

STATE OF MINNESOTA

IN SUPREME COURT

A09-472

Original Jurisdiction

Per Curiam

In re Petition for Disciplinary Action against
Thomas John Lyons, Jr., a Minnesota Attorney,
Registration No. 249646.

Filed: April 8, 2010
Office of Appellate Courts

Martin A. Cole, Director, Timothy M. Burke, Senior Assistant Director, Office of
Lawyers Professional Responsibility, St. Paul, Minnesota, for petitioner.

Eric T. Cooperstein, Minneapolis, Minnesota, for respondent attorney.

S Y L L A B U S

Indefinite suspension with no right to petition for reinstatement for a minimum of 12 months is the appropriate discipline for a lawyer who was untruthful to opposing counsel about whether his client died before or after counsel reached agreement on terms of a settlement, was untruthful to the Director, to opposing counsel, and during testimony before the referee about when he learned of his client's death, and had a substantial disciplinary history.

O P I N I O N

PER CURIAM.

In March 2009, the Director of the Office of Lawyers Professional Responsibility (Director) served and filed a petition for disciplinary action against respondent Thomas

Lyons, Jr. The Director alleged that Lyons' failure to disclose his client's death during settlement negotiations and false and misleading statements made to opposing counsel and to the Director about the client's death constituted unprofessional conduct warranting public discipline. Lyons served and filed a general denial. Pursuant to Rule 14 of the Minnesota Rules on Lawyers Professional Responsibility (RLPR), a referee hearing was held, after which the referee filed findings of fact, conclusions of law, and a recommendation for discipline with our court. The referee recommended that Lyons be indefinitely suspended from the practice of law in the State of Minnesota with no right to petition for reinstatement for a minimum of 12 months. We adopt the referee's recommended discipline.

Lyons was admitted to practice law in Minnesota on October 28, 1994. At all times relevant to these proceedings, Lyons was engaged in the practice of law at a law firm known as the Consumer Justice Center, P.A., in Vadnais Heights, Minnesota. Lyons has been disciplined on seven previous occasions. In December of 1998, Lyons was both admonished and placed on private probation for separate incidents of misconduct; in 2001, he was publicly reprimanded and placed on probation for two years; in 2002, Lyons was admonished; and he was again admonished in 2005. In addition, Lyons received two separate amended admonitions in 2007. Lyons' previous discipline resulted from material misrepresentations, prosecuting frivolous claims, and failure to follow appropriate procedure.

In 2006, Lyons was retained by a man who had been erroneously reported by Trans Union, LLC, a credit reporting agency, to be dead. In September 2006, a

complaint against Trans Union under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2000), was filed in the United States District Court for the District of Montana. Lyons arranged for a Montana attorney, Sean Frampton, to serve as local counsel.

On September 18, 2007, Lyons and counsel for Trans Union engaged in a settlement conference, but no settlement was reached. On October 6, 2007, the client was hospitalized. On October 7, Frampton sent Lyons an email that said the client “is ill and in critical conditions [sic]. Please keep him in your prayers. Call and I will explain.” On October 8, Lyons replied, “Are you in the office today or on your cell phone? Should I explore settlement with Defendant?” On October 9, Frampton replied, “The doctors will be pulling the life support today. Sadly, he isn’t going to make it. Upon direction of [the client’s wife], please settle the lawsuit with [Trans Union].” That same day, Lyons replied, “I will do so and report back to you ASAP. I am totally confused by the series of events leading up to this tragic loss. Please advise when you have more information about the funeral and wake.” Lyons then emailed Trans Union, expressing the need to “confirm settlement positions” and requesting that Trans Union respond by telephone. The client died on October 9.

On October 26, 2007, Trans Union sent an email to Lyons offering to settle the claim for \$19,000. The following day, Lyons accepted the offer by email and requested that opposing counsel “[d]raft the release and order the check made payable to [the Consumer Justice Center] trust account.” Lyons did not inform Trans Union of the client’s death. On November 6, Trans Union sent Lyons a settlement agreement and

release. The following week, Lyons emailed Frampton, asking whether the client's wife could sign the agreement as "power of attorney." Frampton replied that the client's wife could sign the settlement agreement because she was the personal representative of the estate. Although the settlement documents were not yet signed, a stipulation dismissing the case with prejudice was filed electronically with the federal court on December 14, 2007.

In an email to Trans Union dated January 7, 2008, Lyons noted that he was "[s]till working on [the client] who was hospitalized and I think the release is being signed by his wife or power of attorney." Trans Union changed the signature line of the settlement agreement to read "Agent (Attorney-In-Fact)" and instructed Lyons to attach the power of attorney to the agreement as an exhibit. On January 14, 2008, the agreement, signed by the client's wife as personal representative of the estate rather than under a power of attorney, was returned to Trans Union.

Upon receiving the signed settlement agreement, Trans Union emailed Lyons asking if the client had passed away. Two days later, Lyons responded, "Yes – HOW IRONIC." The referee found and Lyons does not dispute that this e-mail on January 31, 2008, was Lyons's first disclosure to Trans Union that the client had died. The day following Lyons' disclosure, Trans Union asked, "When did he die? When did you find out?" Lyons replied, "Unsure. Recently." Trans Union responded by asking, "Did he die before or after we agreed to settle?" Lyons replied, "We settled before I found out he passed away." Trans Union again asked, "Did [the client] die before or after we agreed to settle?" Lyons replied that the client "died after we agreed to settle." Trans Union

demanded to know, “On what date did [the client] die? On what date did you find out?” Lyons replied, “Unsure of exact dates – sorry. I learned about it from local counsel afterwards – that is why we had to redo the signature block to estate after you sent it to us with only [the client’s] name.”

Thirteen minutes after this last reply to Trans Union on February 5, 2008, Lyons emailed Frampton and Lyons’ legal assistant that Trans Union “is trying to avoid payment on this settlement.” Lyons instructed his legal assistant to “pull the file and we will pinpoint to best we can the exact date of settlement” with Trans Union. Despite telling Trans Union’s counsel both that the client had not died, and that he had not learned of the client’s death until after the case was settled in late October, Lyons wrote to Frampton: “[The client’s] date of death was 10/9/07 and I believe that was confirmed in an email the following week by Sean [Frampton].”

Trans Union then sent an email to Frampton, with a copy to Lyons, asking Frampton to fill in the dates as to when the client died and when his counsel found out. Despite Lyons’ earlier email to Frampton acknowledging that Frampton had informed him of the client’s death within a week of the client’s passing, Lyons emailed Frampton:

FYI–

I don’t know that it is necessary to respond to him. However if you do here is the sequence as I understand it.

[The client] passed away 10/9/07

[Trans Union] offers 19k on 10/26/07

I accept via email on 10/27/07

There are no emails from you to me on notification of [the client's] death until after November 1, 2007.

Any questions please call.

Frampton responded to Lyons that the matter was irrelevant as they did not have an obligation to advise Trans Union of the client's death and that he would defer to Lyons' recollection. Lyons replied, "I agree completely. Just defer to me." In response to another inquiry from Trans Union, Lyons wrote, "[THE CLIENT] DIED ON 10/9/07. ACCORDING TO OUR EMAILS WE SETTLED ON 10/27/07. I DID NOT LEARN OF HIS PASSING UNTIL AFTER WE SETTLED – SORRY EXACT DATE UNKNOWN BY MYSELF OR FRAMPTON. SEND THE CHECK AND WE CAN CLOSE OUR FILES." Trans Union then asked Frampton directly when he found out about the client's death; Frampton responded that he found out on the day the client died.

Trans Union indicated that it would not be bound by the settlement and, as a result, Frampton filed an action in Montana state court to enforce the settlement agreement. Trans Union counterclaimed and added Lyons and Frampton as parties. That litigation was resolved when Lyons agreed to pay \$7,500 to the client's wife.

On April 7, 2008, the Director notified Lyons that an ethics complaint had been filed with respect to the settlement and that Lyons should submit "all documents that evidence, memorialize, or refer or relate in any way to, any communications, whether verbal, written or electronic, you had with any person regarding the death of [the client]." In response, Lyons provided some documentation, including a number of emails. The Director subsequently obtained additional emails from other sources. At the referee

hearing, Lyons testified that he had provided the Director with all the information he could locate in his files, that his practice was to print emails he received before deleting the electronic copies, and that his email provider did not provide copies of deleted emails more than 60 days after deletion. The referee found that Lyons' failure to provide the Director with the emails, which were later obtained by the Director from other sources, violated Rule 25(a), RLPR.¹ The referee also noted that Lyons had written in an email that he "may have telephone call notes" relating to the client's death, but failed to provide any such notes to the Director.

After Lyons provided his initial response, the Director requested that Lyons "state how and from whom he learned [the client] had died." Lyons replied that it was his recollection that he heard from Frampton sometime in early November, after the settlement had been negotiated. Lyons similarly testified at the referee hearing that he did not recall receiving actual notice of the client's death until after he reached a settlement with Trans Union. However, the client's local counsel in Montana, Frampton, testified in his deposition, which was submitted to the referee in lieu of Frampton's appearance at the referee hearing, that he had a conversation with Lyons notifying him of the client's death "within a short time frame after" the client died, and though he did not recall the exact date, he believed it was within a day or two of death. The referee found

¹ Rule 25(a), RLPR, requires a lawyer who is the subject of an investigation or disciplinary proceeding to cooperate with the Director and his staff "by complying with reasonable requests," including requests to furnish documents.

that Frampton informed Lyons of the client's death by telephone within a week of the client's death.

At the referee hearing, Lyons testified that when he responded to Trans Union, "Sorry, exact date unknown by myself or Frampton," he meant that neither he nor Frampton knew the exact date that Frampton had notified him of the client's passing. However, the referee found that by that testimony Lyons was falsely indicating uncertainty as to the date of the client's death.

The referee concluded that Lyons' conduct violated Rules 3.3(a)(1), 4.1, and 8.4(c) and (d) of the Montana Rules of Professional Conduct;² Rules 8.1(a) and (b)³ and

² The referee applied the Montana Rules of Professional Conduct because Rule 8.5(b)(1) of the Minnesota Rules of Professional Conduct provides in pertinent part that "[i]n any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied . . . for conduct in connection with a matter pending before a tribunal [are] the rules of the jurisdiction in which the tribunal sits." The litigation was venued in the United States District Court for the District of Montana, and that court applies the American Bar Association's Model Rules of Professional Conduct and the Montana Rules of Professional Conduct. Rule 83.13, Local Rules of Procedure of the United States District Court for the District of Montana. Therefore, and as the parties agree, the Montana Rules of Professional Conduct apply to Lyons' conduct that occurred in connection with the litigation at issue.

Montana Rule 3.3(a)(1) provides that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false stat[e]ment of material fact or law previously made to the tribunal by the lawyer."

The referee's ruling refers to Montana Rule 4.1. Montana Rule 4.1(a) provides that "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."

Montana Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

(Footnote continued on next page.)

8.4(c) and (d)⁴ of the Minnesota Rules of Professional Conduct; and Rule 25 of the Minnesota Rules on Lawyers Professional Responsibility.⁵ The referee recommended that Lyons be indefinitely suspended with no right to petition for reinstatement for at least 12 months.

I.

Lyons does not challenge the referee's finding that he failed to disclose the client's death to Trans Union before accepting Trans Union's settlement offer. Nor does Lyons

(Footnote continued from previous page.)

Montana Rule 8.4(d) provides that "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

However, with regard to Lyons' conduct during this disciplinary proceeding, the Minnesota Rules of Professional Conduct and the Minnesota Rules on Lawyers Professional Responsibility apply.

³ Rule 8.1(a) of the Minnesota Rules of Professional Conduct provides in relevant part that "a lawyer . . . in connection with a disciplinary matter, shall not knowingly make a false statement of material fact." Rule 8.1(b) provides in relevant part that "a lawyer . . . in connection with a disciplinary matter, shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from [a] disciplinary authority."

⁴ Minnesota Rule 8.4(c), like Montana's Rule 8.4(c), provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Minnesota Rule 8.4(d), like Montana's Rule 8.4(d), provides that "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

⁵ Rule 25(a)(1), RLPR, provides that "[i]t shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director, or the Director's staff, the Board, or a Panel, by complying with reasonable requests, including requests to [f]urnish designated papers, documents or tangible objects."

challenge the referee's finding that he made a number of misrepresentations to Trans Union regarding when the client died and when he learned of the client's death. Lyons does, however, claim that the referee erred in finding that his communications with the Director and his testimony at the hearing were intentionally false and in finding that he "fail[ed] to make full documentary disclosure of relevant communications" to the Director.

The Director bears the burden of proving misconduct by clear and convincing evidence. *In re Varriano*, 755 N.W.2d 282, 288 (Minn. 2008); *In re Gillard*, 271 N.W.2d 785, 805 n.3 (Minn. 1978) (adopting "full, clear and convincing evidence" standard for attorney discipline matters) (internal quotation marks omitted) (citation omitted). This standard requires a high probability that the facts are true. *In re Houge*, 764 N.W.2d 328, 334 (Minn. 2009); *see also Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978) (noting that clear and convincing evidence is established by "more than a preponderance of the evidence, but less than proof beyond a reasonable doubt"). If either party orders a transcript of the hearing, as Lyons did here, the referee's findings of fact and conclusions of law are not conclusive. Rule 14(e), RLPR; *In Re Ryerson*, 760 N.W.2d 893, 901 (Minn. 2009). We nonetheless give great deference to the referee's findings and will not reverse those findings unless they are clearly erroneous, especially when the referee's findings rest on disputed testimony or in part on credibility, demeanor, and sincerity. *In re Barta*, 461 N.W.2d 382, 382 (Minn. 1990). To conclude that a referee's findings are "clearly erroneous," we must be "left with the definite and firm conviction that a mistake has been made." *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987).

Lyons acknowledges that he was “actively tr[ying] to avoid disclosing” the client’s death to Trans Union when he wrote to Trans Union’s counsel on January 7, 2008, that the client, who had died nearly three months earlier, “was hospitalized.” And Lyons now accepts that his “recollection was wrong” and that “he knew prior to October 27, 2007, that [the client] had died.” However, Lyons claims that the referee erred in finding that he was untruthful both when he wrote to the Director in May 2008 and when he testified at the referee hearing that he did not recall learning of the client’s death until after the settlement agreement was reached. Our careful review satisfies us that the record supports the referee’s findings that Lyons was untruthful in statements to the Director and in testimony before the referee. Here, the referee’s findings that Lyons was untruthful in his statements to the Director and in the testimony he gave at the hearing were based on the referee’s evaluation of Lyons’ demeanor, credibility, and sincerity, and we defer to a referee’s findings on such matters. *In re Moulton*, 721 N.W.2d 900, 905 (Minn. 2006) (“Deference to the referee is particularly appropriate when the findings are based on a respondent’s demeanor, credibility, or sincerity.”). Thus, we conclude that the referee’s findings are not clearly erroneous.

Lyons also claims that the referee’s findings that he failed to provide all requested emails and telephone notes, and thus failed to cooperate with the Director, are also clearly erroneous. Lyons argues that there is no evidence in the record that would support the conclusion that he had, either in his possession or available to him, any of the missing emails or notes at the time they were requested. Whether the referee erred in finding that Lyons failed to cooperate with the Director’s investigation is a closer question, but we

need not answer it to determine the appropriate discipline for Lyons' misconduct because, in the end, the discipline we impose would not be any different based on the presence or absence of that finding.

II.

The sanction recommended by the referee carries great weight, although we have the final responsibility for determining the appropriate discipline. *In re Jagiela*, 517 N.W.2d 333, 335 (Minn. 1994). In imposing discipline, our purpose 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 by other attorneys. *In re Plummer*, 725 N.W.2d 96, 98 (Minn. 2006); *In re De Rycke*, 707 N.W.2d 370, 373 (Minn. 2006). In deciding the appropriate discipline, we consider the nature of the misconduct, the cumulative weight of the rule violations, and the resulting harm to the public and to the legal profession. *In re Nelson*, 733 N.W.2d 458, 463 (Minn. 2007). In addition, we consider any mitigating or aggravating circumstances. *In re Houge*, 764 N.W.2d 328, 338 (Minn. 2009) (citing *In re Nelson*, 733 N.W.2d at 463-64). Although our past decisions provide guidance and aid in enforcing consistent discipline, we impose discipline based on each case's unique facts and circumstances. *In re Redburn*, 746 N.W.2d 330, 334 (Minn. 2008).

Lyons' misconduct is serious. Lyons made false and misleading statements to the Director during the disciplinary investigation when he asserted that he did not learn of the client's death until sometime in early November, after the settlement with Trans Union had been negotiated. In addition, Lyons gave false and misleading testimony on the same

subject at the referee hearing. Finally, Lyons' false and misleading statements to opposing counsel about whether he knew of his client's death before the parties reached a settlement concerned a material fact. See *In re Forrest*, 730 A.2d 340, 345-46 (N.J. 1999) (noting that lawyer's failure to disclose his client's death "deceived both his adversary and the arbitrator about a fact that was crucial to the fair and proper resolution of the litigation" and suspending lawyer for six months); *Harris v. Jackson*, 192 S.W.3d 297, 306 (Ky. 2006) (noting that the death of the plaintiff left the lawyer "without a party to represent in the action"); see also *Ky. Bar Ass'n v. Geisler*, 938 S.W.2d 578, 579 (Ky. 1997) ("When a lawyer's client dies in the midst of the settlement negotiations of a pending lawsuit in which the client was the claimant, the lawyer has a duty to inform opposing counsel and the Court in the lawyer's first communications with either after the lawyer has learned of the fact." (quoting ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 95-397 (1995))). When "a lawyer demonstrates a lack of that truthfulness and candor that the courts have a right to expect of their officers," we "do not hesitate to impose severe discipline." *In re Schmidt*, 402 N.W.2d 544, 548 (Minn. 1987).

The referee found that Lyons' disciplinary history substantially aggravates the sanction for his conduct. See *In re Gherity*, 673 N.W.2d 474, 480 (Minn. 2004) (holding that a lawyer's prior disciplinary history is relevant to determine an appropriate sanction). We agree. Lyons has previously been subject to discipline on seven occasions. The fact that Lyons has been previously disciplined seven times suggests that he has not renewed his "commitment to comprehensive ethical and professional behavior." See *In re Isaacs*,

451 N.W.2d 209, 212 (Minn. 1990) (internal quotation marks omitted). The referee also found that Lyons’ substantial experience in the practice of law is an aggravating factor. *See In re Moeller*, 582 N.W.2d 554, 559-60 (Minn. 1998) (noting the referee’s conclusion that a lawyer’s substantial experience in the practice of law was an aggravating factor); *see also In re Oberhauser*, 679 N.W.2d 153, 160 (Minn. 2004) (considering the fact that the lawyer was “an experienced attorney”). Again, we agree.

The misconduct here, coupled with Lyons’ substantial disciplinary history, warrants significant discipline. The referee recommended that Lyons be suspended indefinitely and that he not be permitted to apply for reinstatement for a minimum of 12 months. We conclude that the discipline recommended by the referee is the appropriate discipline in this case. We therefore adopt the referee’s recommendation and indefinitely suspend respondent Thomas John Lyons, Jr., from the practice of law for a minimum of 12 months.

Accordingly, we order that:

1. Respondent Thomas John Lyons, Jr., be indefinitely suspended from the practice of law, effective immediately, and be ineligible to petition for reinstatement for a minimum of 12 months from the date of filing of this opinion.
2. Lyons shall comply with the requirements of Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals).
3. If Lyons seeks reinstatement, he must comply with the requirements of Rule 18(a)-(c), RLPR.

4. Lyons shall pay \$900 in costs pursuant to Rule 24, RLPR.

So ordered.