

FILE NO. A23-1890
STATE OF MINNESOTA
IN SUPREME COURT



In re Petition for Disciplinary Action against
Susan S. Smith, a Minnesota Attorney,
Registration No. 0340467.

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

The above-captioned matter was heard on April 15, 16 and 17, 2024, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Susan Humiston, Esq. appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Respondent Susan S. Smith, Esq. appeared pro se. The hearing was conducted on the Director's Petition for Disciplinary Action, filed on December 12, 2023; and Respondent's Answer filed on December 28, 2023.

The Director presented the testimony of the Honorable Leonardo Castro, C.B., S.M., and S.S. Previously, the judges in the matters underlying the petition for disciplinary action ordered that the names of several individuals who had not agreed to be plaintiffs be sealed and initials be used. By order dated April 15, 2024 the undersigned referee ordered that the parties to this matter use initials for the individuals whose names were sealed, that exhibits and any transcript filed publicly be redacted or initials be used to protect the individuals identity and that any unredacted transcript and exhibits be filed under seal. Respondent Smith testified at the hearing and presented the testimony of Jose Jimenex, Robin Peterson and Julie Quist, and presented the testimony of Alison Hopper via Zoom. Directors Exhibit Numbers 1-52 were received into evidence; and Respondent's Exhibits 215-224, 227-234, 268, 272, and 304 were received into evidence. The other exhibits offered by respondent were either withdrawn, excluded by the referee upon objection or were not offered.

The Referee's findings of fact, conclusions of law and recommendation are due to the Minnesota Supreme Court on or before May 21, 2024.

The Director bears the burden of proving professional misconduct by clear and convincing evidence. In re Severson, 860 N.W.2d 658, 665 (Minn. 2015). This standard "requires a high probability that the facts are true." In re Lyons, 780 NW2d 629, 635 (Minn. 2010). Put differently, the Director must prove the allegations by "cogent and compelling evidence." In re Strid 551 NW 2d 212, 215 (Minn. 1996). The Director also has the burden of proving aggravating factors by clear and convincing evidence. Id. When the Director has proven misconduct, the burden shifts to the Respondent to prove any mitigating factors that have been alleged. In re Farley, 771 NW 2d. 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 party's respective burdens of proof as well as the Referee's determinations regarding the demeanor and credibility of the witnesses. For each factual finding made below, the Referee 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. Respondent was admitted to practice in 2004 and, except for a short period of about 2-3 years generally between 2017-2019 when she let her license lapse, has practiced law.
2. Respondent's practice consists of providing advice and counsel to disability clients and representing clients in election matters. Her work is generally provided on a pro bono basis.

3. After the 2020 election a group of Minnesota voters, led by Jose Jimenez and his wife Sandra formed an ad hoc organization called Minnesota Election Integrity Team (MNEIT) in response to serious concerns those voters raised about the results of the election. The purpose of MNEIT was to facilitate communications between concerned citizens who had questions about the way the 2020 election was conducted, and to gather evidence to file legal actions to challenge the 2020 election in Minnesota. Jimenez and his wife Sandra were candidates for elected office in 2020.
4. Jimenez is an intellectual property lawyer who has been licensed to practice in Minnesota since 1982. Alison Hopper was a paralegal in Jimenez's law firm and provided volunteer assistance to MNEIT.
5. Based upon training received as well as their observations MEIT members believed election law violations occurred in 2020 Minnesota elections. Jimenez testified he received guidance related to potential election contests from former Secretary of State Mary Kiffmeyer who recommended he contact Respondent to assist him in determining what legal action could be pursued.
6. In November 2020 Jimenez contacted Respondent and discussed the formation of MNEIT, and asked if she would provide pro bono representation to MNEIT and its members relating to the 2020 Minnesota elections. Jimenez believed that Respondent had the litigation expertise and should be in charge of the litigation. Respondent believed that Jimenez would be responsible for all contact with the client.
7. MNEIT organized volunteers to observe and gather evidence from several counties as those counties conducted their post-election reviews, and then use the evidence gathered to file a petition with the Minnesota Supreme

Court to challenge the election results and to enjoin certification of the election results.

8. Respondent drafted the legal challenge to the Minnesota Supreme Court and MNEIT volunteers worked to gather evidence that could be used for affidavits in support the petition. Respondent stated that affidavits would be needed to commence an election contest for individuals and requested that Hopper and Jimenez obtain affidavits from individuals knowledgeable of election interference.
9. Respondent drafted an affidavit entitled "Affidavit of Eligible Minnesota Voter," and provided it to Hopper for distribution to the volunteers and individuals on MNEIT's email list. Hopper sent out an email with the blank affidavit at Respondent's direction.
10. The email that was sent MNEIT on November 30, 2020 read as follows:

Subject: IMPORTANT: Calling all MN Voters

THE TIME HAS COME! It is time for your voice to be heard! Anyone who supports the challenge of these elections to stop the election fraud happening in Minnesota, and wants to be listed as a: VOTER CONTESTING THE ELECTIONS.

Attached please find a form-fillable PDF: [Affidavit for Eligible MN Voter](#)

In the coming days/weeks, we are planning on filing a Voter contest to each of the following races:

- Jason Lewis
- Tyler Kistner
- Kendall Qualls

Please complete this affidavit and return to the email address

ASAP:mnelectionintegrity@gmail.com

You can sign it online or type out your full name with a /s/ before the name.

If you can fill out electronically - please print, sign, and scan or take a picture and email it back.

Exh. 6

11. The Affidavit of Eligible Minnesota Voter states:

5. I contest the aforementioned election(s) for the following reasons:
 - a. I believe there were irregularities in the conduct of the election;
 - b. I believe there were irregularities in the canvass of votes;
 - c. I believe there is a question of who received the largest number of votes legally cast in each contested election;
 - d. I believe there are grounds to assert deliberate, serious, and material violations of the Minnesota Election Law.
6. I understand I will be joining with other voters across MN to contest Minnesota election results.

Exh. 29 at pg. 180

12. Respondent knew that the individuals returning the affidavits did not have any more information than was provided in the affidavit itself. Jimenez and Smith believed that the email sent on November 30 was an offer of representation and that the act of signing and returning the affidavit was an acceptance.
13. The referee finds that neither the email or affidavit were sufficient to put a person of ordinary intelligence on notice that by signing and returning the affidavit the person was agreeing to have Smith represent them in an election contest and was agreeing to the possibility of paying expenses of the prevailing party should the case be unsuccessful.
14. Hopper, in consultation with Respondent, chose the individual named contestants for each matter. Based upon her conversations with Hopper Respondent knew how the individual plaintiffs were selected to be named in the lawsuit.
15. On December 1, 2020 Respondent filed five notices of election contests in Ramsey County in the names of the 14 voters pursuant to Minnesota Chapter 208 challenging the successful candidates in Minnesota's Second,

Third, Fourth and Fifth Congressional Districts and the successful candidate for Minnesota's U.S. Senate seat.

16. The Ramsey County Court files related to these actions were: 62-CV-20-5598 (Tina Smith); 62-CV-20-5599 (Angie Craig); 62-CV-20-5600 (Dean Phillips); 62-CV-20-5601 (Betty McCollum); 62-CV-20-5602 (Ilhan Omar). The referee takes judicial notice of the registrars of action for these matters.
17. When Respondent was preparing the draft form affidavit and the election contest lawsuit she believed she was representing MNEIT and the 14 plaintiffs in the election. The referee finds that when she was providing those professional services the Rules of Professional Conduct applied to that representation.
18. At the time of filing the election contest Respondent believed that she was representing MNEIT and the individual plaintiffs. It was her understanding that Jimenez would sign the pleadings as attorney of record. At the last-minute Jimenez asked her to sign the pleadings and she agreed to do so.
19. The congressional election contests were assigned to Judge Leonardo Castro. The senate election contest was assigned to a three-judge panel comprised of Judges Jennifer Frisch, Denise Reilly and Renee Worke.
20. Prior to the filing of the notice of election contest in the names of the 14 individual plaintiffs it is undisputed that Respondent did not have any conversations or communications with any of the 14 plaintiffs regarding the objectives of her representation of them, the terms under which she was undertaking the engagement, the means by which she would seek to pursue her client's objectives, the risks involved in any planned course of actions, or the likelihood of success of any proposed actions and the possibility of any judgment for court costs should the contest be unsuccessful. None of the 14 plaintiffs knew Respondent's name.

21. Respondent did not direct anyone at MNEIT to engage in such conversations nor did she take any steps to ensure that such conversations occurred.
22. After Respondent filed the lawsuit she provided copies of the pleadings to Hopper and asked that the pleading be forwarded to the 14 plaintiffs. Hopper missed Respondent's emails and did not provide the information to the individuals requested.
23. Respondent provided basic information to Jimenez regarding the upcoming hearings before Judge Castro and shared some information to the group, not individual emails to the 14 plaintiffs. Respondent did not take steps to assure that the plaintiffs would receive the information they needed to participate in the Zoom hearing.
24. On December 18, 2020 Judge Castro held a hearing on the consolidated election contest matters. After the hearing, Judge Castro granted the defendant contestees motion to dismiss the proceedings on several grounds including: (1) lack of timely service on the Minnesota Secretary of State; (2) Minnesota Secretary of State was not a proper party; (3) three of the actions were brought in the wrong county; and (4) the factual allegations were facially inadequate. Respondent did not notify or direct anyone at MNEIT to notify any of the named contestants that the matter had been dismissed.
25. On December 29, 2020 the three-judge panel granted the defendant contestees motion to dismiss and dismissed the election contests involving Tina Smith on several grounds set forth in the panel's Order.
26. Respondent did not provide any of the named contestants notice of the hearing before Judge Castro, did not provide copies of any of the briefs that had been filed by the parties in any of the 5 actions, did not provide to the

named contestants any of the December orders of the courts dismissing the election contests notice, and did not direct anyone at MNEIT to do so.

27. The Defendant Contestees requested and were granted costs and disbursement incurred in defending each of the election contests. Those costs totaled about \$18,000 which were taxed against the 14 plaintiffs. Respondent did not provide notice of taxation of costs to any of the contestants nor did she request anyone at MNEIT to do so. Moreover, Respondent did not notify any of the contestants that judgments for costs and disbursements was entered against them, nor did she direct anyone at MNEIT to notify them.
28. Jimenez had been fundraising and planned to use personal funds and funds raised by MNEIT to pay for the judgments for costs and disbursements.
29. Respondent did not discuss with any of the individual plaintiffs whether they wished to appeal the dismissals or whether there was a basis to do so. Respondent did not discuss whether Jimenez addressed this topic with the individual plaintiffs.
30. Respondent was contacted by C.B. via email in late February 2021. Before the email C.B. searched her named in Minnesota Court records, and was surprised to find that she was involved in a lawsuit against the Secretary of State. The Respondent then called C.B and the conversation lasted about one hour. There is sharp disagreement as to the tenor of the conversation and what was said on a variety of topics.
31. The referee finds that during the conversation C.B. stated that in signing the affidavit she agreed she was expressing her concerns relating to the election similar to the signing of a petition, and that she did not understand she was retaining or authorizing a lawyer to file a lawsuit on her behalf. C.B. stated that she did not believe that by signing this affidavit she was agreeing to

retain a lawyer. Respondent told C.B. to talk to Jimenez and that she would not have to pay the judgment for costs.

32. During this conversation Respondent realized that the post-election contest lawsuit information had not been shared with the 14 plaintiffs and worked with Jimenez to send an email to the plaintiffs providing general information about the unsuccessful results of the contests, that judgment for costs had been entered, and that the costs would be satisfied “this week.” This email did not explain why the contests had been dismissed, what appeal rights were available, what costs had been assessed and what judgments were entered. It affirmatively stated that MNEIT used the affidavit returned by the plaintiffs to conclude that they agreed to be plaintiffs in the election contests.
33. After the telephone conversation C.B. reported to local law enforcement that her name had been used in the election contest lawsuits improperly and in her view fraudulently. Also, she wrote Judge Castro to let him know that her name had been used without her permission and in her view fraudulently. Further, C.B. contacted other plaintiffs in the election lawsuit.
34. Plaintiff Quist testified that she understood that by signing the affidavit she agreed to be a plaintiff in the election contest. She did not ask to have her name removed from the lawsuit. She acknowledged that she was not told judgment had been entered against her or the amount of the judgment.
35. Plaintiff Peterson did not ask to have her name removed from the lawsuit. She found out from C.B. that she had been named in a lawsuit, and that no one provided her with any paperwork or told her that judgment had been entered against her. She acknowledged that lawsuits are serious and can see why others would be upset by the lack of communication.

36. Judge Castro was troubled by C.B.s letter of March 1, 2021. Based upon that letter plus hearing from other plaintiffs he scheduled a hearing for March 26, 2021. Exh. 38.
37. At the hearing Judge Castro took testimony from C.B., S.S. and W.H. Judge Castro found that neither Respondent nor anyone on her behalf communicated with the 14 plaintiffs before the filing of the lawsuit in violation of obvious pre-suit requirements. The judge found that Respondent's failure to contact the plaintiffs was a fraud on the court because she was representing in the lawsuit that she had done the necessary pre-suit work. At the conclusion of the hearing Judge Castro concluded that Respondent had perpetrated a fraud on the court and on the individual plaintiffs. The judge ordered their names be removed from the proceedings, that the judgments against the individual plaintiffs be vacated and that Respondent be sanctioned \$10,000.
38. Judge Castro entered an order on April 9, 2021 consistent with his ruling on the bench. Exh 15, 15A. The judge issued a memorandum on June 14, 2021 setting forth the reasoning for his order stating, among other things, that Respondent "misled the court as to material circumstances and abused the judicial process ultimately resulting in the rendition of judgment against C.B., W.H., and S.S.
39. Before the referee Judge Castro testified that the court must be able to trust what lawyers tells them is true and that Respondent's actions in failing to speak to the named plaintiffs before filing suit was an affront to the court. Further that Respondent's failure to do so cast the bar and judiciary in a poor light and damaged their respective reputations. He believed Respondent's conduct to be deceitful and egregious.

40. In the U.S. Senate contest, the district court panel issued an order dated April 14, 2021 to show cause why sanctions should not be issued upon receipt of a request by a named plaintiff to have their name removed and judgment against them set aside. Exh 16. After briefing the district court panel issued an order dated June 22, 2021 granting the request to remove T.D., sanctioned Respondent \$15,000, found that Respondent committed fraud upon the court and failed her basic ethical duties. Exh. 19.
41. Ultimately, 9 of the 14 plaintiffs asked to be removed from the proceedings. C.B. testified that Judge Castro restored her faith in courts.
42. Jimenez using personal and MNEIT funds paid a portion of the judgment for costs, and that Respondent paid about \$7,000-9,000 of the cost judgment. The costs were paid and satisfaction of judgments entered around the time of the March 26, 2021 hearing.
43. The referee finds that Respondent believed in good faith that election irregularities occurred during the 2020 election. Respondent clearly sought to exercise her First-Amendment rights in the gathering of evidence to support an election contest. When Respondent signed the election contest pleadings she misrepresented to the court that she was the attorney of record for the 14 plaintiffs. To the referee Respondent confirmed that she represented the 14 plaintiffs in the proceedings. The referee finds that Respondent bears responsibility for the misrepresentation.
44. On January 15, 2021 the Director mailed to Respondent a notice of investigation regarding a complaint by a concerned citizen about statements made by Respondent regarding the impartiality of a judicial officer presiding over certain pre-election proceedings. Exh. 22.

45. Respondent initially cooperated, but later failed to respond to communications from the investigator who was seeking additional information. Exh. 23-24.
46. By letter dated June 4, 2021 the Director notified Respondent that the district ethics committee (DEC) had completed its investigation and enclosed a copy of the DEC report. Exh. 24. And the Directors asked for responses to specific questions within 14 days.
47. On June 16, 2021 the Director mailed Respondent a notice of investigation regarding Judge Castro's complaint. Exh. 25. Respondent was requested to respond within 14 days.
48. By letter dated June 22, 2021 sent to Respondent via email, the Director provided a copy of a second complaint from Nathan Hartshorn of the Minnesota Attorney General's Office and notified Respondent that because the issues were similar the two complaints would be consolidated.
49. By email dated June 24, 2021 sent to the Director's office, Respondent acknowledged receipt of the Director's June 4 letter, acknowledged that she had received other mail from the Director's office, stated that she viewed the timing as suspicious, and that she would respond by July 2.
50. On June 25, 2021 the Director replied via email stating that the timing was due to the timing of the Director's letters, due to the DEC completing its investigation and due to the receipt of new complaints, and due to sanctions imposed by the district court.
51. On June 30, 2021 the Director mailed to Respondent a notice of investigation regarding another complaint received on behalf of the three-judge senate panel. Exh. 28. Respondent was requested to provide a response within 14 days.

52. On July 6, 2021 the Director received by U.S. mail Respondent's response to the first complaint. Exh. 29, 29A. Respondent expressed her view that she saw no need to respond further to the DEC investigator. Respondent raised concerns that the initial complaint was related to her daughter's murder in November 2013, that the courts were corrupt and that she would be bringing additional information to show fraud on the court by others.
53. Respondent further stated that she would provide additional information when the timing was right. As to the complaint she stated she did nothing wrong, that the election contestants were simply "weak kneed," and that the national media and others were trying to silence the voice of concerned citizens who were concerned fraud had occurred in the November 2020 elections.
54. Respondent did not provide a response to the additional judge's complaint received and did not supplement her prior submission. Exh. 29, 29A.
55. In her letter dated February 16, 2022 the Director sent to Respondent via email a request for a meeting with Respondent to discuss all complaints and asked her to provide dates she was available in February-March. Exh. 30. Respondent failed to respond. On April 19, 2022 the Director asked for a response to her February 16, 2022 letter. Exh 31. The Director reminded Respondent of her duty to cooperate. Respondent failed to respond.
56. On June 8, 2022 a representative from the Director's office attempted to telephone Respondent at her office number. Exh. 32. The Director's office was unable to leave a message because the message box was full. By letter also dated June 8, 2022 sent by U.S. mail and email the Director outlined prior attempts to reach Respondent and reiterated the need for a meeting. Exh. 33. Respondent failed to respond.

57. By letter dated March 29, 2023 sent to Respondent by U.S. mail and email the Director notified Respondent that she intended to seek public discipline, which would include Respondent's failure to cooperate with the investigations. Exh. 34. The Director enclosed a copy of her June 8, 2022 letter and again requested a meeting. Respondent failed to respond.
58. By letter dated April 25, 2023 sent to Respondent by U.S. mail and email the Director again notified Respondent of the serious consequences that could result from lack of attention to the complaint investigations. Exh. 35. The Director included a copy of her March 29, 2023 letter and requested a response.
59. Respondent did not provide any response to the Director until charges were served against her in September 2023.
60. When Respondent was preparing the draft form affidavit and the election contest lawsuit she believed that she was representing MNEIT and the plaintiffs in the election contest.

CONCLUSIONS OF LAW

61. When Respondent was working with Jimenez during the pre-suit phase of the election contest they both understood that Respondent represented MNEIT and the plaintiffs yet to be selected. Respondent was the lead litigation lawyer in the case and the attorney of record. Consequently, the Rules of Professional Conduct applied to her conduct during the pre-suit phase of the case. Her obligations apply as a matter of law as confirmed by Respondent's belief.
62. The referee concludes that Respondent's conduct in signing the pleadings as the attorney of record for 14 plaintiffs was intentionally dishonest. There

is no evidence that she acted carelessly, negligently, or recklessly in signing as attorney of record. Respondent intentionally deceived the court.

63. Respondent violated Rule 1.1, MRPC by failing to properly enter into an attorney client relationship with the 14 plaintiffs. Specifically, the on-line solicitation to sign a form affidavit is not sufficient communication to form an attorney client relationship. The solicitation did not explain what an election contest was, did not say who was filing the election contests and did not explain how the returned affidavit would be used. The most reasonable interpretation of the on-line solicitation and affidavit is that it was a request for a show of support for the cause listed. Respondent failed her obligation to make clear that the solicitation was to form an attorney client relationship and to authorize the filing of 5 election contests.
64. Additionally, Respondent violated Rule 1.1, MRPC by filing a lawsuit without first discussing with the clients the pros and cons of an election contest, the potential outcomes, and potential risks. See Comment 5, Rule 1.1 MRPC. And competency also requires that the lawyer obtain informed consent of the client. *Id.*, Comment 6. The referee concludes that Respondent did not properly delegate the communication responsibilities to Jimenez. Specifically, she did not consult with the client on that topic and did not double-check with the client to make sure the communication occurred. See Rule 1.2c, MRPC; *In re Fett*, 790 NW2d 840, 848 (Minn. 2010). Respondent had no contact with the 14 plaintiffs and knew that no one from MNEIT had any such pre-suit conversations.
65. Respondent failed to consult with the 14 plaintiffs regarding the objectives of the representation and the means by which they were to be pursued in violation of Rule 1.2(a), MRPC. Specifically, it is undisputed that neither

the Respondent nor anyone on her behalf consulted with any of the 14 plaintiffs before the filing of the suit as required by the rule.

66. Respondent failed to “keep the client reasonably informed about the status of the matter” in violation of Rule 1.4(b) MRPC. It is undisputed that Respondent did not engage in any conversations with the 14 plaintiffs. Respondent did not believe it was necessary to do so and knew that no one else from MNEIT did so. Respondent failed to explain to the 14 plaintiffs the risks of litigation including the potential downsides to an election contest, such as the assessment of costs of the prevailing party against the 14 plaintiffs. Further, Respondent did not explain to the 14 plaintiffs their right to appeal, the chances of success and the deadline to appeal.

67. Rule 8.4, (c), MRPC states it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” The Supreme Court has not decided whether an intent to deceive is an element of this rule. See *In re Trombley*, 916 NW2d 362, 370 fn. 7 (Minn. 2018).

68. Both Judge Castro and the senate panel relied upon the Court’s decision in *Halloran v. Blue & White Liberty Cab Co.* 92 NW2d 794 (Minn. 1958) to determine that Respondent committed fraud on the court, and that judgment could be vacated against Respondent’s clients. In *Halloran* the defendants failed to disclose that the defendant company they were representing did not legally exist as an entity. The court concluded that the defendant attorney represented “nobody” leading the court to adjudicate a case that was not real “but a farcical and fictitious one.” *Id* at 797.

69. Respondent signed a pleading filed in court as the attorney of record for 14 plaintiffs to whom she did not communicate with prior to the filing of the pleading. At the time Respondent had not contacted the 14 plaintiffs and

knew that no one at MNEIT had contacted the clients. Respondent's signing of the pleadings was a fraud on the court in violation of Rule 8.4, (c). Further, Respondent's conduct significantly prejudiced the administration of justice in violation of Rule 8.4 (d).

70. Rule 8.4(d) states it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." The failure to pay law related debt and sanctions is conduct prejudicial to the administration of justice. Here, Respondent failed to pay court-ordered sanctions and failed to timely appeal those sanctions. Accord, *In re Samborski*, 644 NW2d 402, 408 (Minn. 2002).

71. Rule 8.1(b), MRPC prohibits a lawyer in connection with a disciplinary matter from "knowingly fail(ing) to respond to a lawful demand for information from an admissions or disciplinary authority." Rule 25, RLPR, states that "It shall be the duty of any lawyer who is subject of an investigation or proceeding under these rules to cooperate with ...the Director or Director's staff...by complying with reasonable requests," including requests to meet with the Director under Rule 25(a)(3), RLPR, and to respond to notices of investigation. Rule 25(b), RLPR provides that a violation of this rule is grounds for investigation.

72. Respondent knowingly and deliberately failed to cooperate on numerous occasions.

73. The referee acknowledges Judge Castro's order and findings, but that order and findings are not binding on this referee. *In re Murrin*, 821 NW2d 195, 205 (Minn. 2012).

74. The referee concludes that the COVID pandemic and the tumult of the 2020 national, state, and local elections do not operate to excuse Respondent's

obligation to comply with the ethical rules binding on all lawyers practicing in Minnesota.

75. The referee admires Respondent's willingness to volunteer what appears to be enormous amounts of time in pro bono representation of clients in election contests. That work ought to be encouraged and respected.
76. 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 factors that guide this determination are: (1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) harm to the legal profession. *In re Nelson*, 733 NW2d 458, 463 (Minn. 2007). In this 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).
77. Nature of the misconduct. Respondent misconduct is serious. First, she lacked the fundamental competence to properly enter into an attorney client relationship with the 14 plaintiffs in violation of Rule 1.1 (lack of competence). Second, Respondent failed to communication with the clients as to the objects and risks of the election contest in violation of Rule 1.2(a) (failed to consult with the clients); Rule 1.4(b) (failure to communicate); Rule 1.4(a)(3) (failure to keep client reasonably informed). Third, Respondent misrepresented to the courts that she was the attorney of record for the 14 plaintiffs in a significant litigation matter in violation of Rule 8.4c. Fourth, Respondent failed to cooperate with the Director and her staff in violation of Rule 8.1(b) and Rule 25.

78. Cumulative weight of the violations. Respondent's lack of competence and failure to consult and communicate with the client regarding a significant litigation matter are troubling. More importantly her misrepresentations to the court and failure to cooperate with the Director and her staff are very serious. Moreover, the misconduct was not an isolated event. Instead, these acts occurred to varying degrees from November 2020 until roughly the filing of the petition for discipline. The sanctions imposed remain unpaid.
79. Harm to clients, legal profession, and the courts. Several of the individual plaintiffs were harmed by her misconduct resulting in the entry of judgments against them. Those clients were required to seek relief from the courts which did result in the payment of judgments. As a result of Respondent's misrepresentation to the courts the reputation of the legal profession and the courts was harmed. That misrepresentation impaired the reputation of the legal profession as ministers of justice. The implication of Respondent's misconduct is that a lawyer can file a lawsuit without the permission of the client and have a money judgment for costs assessed without the knowledge or consent of the client. This misconduct has clearly damaged the reputation of the bar and the courts. Because the case is significant, its impact is more widespread.
80. Aggravating and mitigating factors. The referee finds and concludes that her length of time as a lawyer is not an aggravating factor. Indeed, her lack of prior discipline creates the lack of an aggravating factor. See *In re Fairbairn*, 802 NW2d 734, 746 (Minn. 2011).
81. Respondent's failure to clearly communicate the formation of an attorney client relationship is troubling. Specifically, her lack of understanding of the importance of entering into an attorney client relationship with the individual, the necessity of prior communication and agreement with the

client in terms of a fee agreement, and the lack of any informed consent regarding the risks of litigation are serious.

82. Mitigating factors. The referee believes that Respondent's previous sanctions by Judge Castro and the senate panel should be considered. Also, it is true that Respondent has not exhibited true remorse. But Respondent has accepted responsibility that an attorney client relationship exists and that she is bound by the Minnesota Rules of Professional Conduct. And the referee believes she has learned her lesson.
83. Analogous case law. This case is unique in the sense that Respondent failed to properly form an attorney-client relationship with the 14 plaintiffs but acknowledges the Rules of Professional Conduct apply to her in this matter. The referee agrees with the Director that *In re Greenman*, 860 NW 2d 368 (Minn. 2015) is analogous. But there is no evidence that she was pursuing frivolous claims, failure to respond to inquiries by clients or failure to timely return a client file. Moreover, the fine assessed against Respondent by Judge Castro and the senate panel of \$25,000 is significant. Finally, the referee believes that Respondent has learned her lesson.

RECOMMENDATION FOR DISCIPLINE

Based upon the foregoing the referee hereby recommends as follows:

1. Respondent be suspended from the practice of law for three months, followed by a period of one year of probation (on terms and conditions as recommended by the Director and the Court).
2. Reinstatement to the practice of law be conditioned on payment of the sanctions or entry into a payment plan sufficient to satisfy the sanctions in a reasonable amount of time as determined by the Director.

3. Further, that Respondent be permitted to be reinstated by affidavit, and that the proceedings outlined in Rule 18(a)-(d), RLPR be waived, but that Respondent must comply with Rule 26, RLPR, and shall pay \$900 in costs, plus any disbursements related to the proceedings.

Dated: May 17, 2024

BY THE COURT:

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

REFEREE'S MEMORANDUM

Both counsel effectively presented their positions and were respectful of each other and the Referee. The Referee did his utmost to make sure that each side had ample opportunity to present their respective theories of the case to the Referee within the bounds of the Rules of Evidence and the Rules of Civil Procedure.

Many members of the public attended the three-day hearing. They were respectful and courteous throughout the proceeding.

It is my intention to discuss in this memorandum the issues of Respondent's constitutional claims, the attorney client relationship between Respondent and the 14 plaintiffs and the elements of fraud and misrepresentation.

Constitutional Claims

Respondent argues that she was deprived of her rights to procedural and substantive due process in the hearing before Judge Castro and therefore the petition must be dismissed. Respondent's claim lacks merit on many different levels. First, as the Director concedes Judge Castro and the senate panel's decisions are not binding on the referee. Specifically, those decisions with respect to fraud on the court are not binding on the referee-the issue

of fraud may be similar, but the burden of proof in this proceeding is clear and convincing evidence which is greater than the preponderance of the evidence in the earlier proceedings. Further, the proceeding before the referee was more extensive in terms of witness testimony, briefing and proposed findings, conclusion, and recommendation. Nonetheless in the interests of completeness the referee will briefly address the constitutional issues.

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, section 1. Minnesota law dictates that holders of law licenses are entitled to procedural due process protections. *In re Garcia*, 792 NW2d 434, 441 (Minn. 2010). Attorney discipline proceedings must provide Respondents with key procedural safeguards. *In re Michael*, 836 NW2d 753, 760 (Minn. 2013).

Respondent’s claims that her due process rights were violated because of the manner in which Judge Castro and the senate panel conducted the hearing before them. But her procedural due process rights are about the manner in which the case before me was prosecuted, not the hearing before Judge Castro, or the senate panel. Here, Respondent makes no claim that the Director’s petition is not “sufficiently clear and specific,” that she had been denied the opportunity to defend herself against the charges, or that she did not have the opportunity for a hearing to “present evidence of good character or mitigating circumstances. Therefore, the procedural due process claim lacks merit.

Respondent also claims that she has been denied substantive due process. A substantive due process right arises when a person claims a deprivation of a constitutionally protected liberty or property interest, and that this interest has been interfered with to an extent that violates the Due Process Clause. *In re Indiv. 35W Bridge Litig.*, 806 NW2d 820, 829 (Minn. 2011). The governmental conduct must be so egregious that it shocks the conscious. *Mumm v. Mornson*, 708 NW2d 475, 487 (Minn. 2006). Moreover, only a purpose to cause harm unrelated to the legitimate object of the government action in question will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation. *Mitchell v. Dakota Cnty. Soc. Servs.*, 959 F.3d. 887, 898 (8th Cir. 2020). Without specific details conclusory allegations are not enough.

Assuming without deciding that Respondent had a protected property interest in her law license she has wholly failed to prove that her substantive due process rights have been violated. Therefore, Respondent’s substantive due process claim fails.

Attorney Client Relationship

Common law generally governs the formation of the attorney-client relationship. *In re Perry*, 494 NW2d 290 (Minn. 1992). The relationship is created either by contract, or by reliance by the putative client on the attorney’s advice or by operation of law, or by court appointment. In cases involving Rules of Professional Conduct that refer to a client the question of whether there is an attorney-client relationship “is very important, for if there was no attorney-client relationship there could be no violation of Rules 1.4 and 1.7.” *In re Perry* at 294.

Under the Rules of Professional Conduct, it is the responsibility of the lawyer to clearly communicate the formation of the attorney-client relationship, including identifying the scope of the representation and the basis for any fees to be charged. See Rule 1.5(b).

Whether an attorney-client relationship exists is a question of fact dependent upon the facts and circumstances. *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 NW2d 261, 265 (Minn. 1992). Based upon clear and convincing evidence the referee finds that Smith was hired by MNEIT to represent it and the 14 plaintiffs in the election contest. Both Jimenez and Smith testified that Smith was engaged to represent MNEIT in November 2020 to assist MNEIT in gathering evidence for an election contest, to draft an affidavit for potential clients to sign and then to draft and file the election contest. In short, there was an agreement between Jimenez and Smith to provide legal services for the benefit of the potential plaintiffs. And there was communication between MNEIT and the potential clients, and between MNEIT and Smith. Further Respondent believed there was an attorney client relationship and drafted the affidavit and election contest to accomplish the timely filing of the contest. Consequently, Respondent is estopped to deny either the existence of an attorney client relationship or that the Rules of Professional Conduct apply to and govern her conduct.

Alternatively, when Smith signed the election contest pleading as attorney of record the Rules of Professional Conduct applied to her conduct by operation of law. Respondent prepared the affidavit, prepared the election contest, and signed the pleadings as the attorney of record. In doing so, Respondent knew that the Rules of Professional Conduct applied to her conduct. Put differently, when Respondent signed the acknowledgement of potential liability under Mn. Stat. 549.211 she acknowledged the underlying facts that an attorney client relationship existed and that the Rules of Professional Conduct applied to her conduct by operation of the statute. Moreover, Smith acknowledged in testimony that she represented the 14 plaintiffs. See *In re Perry*, 494 NW2d 290 (Minn. 1992). Consequently, the referee finds and concludes that the Rules of Professional Conduct apply to Smith.

Elements of Fraud and Misrepresentation

Respondent argues that fraud and misrepresentation within the meaning of Rule 8.4c, MRPC requires intent. Our Supreme Court has not decided for purposes of Rule 8.4c, MRPC, whether intent to deceive is an element of this rule violation. See *In re Trombley*, 916 NW2d 362, 370 fn. 7 (Minn. 2018). Here, the referee finds and concludes that Respondent acted in an intentionally dishonest manner when she signed the election contest as the attorney of record. Simply stated, there is no dispute that her signing of the pleading was an intentional act; and that act was also dishonest—Respondent knew that neither she or anyone at MNEIT discussed the matter with the 14 plaintiffs. Thus, it is not necessary to resolve whether negligent misrepresentation is enough.