhn’s maiden name was Holt, and that she lived in Echo, Minnesota. Thereafter, Frank’s firm searched for an heir of Edward Holt by conducting an internet search, reviewed some obituaries, and talked to potential descendants of Edward Holt and his mother Henrietta Miller Holt, who was the mother of Edward Holt. His explanation of the search was vague and nonspecific. No details were given. Frank admitted that he and his firm had no expertise in conducting a genealogical search. Frank stated that someone told him a genealogical search by an expert could cost \$20,000–\$30,000. Frank elected to not do a genealogical search and chose to rely on his limited search. He also chose

not to publish a request to identify heirs in the local newspaper. After his search no new facts were discovered.

18. When Frank drafted and presented the application to Vagle to sign in November 2017 he had no reasonable factual basis to believe Vagle was a descendant of Edward Holt. Neither Vagle nor Keuhn knew whether she was a descendant of Holt. Despite research by Frank's law firm and Vagle's aunt there was no factual basis to assert Vagle was a descendant. Frank later testified under oath that he simply "hoped" Vagle was a descendant of Holt.
19. On or about November 16, 2017, Frank filed the application with the court. Frank did so without mailed or published notice to any other potential descendant. Frank did not inform the court that he had no factual basis to conclude that Vagle was an heir of Edward Holt. By Order filed November 20, 2017, Vagle was appointed successor personal representative.
20. The referee finds Frank's statement that Vagle was a descendant of the Holt family did not have a reasonable basis in fact and violated Rule 3.1 of the MRPC. Frank's investigation did not produce any evidence that Vagle was a descendant of Edward Holt. The fact that Keuhn's maiden name was Holt and that she grew up in the Echo area was not a sufficient factual basis to conclude that Vagle was a descendant of Edward Holt. And there were no immediate time constraints on Frank to file the application in November. Instead, Frank had additional time to conduct further investigation to locate an heir.
21. Duty to Correct Petition. The Director next argues Frank's failure to correct the petition in January and May 2018 upon learning and on those occasions that Vagle was not a descendant of Edward Holt violated Rule 3.3(a)(1) and 8.4(d). Frank counters that whether Vagle was a descendant

was immaterial in the probate proceedings and therefore he had no duty to clarify that Vagle was not an heir of Edward Holt.

22. Frank needed to find an heir of Edward Holt, or there would be no newly discovered assets to distribute. For example, in the Hammerschmidt matter, Frank was unable to collect and distribute the unclaimed property from the state because he could not establish that his client satisfied the priority requirements of the statute. Here, the same result would have occurred if Susan Bianchi had not discovered the Edward Holt heirs in May 2018. Once the heirs were discovered there was a basis to move forward with the probate proceeding.
23. Whether Vagle was a descendant is relevant and material because if she was not an heir then she could not be a successor personal representative without going through a formal probate proceeding. Minn. Stat. 524.3-203(e) prohibits one who is not in priority from acting as personal representative in an informal probate. Vagle was not a descendant and therefore not in priority. Only descendants of Edward Holt had that right. She was not and therefore lacked the priority requirements of the statute. That the application was false is a basis for her removal.
24. No later than January 2018 Frank knew Vagle was not a descendant of Edward Holt. That fact was not disclosed to the court until many months later. As an experienced practitioner, Frank knew or should have known that Vagle's lack of a priority under the statute in an informal proceeding would be an important and material fact for the court to know.
25. Susan Bianchi, a lawyer in Frank's firm, was assigned to continue the genealogical research in May 2018. Although not trained as a genealogical expert she has internet search skills that proved most helpful. She began work on May 2, 2018. By May 8 Bianchi confirmed that Vagle was not a

descendant of Edward Holt and had found potential living relatives of Edward Holt. Frank had a duty to inform the court of this fact as expressed in finding.

26. The referee finds that Frank had a duty to correct the false statement in January and May 2018. Frank failed to explain to the court his efforts to locate a living descendant, his lack of success in those efforts and why he selected Vagle as the successor personal representative. When he knew she was not an heir to the decedent he had a duty to disclose that fact to the court. His failure to do so was a knowing violation as of those dates.
27. The referee finds that the statement was material to the question of who had the right to recover the unclaimed property and relevant to who had the right to be appointed successor personal representative. Frank counters that the statement in the application does not bear on Vagle's qualifications to serve. The crux of the matter, however, is that the statute has made the person's priority material. The Legislature has made an evaluative judgment that those with statutory priority are better qualified to serve as a personal representative. An individual who lacks priority may be appointed a successor personal representative if notice is given in a formal probate proceeding pursuant to the statute and the court approves the request. That didn't occur in this case.
28. The referee finds that Frank violated Rule 3.3(a) and Rule 8.4(d) when he knowingly failed to disclose to the court in January and May 2018 that Vagle was not a descendant of Edward Holt and therefore not in priority to be appointed a successor personal representative.
29. Lingrey Phone Call. The Director argues that Frank's communication to Lingrey improperly implied that he was disinterested and failed to disclose his client's potential adverse interest which led her to believe Frank

represented the State and the personal interest violated Rule 4.3(b). Frank denies the allegation.

30. In May 2018 Frank began contacting potential living heirs of Edward Holt, including Deborah Lingrey.
31. On May 8, 2018, Frank had a telephone conversation with Lingrey. Bianchi was on the call. Lingrey stated that the phone call was the first time she ever heard of Frank, the RCRTC, or the unclaimed funds of Edward Holt. During the call Frank stated there was unclaimed property with the state, and that he had been retained to look for heirs to receive the property. Frank did not disclose who he represented or whether his client's interest was adverse to Lingrey.
32. Based upon what he said and did not say she concluded that he represented the state. Shortly thereafter, Lingrey emailed the state unclaimed property division and was informed that Frank did not represent the state, and that the state had paid out the money to Vagle.
33. The referee finds Lingrey's testimony to be truthful and sincere. She was rightfully concerned about her conversation with Frank. It would have been better for Frank to have disclosed who he represented and the scope of that investigation. The referee, however, finds no violation of the rule charged by the Director.
34. The referee finds no Rule 4.3(b) violation. Vagle's interests are not directly adverse to Lingrey. As the personal representative Vagle was responsible to collect the unclaimed funds of Edward Holt and distribute them to the rightful heirs under the supervision of the court. Since Vagle is not an heir of Edward Holt she would take nothing from the estate and save her fee as a personal representative. There is no evidence that Vagle failed to fulfill her responsibilities or acted improperly.

35. Contingent fee Agreement. The Director argues Frank's conduct in making an agreement for, charging and attempting to collect unreasonable attorney fees violated Rules 1.5(a) and 8.4(a). Frank denies that the attorney fees were unreasonable.
36. In April 2018 the state issued a check payable to the Estate of Edward A. Holt, Kimberly Vagle as personal representative in the amount of \$913,910.40. Vagle took the check to Frank's law office and it was deposited into the firm's trust account.
37. On May 17, 2018 Frank disbursed some of the funds. He paid \$50,000 to his law firm, \$10,000 to Vagle as personal representative, and \$2,000 to the accountant. On June 19, 2018 Frank filed a petition for full distribution to consenting heirs. Frank asked, among other things, that the court to approve payment of 25% contingency fee, and pay Vagle \$10,000, which had already been distributed.
38. On July 10–11, 2018 Maribeth Lewis and another descendant filed objections to the petition. After a hearing on July 20, 2018 the court declined to remove Vagle as personal representative.
39. On August 3, 2018 Frank served an offer of judgment to all beneficiaries pursuant to the Rule 68 of the Minnesota Rules of Civil Procedure to settle, among other things, Frank's attorney fee claim for \$140,000, and Vagle's personal representative fee claim for \$10,000. The offer was not accepted. Trial on the objections occurred on September 28, 2018.
40. On November 8, 2018 the court issued findings, conclusions of law and order which determined that the 25% contingent fee agreement was an unreasonable fee, that the \$140,000 fee claimed in the offer of judgment was unreasonable, and ordered that Frank receive reasonable attorney fees

\$50,487.50 plus costs. The court also awarded Vagle \$2,500 as a personal representative fee.

41. The court noted that Frank was evasive in his testimony regarding attorney fees, and that Vagle was unsophisticated regarding the appropriateness of a contingent versus hourly fee in this case. Moreover, that Frank's billing practices in this case were not reasonable or customary, and that he lacked business records and testimony to substantiate his estimate that his firm spent 500 hours of time on the case. Also, that Frank's law firm had delayed producing discovery and that Frank failed to disclose important information on a timely basis to Vagle. Those finding are supported by the record and the referee adopts them.
42. The district court found that Frank's Law Firm (EFM) charged \$5,200 to the Estate of McCorquodale to perform services essentially identical to those performed in the Holt estate with the exception of genealogical research. Exh. 22, Finding 29. Additionally, the district court found that in the Estate of Pelzel, also involving issues nearly identical to Holt, but only three shares of stock, EFM initially set a contingency fee retainer of 20% but voluntarily reduced it to 10%, or approximately \$55,000. *Id.*, Finding 30. These findings are supported by the record clear and the referee adopts them.
43. Lewis was required to hire an attorney to challenge Frank's request for attorney fees and endure the stress of vindicating the beneficiaries' rights in court. Those efforts were stressful, time-consuming and expensive. The court awarded over \$34,000 to Lewis's counsel and over \$14,000 to additional counsel for the successor personal representative which was paid out of the estate.

44. But Lewis incurred about \$8,000 of expenses which were not reimbursed from the estate. Lewis paid those expenses.
45. Although differing standards of proof exist between the district court's proceedings and the matter before the referee, the district court's findings are particularly useful. On the subject of the reasonableness of the attorney fees, the district court found Franks's testimony to be evasive, vague and not reliable. The referee finds in this proceeding that Frank's testimony in this proceeding on the subject of the reasonableness of the attorney fees to also be evasive, vague and not reliable.
46. Contingent fees, like any other fees, are subject to the reasonableness standard of the rule. Comment 3 to Rule 1.5, MCPC. Contingent fee agreements are important and necessary to the court system because they make competent legal representation available to those who are unable afford legal representation on an hourly basis.
47. When the contingent fee agreement was signed Frank had completed the Hammerschmidt case, which was a similar case. Based upon that case he knew the state held pursuant to the unclaimed property statute the proceeds of the sale of RCRTC stock for the rightful heirs of Edward Holt, that the amount being held was approximately \$1,000,000, and that the appointment of a successor personal representative was the proper procedural vehicle to gain access to the funds.
48. Generally, a successful contingent fee case requires that the lawyer establish: liability of the Defendant for harm/injury caused by the Plaintiff; damages caused suffered by the Plaintiff caused by the Defendant; and a Defendant which has the ability to pay. Here all three were resolved at the time the agreement was signed. The liability issue was resolved—the state held the money due to the right heirs; and the damage issue was resolved—

the value of the stock was determined at the time of sale. And the state had the funds to pay for the unclaimed property. All Frank needed to do was to identify and locate a qualified person to be successor personal representative of the estate and to identify and locate the heirs. The task of identifying and locating the heirs was real-if none were found the money would need to be returned to the state.

49. Turning to the factors, factor 1 examines the time and labor involved, the novelty and difficulty of the questions involved and the skill necessary to perform the work. The work involved locating heirs of Edward Holt, particularly a qualified person to serve as successor personal representative. Frank and his office had experience in the doing the probate work of preparing the application for appointment of successor personal representative, collecting the new assets from the state and preparing a petition to distribute the funds. This work was relatively routine. Neither Frank nor his office had any particular expertise in finding the heirs of Edward Holt. It turned out that Susan Bianchi, who started her worked on May 2, had the internet skills needed and did find an heir of Edward Holt. That expertise didn't come into play until Frank asked Bianchi to review and complete the work. She did work on the internet, including accessing ancestry.com, and searched local obituaries.
50. The legal work performed by Frank was modest. Frank claimed his office invested 500 hours trying to locate an heir of Edward Holt. But this work was done before Vagle hired Frank. Moreover, I believe the time estimate is grossly exaggerated. I do not believe it is accurate or entitled to much weight. Susan Bianchi was the only time-keeper at the firm to post the time she spent on the project. Her time appears reasonable. But no other time was posted. Without some verification of the date, amount of time, and

services performed it is speculative to determine how much additional time by other members of the firm should be considered. I do, however, believe that important tasks were performed in doing the probate work and some additional time-beyond that done by Susan Bianchi-was spent looking for heirs of Edward Holt, but that amount of time was modest.

51. Factor 2 examines whether acceptance of this work by Frank precluded Frank taking on other professional work. This factor is not relevant to our inquiry. Frank does not claim he was precluded from accepting other work. And there is no evidence that he was precluded from doing so.

52. Factor 3 examines the fee customarily charged in the locality for similar legal services. The evidence presented involved three examples-one case in which Frank charged an hourly fee of \$5,200 and another where Frank received a contingent fee of approximately \$56,000 in the Pelzel case. The Pelzel fee was a voluntary reduction of the fee by Frank to about 10% of the recovery. A third case involved a commercial recovery firm which offered to do the work for 10% of the amount recovered. The referee finds that either an hourly fee or a contingent fee would be reasonable in this case. Given the amount of money at stake and the issues involved a contingent fee could be reasonable, subject to an examination of the other factors in Rule 1.5(a), MRPC. The crux of the matter is the reasonableness of the contingent fee percentage.

53. Factor 4 examines the amount involved and the result obtained. Here, the amount involved in Holt was \$913,910. The result obtained was a decision of the district court that sustained the objections to the petition of Vagle for distribution. That decision reduced Frank's attorney fees from 25% to about 10% on the ground that the fees were disproportionate, excessive and unreasonable. That decision is supported by the evidence presented. Fifth,

the only time constraint was a one-year time bar to bring a claim to recover the unclaimed property. Frank had several months before that time-bar was an issue.

54. Factor 6 examines the nature and length of the professional relationship.

Frank had not previously represented Vagle, and so this factor is not relevant. Factor 7 examines the experience, reputation, and ability of the lawyer or lawyers performing the service. Here, Frank had experience in probate matters and reopening closed estates. Frank and his law firm had no experience in conducting a genealogy search to locate heirs. He could have hired an expert to do such research but chose not to do so. Instead he chose to rely on the inquiries made by him and law firm members to acquaintances, review of local obituaries and a limited internet search.

Factor 8 simply examines whether the fee is hourly or contingent.

55. My analysis of the factors when I examine them as of the time the attorney fees were charged. The relevant facts do not materially change.

56. The referee finds that both the 25% fee and 15% fee are disproportionate, excessive and unreasonable. Two reasons support my conclusion. First, the amount of work to be done was simple, routine probate work. He needed to collect the unclaimed property of Edward Holt, and to distribute the assets under the supervision of the court. This was routine probate work. The work done by Susan Bianchi in locating the heirs of Edward Holt was done in about one week by a person who was not an expert genealogist.

57. Second, the risk of no recovery of attorney fees was minimal. The risk was a nonlegal one-Frank needed to identify and locate the rightful heirs of Edward Holt, including a qualified heir with priority to serve as the successor personal representative for an informal probate proceeding. If no

heirs, were located then there would be no recovery. That risk, however was minimal. Frank knew there were many Holts in the Echo area. In sum, for a minimal amount work and very little risk Frank would recover made an agreement, charged and sought fees of \$228,000, which he reduced to \$140,000. On its face those amounts are disproportionate, excessive and unreasonable. I don't see sufficient adversity that would result in a violation of the rule.

58. In sum, the percentages sought, namely 25% and 15% were unreasonable. Therefore, I conclude that the fee agreement of 25%, the fee agreement charged in the petition to disburse funds and the offer of judgment of about 15% are unreasonable and therefore a violation of Rule 1.5(a) and 8.4(a).

COUNT III-PELZEL MATTER

59. In 1954 Clara Pelzel died with no surviving spouse or children but had stock in RCRTC.
60. When RCRTC was sold in 2012, no rightful heir to Pelzel's estate could be found, and the therefore the stock was liquidated and turned over to the state pursuant to the unclaimed property statute.
61. In October 2017 Nicholas Fischer retained Frank for representation in an unclaimed property matter arising out of the Pelzel estate, Fischer was to act as the successor personal representative of the estate. Frank's written fee agreement provided that Frank would receive a 20% contingency fee for any amounts recovered.
62. Frank drafted for Fischer to sign an application for Fischer to be appointed successor personal representative. In the application Frank states "Nicholas Fischer has priority under Minn. Stat. 524.3-203 for appointment as

successor personal representative because he is the closest, living next-of-kin” of Pelzel.

63. On or about November 7, 2017 Frank filed the application with the court.

The court granted the application. The unclaimed property division of the state issued a check in the amount of \$548,346 and Frank ultimately collected \$53,750 in attorney fees.

64. False Statement to Court. The Director makes three claims. First, the

Director argues that Frank’s conduct in stating in the application that Fischer was the closest surviving next-of-kin when he knew this was not true violated Rule 3.3(a)(1), 4.1 and 8.4(c) and (d). Frank denies the claim.

65. The referee finds that Frank had a reasonable basis to state that Fischer was the closest surviving net-of-kin. The statement is somewhat inartful because Fischer is one of many in the same line of priority but that does not make the statement false. It is immaterial that Fischer is one of several who were the closest living next-of-kin. Under the statute each would have the same priority. Consequently, the referee finds no violation of Rules 3.3(a), 4.1 and 8.4(c).

66. Ex Parte Proceeding. Second, the Director argues the statement Fischer is the closest living next-of-kin also violates Rule 3.3(d), MRPC. Frank had a reasonable to make the statement as expressed above, and therefore there is no violation of Rule 3.3(d).

67. Contingent Fee Agreement. Frank’s contingent fee agreement was for a 20% contingent fee of any amount recovered. Frank then received objections to the Holt attorney fee application and was notified that an asset recovery company was willing to handle the matter for a 10% contingent fee. Thereafter, Frank agreed to reduce his fee to about 10% of the recovery or \$53,750.

68. The referee finds that Frank's conduct in making an agreement for a contingent fee of 20% was disproportionate, excessive and unreasonable and violated Rule 1.5(a).

AGGRAVATING FACTORS

69. Frank's substantial experience in law, particularly probate law aggravates his misconduct.

70. Frank's prior discipline does not aggravate his misconduct. His admonition on April 17, 2014 occurred, but does not bear much weight in this matter.

71. The referee finds no other aggravating factors.

72. The referee finds no mitigating factors.

CONCLUSIONS OF LAW

1. Frank's telephone contact with the Lecys to inform them of unclaimed funds potentially connected to the Mabel Holt estate did not violate Rule 7.3 (a), Minnesota Rules of Professional Conduct (MRPC). The Director failed to prove by clear and convincing evidence that a significant motive for the phone call was Frank's pecuniary gain.
2. In the Holt matter, Frank's statement in the application for successor personal representative that Vagle had priority under Minn. Stat. 524.3-203 because she is a descendant of the Holt family with no reasonable basis in fact violated Rule 3.1, MRPC.
3. In the Holt matter, Frank's failure to correct the application in January and May 2018 upon learning that Vagle was not a descendant of Holt violated Rule 3.3(a)(1) and Rule 8.4(d), MRPC.
4. In the Holt matter Frank's telephone communication did not violate Rule 4.3(b), MRPC.

5. In the Holt matter, Frank's conduct in making an agreement for, charging and attempting to collect unreasonable attorney fees violated Rule 1.5(a) and 8.4(a), MRPC.
6. In the Pelzel matter, Frank had a reasonable basis for stating that Fischer was the closest surviving next-of-kin and therefore did not violate Rule 3.3(a)(1), 4.1 and Rule 8.4(c), MRPC.
7. In the Pelzel matter, Frank's conduct in filing an application for appointment of a successor personal representative without stating that Fischer was one of many surviving grandchildren did not violate Rule 3.3(d), MRPC.
8. In the Pelzel matter, Frank's conduct in making an agreement for an unreasonable contingent fee of 20% violated Rule 1.5(a), MRPC.

AGGRAVATION FACTORS

9. Frank's substantial experience in the practice of law, particularly in the field of probate aggravates his misconduct.
10. No mitigation is found in Frank's claim of cooperation.
11. Frank is not entitled to mitigation on the basis that no client was harmed.

RECOMMENDATION FOR DISCIPLINE

Based on the foregoing findings of fact and conclusions, the undersigned makes the following recommendation:

1. Respondent L.W. Frank be suspended from the practice of law for 10 days, effective 14 days from the date of the Supreme Court's suspension order.
2. Frank shall pay \$900 in costs disbursements, pursuant to Rule 24, Rules on Lawyers Professional Responsibility (RLPR).

3. Frank shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel and tribunals).
4. Frank shall be eligible for the reinstatement to the practice of law following the expiration of the suspension provided that Frank files with the Clerk of the Appellate Courts and serves upon the Director an affidavit establishing that he is current in continuing legal education requirements, has complied with Rules 24 and 26, RLPR, and has complied with any other conditions for reinstatement by the Supreme Court.
5. Within one year of the date of the Supreme Court's suspension order, Frank shall file with the Clerk of Appellate Courts and serve upon the Director proof of successful completion of the written examination for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Failure to timely file the required documentation shall result in automatic suspension, as provided in Rule 18(e)(3), RLPR.

Dated: August 20, 2021

BY THE COURT:

/s/ Christopher J. Dietzen
Justice Christopher J. Dietzen, Retired
Supreme Court Referee

REFEREE'S MEMORANDUM

PRIOR COURT PROCEEDING

The referee agrees with the Director that the materials of the attorney fee litigation—the transcript of the proceeding, including the exhibits and the Court's Findings of Fact,

Conclusions of Law and Order (Order) are admissible in this matter. *In Re Morris*, 408 NW2d 859, 863 (Minn. 1987). The district court's decision, however, has a different burden of proof, and therefore is not binding. Moreover, the Order does not preclude Frank from arguing and presenting evidence that he did not commit professional misconduct.

COUNT I-IMPROPER SOLICITATION

The Director argues that Frank solicited legal business from the Lecy's in violation of Rule 7.3 (a). Frank denies that he violated the rule. Rule 7.3(a) states: "A lawyer shall not by in-person or live telephone contact solicit professional employment from anyone when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer." Subpart (d) sets forth exceptions to the prohibition, but those exceptions are not applicable. The question is whether Frank's pecuniary gain was a significant motive for the telephone call. Frank testified that the purpose of the phone call was to locate an heir to the Edward Holt Estate and to advise them of the outstanding unclaimed funds. No evidence was presented that the primary purpose of the call was Frank's pecuniary gain. The referee finds no Rule 7.3(a) violation.

COUNT II- HOLT MATTER

A. False Statement to Court. The Director argues that Respondent violated several ethical rules by stating in the Application that Vagle was "a descendant of the Holt family." The Director asserts that the statement was without a basis in law and fact. Rule 3.1, and that the description of Vagle's relationship to the Holt family was a material misstatement which triggered a requirement under Rules 3.3(a)(1) and 8.4(d) for Respondent to affirmatively inform the court when he learned that Vagle was not a descendant of Edward Holt.

Rule 3.1 states: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is reasonable basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Comment 2 states in relevant part: “What is required of lawyers, however, is that they inform themselves about the facts of their client’s cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”

Frank argues that the statement in the application that “Vagle is a descendant of the Holt family” is accurate. I disagree. The application is to appoint a successor personal representative to reopen the Estate of Edward Holt. Thus, the application is for the Estate of Edward Holt. The statement that Vagle is a descendant of the Holt family clearly conveys to the reader that Vagle is a descendant of Edward Holt.

Second, Frank argues that he had a reasonable basis to believe that Vagle was a descendant of Edward Holt. He affirmatively states that he and his firm did an internet search and talked to relatives of Vagle and her mother in the Echo community. Those efforts, however, did not produce any new information. Frank relied on the fact that Vagle’s mother’s maiden name was Holt and that Edward Holt was from the same area to conclude Vagle could possibly be a descendant of Edward Holt.

Frank stated that his firm invested 500 hours searching for descendants of Edward Holt before the application was filed. The referee finds that estimate not credible. No logs or lists of individuals contacted were produced. When asked about the efforts made, Frank was vague and evasive. No new information was produced. It is unclear why Frank chose to file the application in November. Additional research could have been done. Frank did not conduct a reasonable investigation of whether Vagle was a descendant of Edward Holt. Before he filed the application Frank knew that the amount of money at stake was about \$1,000,000. Frank admitted that he could have hired a genealogy expert to do the search but did not. It is unclear why Bianchi’s work was not done before the filing of the petition.

Frank could have advertised in the local paper or gone door-to-door in the Echo community to do the search.

- B. Duty to Inform the Court. The Director argues that Frank had a duty to correct the statement in the application that Holt was a descendant of Holt. Rule 3.3(a) states: “A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” Rule 8.4(d) states: “It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.”

Frank knew by January 2018 that Vagle was not a descendant of Edward Holt. But he failed to notify the court of this change. This was a material fact because Vagle was not entitled to priority under the statute. Minn. Stat. 524.3-203. Vagle was not a descendant and therefore not in priority. Only descendants of Edward Holt had that right. By May 8, 2018 Bianchi confirmed that Vagle was not a descendant and told Frank that fact, and that she had found potential heirs of Edward Holt. As of January 2018 and May 2018 Frank had a duty to inform the court of that fact. Whether it was moot or not was up to the court to decide not Frank. It was a material fact to Vagle’s appointment. Frank’s failure to do so was a knowing violation of Rules 3.3(a)(1) and Rule 8.4(d), MRPC.

- C. Lingrey Phone Call. Rule 4.3(b) states: “In dealing on behalf of a client with a person who is not represented by counsel: (b) a lawyer shall clearly disclose that the client’s interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;” Frank argues that Vagle’s interests are not adverse to Lingrey. He points out that the role of the personal representative is to distribute the funds of the estate to the rightful heir.

This is largely correct. I don't see sufficient adversity under the rule that would trigger a violation of the rule and therefore there is no violation.

D. Contingent Fee. The Director argues that the 25% contingent fee is unreasonable. Fourth, Rule 1.5(a) states: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. *Id.*

The rule directs the reasonableness inquiry to three points in time: when the agreement was made, when the fee is charged and when the fee is collected. The rule also sets forth 8 factors to consider in making the determination. *Green v. BMW of N. Am., LLC*, 826 NW2d 530, 537 (Minn. 2013). I may also consider the district court's findings on that issue.

COUNT III-PELZEL MATTER

The Director alleges that Frank's identification of Fischer as "the closest, living, next-of-kin" to Clara Pelzel was a false statement violating Rules 3.3(a)(1), 4.1, and 8.4(c) which all prohibit lawyers from making knowingly false statements or otherwise acting dishonestly. According to the Director because there were other living grandchildren of

Clara Pelzel, i.e., there were multiple people in the closest living generation, including Mr. Fischer, that Mr. Fischer could not, by himself, be “the closet” living relative.

Rule 3.3(a)(1) and 4.1 prohibit “knowingly” false statements. It may be unclear whether having an “intent to deceive” is an element of Rule 8.4(c), but it does include making “false statements with knowledge of their falsity.” *In Re Tayari-Garrett*, 866 NW2d 513, 528 at n. 2(Minn. 2015). The referee finds no violation. The Director failed to prove a violation by clear and convincing evidence.

Similarly, I find no Rule 3.3 (d) violation. The Director failed to present clear and convincing evidence that the existence of other living Pelzel descendants in the same generation as Mr. Fischer was a material fact to the court’s appoint of a successor personal representative.

RECOMMENDED DISCIPLINE

The purpose of discipline for professional misconduct is “not to punish the attorney but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as other attorneys.” *In Re Rebeau*, 787 NW2d 168, 173 (Minn. 2010). The four factors that guide the determination are: (1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession. *In Re Nelson*, 733 NW2d 458, 463 (Minn. 2007). In that analysis I must also consider any aggravating and mitigating factors and the discipline imposed in similar cases. *In Re Albrecht*, 845 NW2d 184, 191 (Minn. 2014).

The nature of the misconduct is serious. Frank made a false statement to the court and knowingly failed to correct it on at least two occasions. Moreover, he entered into a contingent fee in two matters in two cases-Holt and Pelzel and attempted to charge and collect in Holt for fees that were excessive, disproportionate and unreasonable. The cumulative weight of the misconduct is also serious. The referee views the false statement and knowing false statements as serious. Frank made statements to the court knowing they were not true.

The unreasonable contingent fee is the most serious because Frank had several occasions to withdraw the request to collect 25% on the Holt matter but did not. The referee finds this troubling. From the victim's standpoint Lewis and the rightful heirs were forced to vindicate their position in court. To his credit Frank reduced his fee to about 10% in the Pelzel matter. Frank's misconduct directly involved the practice of law before our courts. This misconduct by its very nature harms the public and the legal profession. Such conduct undermines the public's perception of the legal profession, and confidence in the ability of lawyers to abide by the rule of law. Misconduct involving dishonesty by an experienced lawyer before our courts is particularly serious because honesty and integrity are among the most important attributes the public has the right to expect of lawyers.

The referee has considered a greater suspension but believes that is not consistent with the purpose of discipline. Similarly, the referee considered a public admonition, but concluded that would not serve the purpose of discipline.

L.W. FRANK TRIAL EXHIBIT INDEX

DIRECTOR'S EXHIBIT NO.	OFFERED	RECEIVED	WITHDRAWN
1 (reserved)	N/A		
2 (reserved)	N/A		
3 (reserved)	N/A		
4	X	X	
5 (reserved)	N/A		
6 (reserved)	N/A		
7	X	X	
8	X	X	
9	X	X	
10	X	X	
11	X	X	
12	X	X	
13	X	X	
14	X	X	
15	X	X	
16	X	X	
17	X	X	
17(a)	X	X	
18	X	X	
19	X	X	
20	X	X	
21	X	X	
21(a)	X	X (pages 430-643 admitted in part, with withdrawals noted*)	*Sub-exhibit 105 (pg. 436) Sub-exhibit 110 (pg. 495) Sub-exhibit 119 (pgs. 537-543) Sub-exhibit 131 (pgs. 578-579)
22	X	X (on condition that it is not used for collateral estoppel or res judicata)	
23	X	X	
24	X	X	

L.W. FRANK TRIAL EXHIBIT INDEX

DIRECTOR'S EXHIBIT NO.	OFFERED	RECEIVED	WITHDRAWN
25	X	X	
26	X	X	
27	X	X	
28	X	X	
29	X	X	
30	X	X	
RESPONDENT'S EXHIBIT NO.	OFFERED	RECEIVED	WITHDRAWN
101	X	X	
102	X	X	
103	X	X	
104	X	X	
105	X	X	