

FILE NO. A13-0520

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against ALAN J. ALBRECHT,
a Minnesota Attorney,
Registration No. 191826.

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

The above-captioned matter was heard on July 8-11, 2013, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Robin J. Crabb appeared on behalf of the Director of the Office of Lawyers Professional Responsibility ("Director"). Respondent ("respondent") appeared *pro se*. The hearing was conducted on the Director's March 8, 2013, petition for disciplinary action, and the Director's May 29, 2013, supplementary petition for disciplinary action. The Director submitted the live testimony of Colleen Clish, Monica Sowden, Kristine Alden-Aksteter, Frances Li, and respondent, and the testimony of Joseph McKee and Stephanie Martinez by sworn statement. Respondent presented the testimony of Holly Peterson, Susan Albrecht, Tom Jussila,¹ and himself. The Director and the respondent submitted exhibits. The Director was directed to submit proposed findings of fact, conclusions of law, and recommendation for discipline, as well as a brief, on July 25, 2013. Respondent's response brief was due August 5, 2013, and the Director's reply brief was due on August 13, 2013. The Referee's findings of fact, conclusions of law, and recommendation for discipline are due to the Supreme Court no later than August 23, 2013.

¹ Mr. Jussila appeared by telephone.

The findings and conclusions made below are based upon the documentary evidence, the testimony presented, the demeanor and credibility of the witnesses as determined by the undersigned, and the reasonable inferences to be drawn from the documents and testimony.

Based upon the evidence as outlined above, and upon all the files, records, and proceedings herein, the Referee makes the following findings of fact:

FINDINGS OF FACT

Sexual Contact with a Client

1. Prior to December 2004, Kristine Alden-Aksteter and respondent did not know each other. There was no sexual contact between respondent and Alden-Aksteter prior to December 2004. (Alden-Aksteter Test.)

2. Respondent represented Alden-Aksteter in various legal matters continuously between January 2005 and at least until May 2007. Respondent resumed representation of Alden-Aksteter from July 2007 until November 19, 2007. Specifically, respondent represented Alden-Aksteter in the following matters, between the following dates:

a. Respondent represented Alden-Aksteter in a contempt of court matter (27-CR-04-064373) beginning in January 2005, and continuing until at least May 2007. (Director's Exhibit ("D. Ex.") 1; Alden-Aksteter Test.)

b. Respondent represented Alden-Aksteter in the post-decree portion of a dissolution matter (27-FA-240503) between January 20, 2005, and until at least October 2005. (D. Ex. 2; Alden-Aksteter Test.)

c. Respondent represented Alden-Aksteter in a marriage dissolution matter (86-F9-05-002819) at least as early as October 2005, and continuing until at least October 2006. (D. Ex. 3; Alden-Aksteter Test.)

d. Respondent represented Alden-Aksteter in a DWI matter (86-K0-06-000032) between December 29, 2005, and July 7, 2006. (D. Ex. 4; Alden-Aksteter Test.)

e. Respondent represented Alden-Aksteter in a second DWI matter (27-CR-07-101020) between July 2007, and November 19, 2007. (D. Ex. 5; Alden-Aksteter Test.)

3. During 2005, respondent represented her in a dissolution matter with contested child custody issues, while Alden-Aksteter was abusing alcohol and had been admitted to a hospital following a suicide attempt, all facts known to respondent.

4. In the summer or fall of 2005, Alden-Aksteter and respondent began a consensual sexual relationship that included multiple instances of sexual contact between Alden-Aksteter and respondent. *Id.* Alden-Aksteter performed oral sex upon respondent on more than two, but fewer than ten, occasions in the fall of 2005. *Id.* On each of those occasions, the sexual contact occurred in respondent's office suite, in the spare office next to the conference room. *Id.* Respondent and Alden-Aksteter were both willing participants in the sexual contact. *Id.*

5. After midnight on October 31, 2005, Alden-Aksteter sent an email message to respondent in which she included a graphic description of proposed future sexual contact between herself and respondent. (Alden-Aksteter Test.; D. Ex. 6.) Within that email message, Alden-Aksteter stated in part, "BESIDES, I WANT TO HAVE NAUGHTY FUN WITH YOU AND YOU HOLD BACK. BELIEVE ME, I UNDERSTAND WHY, BUT WE'VE ALREADY HAD SOME FUN SO WHAT'S THE DIFFERENCE." *Id.* When Alden-Aksteter wrote "some fun," she was referring to the fact that she and respondent had previously engaged in oral sex. *Id.* The description of sexual activity was not intended by Alden-Aksteter to depict events that had taken place, but was an expression of actions that she wanted to happen between her and respondent. *Id.*

6. On October 31, 2005, respondent sent Alden-Aksteter two email messages in response. (D. Ex. 6.) Those email messages continued the graphic description of proposed future sexual contact between respondent and Alden-Aksteter, and expanded upon them. *Id.*

7. At approximately 9:00 p.m. on an evening in or around November 2005, Alden-Aksteter went to respondent's office at his request. (Alden-Aksteter Test.) Alden-Aksteter wore lingerie, at the request of respondent. *Id.* After Alden-Aksteter arrived at the office, she and respondent kissed each other. *Id.* Respondent fondled Alden-Aksteter's breasts. *Id.* Respondent and Alden-Aksteter lay on the floor of respondent's office in a "spooning" position. *Id.* At this time, respondent was fondling Alden-Aksteter's hips, breasts, and buttocks. *Id.* Alden-Aksteter and respondent remained clothed during this episode, but respondent moved his hips back and forth, into the region of Alden-Aksteter's buttocks, until respondent reached sexual climax. *Id.* Such contact was consensual. *Id.*

8. Alden-Aksteter began a relationship with another man in approximately December 2005 or January 2006. (Alden-Aksteter Test.) At or around that time, Alden-Aksteter informed respondent that she no longer wished to engage in sexual activity with him. *Id.*

9. Respondent began representing Alden-Aksteter in a DWI matter beginning in December 2005. (Alden-Aksteter Test.)

10. Even after Alden-Aksteter informed respondent that she no longer wished to have sexual contact with him, respondent would pressure Alden-Aksteter for sexual favors. (Alden-Aksteter Test.) On more than one occasion, but fewer than five occasions, between January 2006 and May 2006, Alden-Aksteter performed oral sex on respondent. *Id.* Each of those instances occurred in respondent's office, though they occurred in different rooms in his office. *Id.*

11. After May 2006, respondent would pressure Alden-Aksteter for sex every time she came to his office to discuss legal matters. (Alden-Aksteter Test.)

12. Respondent began representing Alden-Aksteter in a second DWI matter beginning in July 2007. (Alden-Aksteter Test.)

13. Respondent did not represent Alden-Aksteter after November 2007. However, Alden-Aksteter and respondent continued to meet with each other as friends, and continued to engage in sexual contact. (Alden-Aksteter Test.)

Respondent's objection to receipt of sexual relationship issues between the parties occurring after legal representation ended in November 2007 is overruled, provided however that the evidence is received for limited purposes only. Rule 1.8(j) MRPC prohibits a lawyer from having sexual relations with a client during the attorney-client relationship. Since Alden-Aksteter ceased being a client in November 2007, any sexual relations thereafter did not violate the rule. However they were relevant for purposes of corroboration of prohibited acts occurring during the period of attorney-client relationship, to provide context regarding the prior relationship, the degree of harm caused to the client, and to explain her delay in reporting the sexual relationship. The evidence is only admitted for such limited purposes.

14. Prior to early 2008, Alden-Aksteter and respondent engaged in sexual activity, but did not engage in sexual intercourse. (Alden-Aksteter Test.)

15. Between early 2008 and summer 2009, Alden-Aksteter and respondent had sexual intercourse on three occasions. (Alden-Aksteter Test.) The first two incidents occurred in Alden-Aksteter's apartment. *Id.* The last incident of sexual intercourse occurred in respondent's office, sometime in summer or fall 2009.

16. On the final occasion in which Alden-Aksteter and respondent had sexual intercourse, Alden-Aksteter went to respondent's office late one night in the summer or fall of 2009. (Alden-Aksteter Test.) Alden-Aksteter and respondent went to a nearby

convenience store, where respondent bought beer. Respondent supplied the beer to Alden-Aksteter in spite of knowing her history of alcohol abuse, suicide attempt, and multiple DWI's. Then, the two returned to respondent's office. Respondent led Alden-Aksteter to the downstairs portion of respondent's office. The downstairs portion of the office contained a couch, and resembled a rec room. Alden-Aksteter and respondent kissed and touched each other, and had sexual intercourse in the downstairs area.

17. In the fall of 2009, Alden-Aksteter reported to her therapist, Monica Sowden, that she had engaged in sexual contact with her attorney. Sowden encouraged Alden-Aksteter to report respondent. (Alden-Aksteter Test.; Sowden Test.)

18. Alden-Aksteter made a complaint to the Director regarding respondent's conduct in or around September 2011. (Alden-Aksteter Test.)

19. Respondent states that Alden-Aksteter made numerous advances toward him in 2005, but states that on each occasion, he rebuffed the advances. Respondent admits that he sent the email messages identified as Director's Exhibit 6, and dated October 31, 2005, but states that he did not engage in sexual activity with Alden-Aksteter. The Referee observed the demeanor of both Alden-Aksteter during her examination and cross examination over a substantial part of two days, and the demeanor of respondent during his testimony.

Having observed respondent testify regarding the nature of his relationship with Alden-Aksteter, and considering the testimony of Alden-Aksteter and the remainder of the evidence, the Referee is strongly convinced that Alden-Aksteter's testimony was credible while respondent's denials were not credible. His acknowledged actions—in that he was alone with Alden-Aksteter in his office on several occasions, even after she made unwanted sexual advances toward him; in that he returned Alden-Aksteter's sexually suggestive email message with similarly explicit email messages; and in that he continued to represent Alden-Aksteter on many occasions after she allegedly made sexual

advances—are not consistent with how respondent characterizes the relationship.

20. During the questioning of Alden-Aksteter, respondent repeatedly asked Alden-Aksteter regarding unrelated prior events in an attempt to improperly impeach her character. Respondent would repeatedly ask improper questions immediately after sustained objections to nearly identical questions.

Respondent challenged Alden-Aksteter about her failure to recall alleged detail about his intimate body scars and genital warts upon his sexual organ. However she adequately explained her lack of knowledge due to darkness and the specific positioning of the parties during their sexual encounters. (Alden-Aksteter Test.)

21. Respondent had sexual relations, as defined in Rule 1.8(j)(1), Minnesota Rules of Professional Conduct (MRPC), with Alden-Aksteter on multiple occasions beginning in approximately August 2005, and throughout the various representations. Respondent continued to have sexual relations with Alden-Aksteter on additional occasions after the representations ended in November 2007. There were no more instances of sexual contact between respondent and Ms. Alden-Aksteter after summer 2009.

Unauthorized Practice of Law

22. Respondent was suspended from the practice of law for a minimum of two years effective April 1, 2010, as a result of being found to have committed misconduct. *In re Albrecht*, 779 N.W.2d 530 (Minn. 2010). (D. Ex. 45.)

23. Beginning May 1, 2010, respondent worked as a paralegal for the firm of Thao & Li, P.A. (“Thao & Li”) There is one attorney who works for Thao & Li, and her name is Frances Li. Respondent’s work for Thao & Li was governed by a written contract, which had been partially drafted by respondent. (D. Ex. 9.) The contract was signed by respondent and Li on or about May 1, 2010. *Id.* Within that contract, respondent agreed that he would not “render any legal advise [sic] to the client”; that

he would not "receive, disburse, or otherwise handle client funds"; and that he would not "engage in activities that constitute the practice of law." *Id.* The restrictive language in the contract is identical to the language contained in Rule 5.8(c), MRPC, which governs the employment of suspended lawyers.

24. During fall 2011, respondent held himself out as an attorney. Respondent's checks read "Albrecht and Associates," and bore the image of a scale. (D. Ex. 55.) Respondent had a sign on the exterior of his office which read, "Albrecht and Associates." (R. Test.) Respondent's fax header, in a fax that was sent to a client of Thao & Li's, read "Albrecht and Associates." (D. Ex. 11.)

25. In early August 2011, Joseph McKee completed a written retainer agreement in which he hired Thao & Li to represent him in his Chapter 7 bankruptcy matter. Within the retainer agreement, McKee agreed to pay a total of \$2,600 in legal fees, plus a filing fee of \$299. (D. Ex. 11.) McKee did not speak with any person representing the interests of Thao & Li, except respondent, before signing the agreement. Respondent also determined the payment schedule. *Id.* McKee was required to pay \$500 before Thao & Li started working on the case, an additional \$900 within two weeks, and an additional \$480 before the first Section 341 creditors' meeting. (D. Ex. 11.) Any remaining balance was due within three weeks after the first creditors' meeting. *Id.* Only one person has the authority to determine what Thao & Li charge for a bankruptcy representation, and that person is Li. (Li Test.) Respondent did not consult with anyone at Thao & Li before making the agreement to represent McKee for \$2600, or before deciding on the payment schedule. (Li Test.)

26. During the course of the bankruptcy representation, respondent was McKee's primary, if not sole, source of legal advice. McKee did not meet with Li regarding the bankruptcy representation until March 7, 2012. (Li Test.) McKee did not have any conversations with Li during the bankruptcy representation. (McKee Sworn

Statement, pp. 14-15.) If McKee had any questions regarding the bankruptcy, he talked to respondent. (McKee Sworn Statement, p. 19.)

27. Prior to filing the petition, and throughout the course of the bankruptcy, respondent gave McKee legal advice. (McKee Sworn Statement, p. 40, ll. 13-21.) Respondent gave McKee legal advice as to the effect of filing bankruptcy on creditors' attempts to secure repayment. (McKee Sworn Statement, p. 14, ll. 14-17.)

28. Thao & Li made a partial bankruptcy filing on behalf of McKee on August 9, 2011. McKee was required to complete the filing on or before August 24, 2011. (Li Test.; R. Test.)

29. On or about August 16, 2011, Tom Jussila, a friend of McKee's and a former bankruptcy client of respondent's, personally delivered a check directly to respondent in the amount of \$600, for payment of legal fees related to McKee's bankruptcy. (Jussila Test.; R. Test.; McKee Sworn Statement, pp. 10-11; D. Ex. 16.)

30. Soon after receiving the check from Jussila, respondent contacted Li by telephone. (R. Test.) At that time, respondent told Li that the amount of the check was \$800. (Li Test.) Respondent asked Li's permission to deposit Jussila's check directly into his account, as payment for the work respondent had done on McKee's file to that date. (Li Test.; R. Test.) Li granted permission to do so. (Li Test.; R. Test.) Respondent deposited the check into an account held by him. (R. Test.)

31. On August 24, 2011, Melissa Nelson, McKee's girlfriend, originated a wire transfer of funds in the amount of \$850 for payment of legal fees related to McKee's bankruptcy. That wire transfer was made directly to Wells Fargo account no. xxxxxx8356, an account held only by respondent. (D. Ex. 18.)

32. Respondent did not tender any of the \$850 received by wire transfer on August 24, 2011, to Thao & Li. (Li Test.) Respondent did not inform Thao & Li that he had received those funds. *Id.* Respondent alleged at the hearing that his secretary made an error in depositing the \$850 in his account, that he was unaware of it, and that

he only opened his bank statements when he calculated his income taxes annually. The Referee does not credit his testimony.

33. Respondent completed an invoice to Thao & Li dated August 24, 2011, in which he detailed the services provided to McKee, and listed the value of those services as \$900. (D. Ex. 30.) On the bottom of that invoice, respondent indicated, "paid 8/24" and affixed his signature. *Id.* No year was indicated.

34. Li believed that the invoice in question related to the check given by Jussila to respondent on August 16, 2011. (D. Ex. 30; Li Test.) Other than this initial payment, which respondent was allowed to deposit into his own account, Thao & Li received no payment for McKee's bankruptcy. (Li Test.)

35. On August 31, 2011, one week after the \$850 wire transfer was made to respondent's business account, respondent wrote check no. 5789 for \$900 to Brehmer [sic] Bank. (D. Ex. 55; R. Test.) Respondent was undergoing adverse economic circumstances in the fall of 2011. (R. Test.) He owed ongoing similar monthly mortgage obligations to Bremer. Although the payment was due monthly, respondent made no payments to Bremer Bank in 2011 after August 31, 2011. (R. Test.; D. Ex. 55.)

36. Although the partial bankruptcy filing was due to be completed by August 24, 2011, the bankruptcy filing was not properly completed by that date. As a result, the partial bankruptcy petition was dismissed on August 25, 2011. (Li Test.)

37. The partial bankruptcy filing had imposed an automatic stay of collection activities. (Li Test.) When the partial bankruptcy petition was dismissed, the automatic stay was no longer in effect. (Li Test.) Within hours of the dismissal on August 25, 2011, creditors began collection activities against McKee, including the repossession of one of his vehicles. (McKee Sworn Statement, pp. 16-17.) Respondent gave McKee legal advice with regard to how to avoid repossession of his vehicles by hiding in his house to defeat service. (McKee Sworn Statement, p. 17, ll. 7-23.)

38. Thao & Li filed a second partial bankruptcy petition on McKee's behalf on September 9, 2011. That filing was completed by the deadline. (Li Test.)

39. McKee initiated a wire transfer of funds to respondent on November 1, 2011, in the amount of \$250, exclusive of fees. (R. Test.) This amount was intended to be payment for McKee's bankruptcy. (McKee Sworn Statement, pp. 11-12.) Respondent received these funds. (R. Test.) Respondent did not inform Thao & Li that the money had been received, and did not tender any of that money to Thao & Li. (R. Test.; Li Test.)

40. McKee received his discharge in his bankruptcy matter on or about December 6, 2011. (R. Test.)

41. On or about December 16, 2011, Hermantown Federal Credit Union (HFCU) filed a summons and complaint in state court ("HFCU state court action"). (D. Ex. 27.) Li submitted a responsive letter to the judge on behalf of McKee, on December 21, 2011. (D. Ex. 23.) Within that letter, Li states that she was not representing McKee. *Id.* McKee did not retain Thao & Li to represent him in the HFCU state court action. (Li Test.) After December 21, 2011, Thao & Li did no substantial legal work on behalf of McKee in the HFCU state court action. (Li Test.) Thao & Li did not authorize respondent to perform any legal work for McKee in the HFCU state court action after December 21, 2011.

42. In or around December 2011, the trustee in McKee's bankruptcy case filed a motion to turn over, including the title to McKee's RV. Respondent gave McKee advice in regard to what the trustee's motion meant, and what McKee needed to do to comply with the trustee's wishes. (McKee Sworn Statement, pp. 19-20.)

43. Prior to the January 4, 2012, hearing in federal court on the motion to turn over certain property, McKee communicated with respondent in relation to the motion. (R. Test.) Respondent advised McKee that the motion for turnover was "bogus," and that he could not be forced to turn over what he did not have. (R. Test.; D. Ex. 8, p. 5.)

Li did not believe that the motion was "bogus", and did not direct respondent to characterize the motion in those terms. (Li Test.)

44. McKee appeared at the January 4, 2012, hearing for the trustee's motion to turn over in his bankruptcy case. Neither respondent nor Li appeared with him. (McKee Sworn Statement, p. 20; Li Test.)

45. McKee communicated to the judge at the January 4, 2012, hearing that the trustee's motion to turn over was bogus. (McKee Sworn Statement, p. 20.)

46. Following the January 4, 2012, hearing, Judge Kishel issued an order commanding Li to appear and to explain the various circumstances of her non-appearance, the amount of her involvement in the case, and respondent's representation that the motion was "bogus." That hearing was set for March 7, 2012. (D. Ex. 27.)

47. On or about February 13, 2012, HFCU submitted a notice of motion and motion for default judgment, or in the alternative, summary judgment, in the HFCU state court action. (D. Ex. 28.) Such motion was set for hearing on March 19, 2012. Li received a copy of the motion, and forwarded the motion to respondent. (Li Test.) Li directed respondent to make sure that McKee received a copy of the motion. *Id.* Li did not ask respondent to undertake any legal work in response to the motion. (Li Test.) Instead, Li directed respondent to avoid any contact with McKee. (D. Ex. 18, p. 17.)

48. On or about March 7, 2012, prior to McKee's appearance at the hearing in his bankruptcy case, respondent contacted McKee by telephone. During the first part of that telephone conversation, which was recorded by McKee, respondent gathered information from McKee regarding his interactions with HFCU. (D. Ex. 18, pp. 1-10.) Respondent represented during this conversation that he was "helping [McKee] by drafting an affidavit[.]" *Id.* at p. 8, ll. 4-5. One of the documents that would be appropriate for respondent to draft in response to a motion for summary judgment in the HFCU matter would be an affidavit. (Li Test.) The topics discussed in the March 7,

2012, conversation are consistent with an affidavit that would be appropriate to file in response to a summary judgment motion.

49. During the second half of that conversation, respondent gave legal advice to McKee regarding the effects of McKee's testimony in the March 7, 2012, hearing in his bankruptcy matter. *Id.* at pp. 10-39. Respondent explained legal concepts to McKee, including what types of fee agreements were permissible in bankruptcy, and the possible effects of McKee's testimony. *Id.* at pp. 17-32. Respondent coached McKee as to his testimony at the hearing, and practiced McKee's testimony with him, using a role-playing approach in which respondent played the part of the questioning judge. *Id.* at pp. 23-28. Respondent suggested that McKee tell the judge that he had been confused during his January 4, 2012, court appearance (*id.* at p. 22, ll. 14-16), even after McKee told respondent directly that he was not confused. *Id.* at p. 20, ll. 1-2. Respondent represented to McKee that Li had told respondent not to speak with McKee. *Id.* at 17, ll. 11-12. Respondent admitted that he provided legal services to McKee during this telephone call. (R. Test.)

50. McKee and Li appeared at the March 7, 2012, hearing before Judge Kishel in McKee's bankruptcy matter. (Li Test.) The March 7, 2012, hearing was the first time that McKee and Li met each other during the bankruptcy representation. (Li Test.) Li asked McKee if he had secured representation in the HFCU state court matter. (Li Test.) Li did not represent McKee in the HFCU state court matter at that time. (Li Test.)

51. Minn. Stat. 481.02, Unauthorized Practice of Law, has been used as authority to define unauthorized practice. It states in part under Subdivision 1:

"... or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services..."

52. The written contract signed by respondent and Frances Li May 1, 2010 governed their relationship. This agreement was provided to the Director for his reliance by Li in her letter of May 3, 2010. (D. Exh.'s 9,10)

53. Rule 5.8 MRPC appears directed at supervising lawyers rather than non-lawyers including suspended or disbarred lawyers. However it tracks nearly exactly the written contract signed by respondent and offered for the Director's reliance. Additionally the language includes similar language of Minn. Stat. 481.02. Therefore Rule 5.8 MRPC, the statute, and the agreement of respondent form a harmonious common definition of the unauthorized practice of law.

False Statement to the Director

54. On August 24, 2011, a wire transfer in the amount of \$850 was made directly to respondent's account. Those funds were intended as payment for McKee's bankruptcy. (McKee Sworn Statement, p. 12.)

55. Respondent indicated during his testimony that he was unaware that payment had been made in the McKee matter until sometime after January 2012. (R. Test.) In testifying, respondent reaffirmed his statement made in an August 19, 2012, letter to the Director: "Electronic payment made on August 24. I had no idea that this payment had been made. I could not handle funds. I did not know about the payment until after McKee's [July 27, 2012] deposition." (D. Ex. 29 (for identification only, this exhibit was not admitted into evidence).) This statement was false.

56. Respondent submitted a receipt to Li, in his own handwriting, indicating that certain work was done relating to McKee's bankruptcy. (D. Ex. 30.) The invoice indicates that that work was valued at \$900. *Id.* The invoice further indicated that \$900 was paid on August 24 of an unspecified year. *Id.*

57. Li did not represent McKee in any bankruptcy matter on August 24, 2010. (Li Test.) Further, Li produced this document to her attorney prior to August 24, 2012. *Id.* Therefore, respondent made the notation in question on August 24, 2011, or shortly thereafter. The invoice indicates that respondent knew the payment was attributable to

McKee's account, and that respondent was aware of the payment at or near the time it was made.

58. As noted above, respondent made a \$900 payment to Bremer Bank on or about August 31, 2011, within one week of receiving the wire transfer for \$850. (D. Ex. 55.) Respondent had a monthly obligation to pay Bremer Bank \$900 mortgage payments. (R. Test.) Respondent was undergoing financial difficulties at this time. (R. Test.) Respondent did not make any similar mortgage payments to Bremer Bank after August 31, 2011. These facts and circumstances further emphasize that respondent knew of the transfer at or near the time it was made.

Additional False Statement -Supplemental Petition

59. Respondent audited a law school class (LAW 9504) at Hamline Law School during the spring of 2013. Students who audit a class at Hamline do not receive an assessment/grade for the course, and are not permitted to take the final examination. The student policy manual states that auditing students do not receive a grade; it is silent as to whether an auditing student may nonetheless take the examination. (Clish Test.)

60. On March 26, 2013, the Director filed a petition for disciplinary action against respondent. Subsequently, respondent submitted an answer and the Referee was appointed April 25, 2013. (Petition for Disciplinary Action; Respondent's Answer.)

61. On or about April 21, 2013, respondent appeared at the office of the registrar of Hamline Law School. At that time, respondent had a conversation with Stephanie Martinez, the Student Services Coordinator at Hamline Law School, about taking the final exam in his bankruptcy class. Martinez informed respondent at that time that students who audit a course were not permitted to take exams. (Martinez Test., pp. 12-16.)

62. The Referee, respondent, and the Director communicated by email in an attempt to set a scheduling conference for the pending disciplinary matter. On April 30, 2013, respondent communicated to the Referee and the Director as follows:

My more pressing concern is that I have been taking a bankruptcy class at Hamline Law School and **I have registered to take the final for the class on March [sic] 3, 2013.** So, if we have a scheduling conference, I would prefer to have it early next week.

(Emphasis supplied.) (D. Ex. 57.)

63. Under usual procedures of Hamline Law School, the final examination in respondent's bankruptcy class was self-scheduled, and could be taken on any day between April 29, 2013, and May 13, 2013, inclusive. The exams were administered twice per day, at 9:00 a.m. and 1:30 p.m. If respondent had been eligible to take the exam (which he was not), it would not have been necessary or even possible for him to register to take the exam ahead of time. (Clish Test.)

64. By an email message dated April 30, 2013, at 5:19 p.m. and sent from the Referee to both litigants, the scheduling conference was subsequently set for May 7, 2013, at 9:00 a.m. to be held by telephone conference call.

65. Respondent submitted documentation dated May 1, 2013, to the Director as part of his reinstatement petition. In that documentation, respondent stated as follows:

I registered and attended a semester long class at Hamline Law School on Bankruptcy. I attended every class except two; participated in class discussions and **took the final.**

(Emphasis supplied.) (D. Ex. 58.)

66. On May 7, 2013, at 9:00 a.m., respondent failed to participate in the scheduling conference in his disciplinary matter. The scheduling conference was held at 9:30 a.m., without respondent's participation.

67. On May 7, 2013, at approximately 1:00 p.m., respondent appeared at the registrar's office and attempted to obtain and take the bankruptcy final examination. He was again instructed by registrar personnel that he was not allowed to take the final exam. (Clish Test.)

68. On May 8, 2013, respondent stated in an email message to the Referee:

I want to apologize for not being available yesterday for the apparent telephone conference. . . . I was scheduled to take the final on Friday for the bankruptcy class I was enrolled in at Hamline law school. . . . I did not feel like I . . . prepared enough to proceed with the final so **I rescheduled it to Tuesday morning.**

(Emphasis supplied.) (D. Ex. 59.)

At the evidentiary hearing respondent sought to justify his misrepresentations regarding the Hamline exam by stating that in an ongoing effort to cope with his ADHD and procrastination problems he often used a practice of "registering" future deadlines with himself, and that he attempted to do so in the Hamline matter and did not intend to convey that he had actually registered with Hamline to take the exam. Further, he stated that his message that he had taken the exam was intended to make an assumption that in fact he would soon take the exam. Respondent's testimony is wholly self-contradictory, illogical and incredible. Respondent intended to mislead the Director and the Referee about his Hamline exam. Respondent's actions to go to such lengths to mislead others for so little or no observable personal possible gain is both puzzling and troubling.

Aggravating and Mitigating Factors

Respondent Has Engaged in a Pattern of Dishonest Conduct

69. Respondent made false statements to the Director during the investigation (Count III), and made false statements to the Director and the Court during the litigation of this case (Count IV). These false statements compose a pattern of dishonest

conduct. Attorneys who engage in a pattern of dishonest conduct have often faced severe discipline, including long suspensions and disbarment. *In re Moeller*, 582 N.W.2d 554 (Minn. 1998) (disbarred); *In re Thedens*, 602 N.W.2d 863 (Minn. 1999) (indefinite suspension for a minimum of three years); *In re Klein*, 609 N.W.2d 230 (Minn. 2000) (indefinite suspension for a minimum of two years); *In re LaChapelle*, 491 N.W.2d 17 (Minn. 1992) (disbarred).

Respondent's Misconduct is Similar to Other Misconduct in His History

70. Respondent has previously been disciplined for dishonest misconduct. (D. Exs. 31-34, 42, and 48.)

71. Respondent has been previously disciplined for the unauthorized practice of law, and related misconduct.

72. As respondent's current misconduct is substantially similar to previous misconduct in respondent's history, the Court considers this an aggravating factor.

Respondent Failed to Cooperate with the Director's Investigation

73. By making false statements to the Director, respondent failed to cooperate with the Director's investigation. Failing to cooperate with the Director's investigation is a serious violation in and of itself. *In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002). When it is coupled with additional misconduct, it increases the severity of the disciplinary sanction. *In re Nelson*, 733 N.W.2d 458, 464 (Minn. 2007).

Respondent Did Not Establish a Mental Condition Defense Under Weyhrich

74. Respondent offered very little evidence of any mental condition. Respondent is required to prove five separate elements, by clear and convincing evidence, in order to receive any mitigation. Respondent testified that he had been diagnosed with ADHD. Respondent did not testify that ADHD caused the current

misconduct, that he is currently undergoing treatment, that the treatment has arrested the misconduct, or that the misconduct is unlikely to recur. No expert opinion was presented.

75. When considering mitigation for active misconduct, the respondent must prove all five *Weyhrich* factors in order to receive any mitigation. *In re Mayne*, 783 N.W.2d 153 (Minn. 2010). Respondent did not adduce sufficient evidence to receive mitigation under *Weyhrich*.

The Supreme Court has granted partial mitigation in some cases where a respondent proved less than all five *Weyrich* factors. (*In Re Berg; In Re Bergstrom; and In Re Jellinger*) The Court however has only considered such individual factors when the misconduct is unintentional or passive. (*In Re Farley*)

In the present case the misconduct was intentional, and all five *Weyrich* factors must be proven. (*In Re Mayne*)

Much of Respondent's Misconduct Took Place While He Was Suspended From the Practice of Law

76. Respondent has been suspended from the practice of law since April 2010. (D. Ex. 45.) All of the conduct in Counts II, III and IV occurred while he was suspended. When an attorney commits additional misconduct while suspended, the Court views this as an aggravating factor. *In re Redburn*, 746 N.W.2d 330, 337-8 (Minn. 2008).

Respondent Has Failed to Exhibit Remorse or Offer the Court Any Assurances That the Behavior Will Not Be Repeated

77. Respondent did not express remorse or offer the Court any assurances that the behavior will not be repeated. It is an aggravating factor when an attorney fails to exhibit remorse or offer the court any assurances that the behavior will not be repeated. *In re Garcia*, 792 N.W.2d 434, 443 (Minn. 2010).

To the contrary, respondent repeatedly sought to explain, minimize and attempt to relitigate his numerous past violations, citing each one with rationalizing arguments.

78. In respondent's most recent public discipline matter, respondent presented evidence as to his volunteer work. (D. Ex. 45, pp. 15-16.) Much of that evidence appears to have been duplicated in this matter. (R. Test; Susan Albrecht Test.) In the previous matter, the Referee did not consider it to be a mitigating factor. (D. Ex. 45, p. 16.) Similarly, the Referee does not consider it a mitigating factor here.

Respondent's Disciplinary History is Extensive

79. Respondent has received private discipline on thirteen prior occasions, and has received public discipline on five prior occasions. (D. Exs. 31-48.) In respondent's most recent public discipline, respondent was suspended indefinitely for a minimum of two years. (D. Ex. 45.) In that opinion, the Court characterized his disciplinary history as "extensive." *In re Albrecht*, 779 N.W.2d 530 (Minn. 2010). Respondent has received three additional admonitions since then, including one for the unauthorized practice of law, and another for failing to notify a client that he was a suspended attorney.

80. Respondent's disciplinary history was considered to be an aggravating factor in respondent's two most recent public disciplines. *In re Albrecht IV*, 660 N.W.2d 790 (Minn. 2003); *In re Albrecht V*, 779 N.W.2d 530 (Minn. 2010).

CONCLUSIONS OF LAW

1. Respondent, by engaging in sexual relations with a client while representing that client, when no preexisting sexual relationship existed prior to the beginning of the representation, violated Rule 1.8(j), MRPC.

2. Respondent did not violate Rule 5.8, MRPC.

3. Respondent, by rendering consultation or advice in McKee's bankruptcy and HFCU state court matters, and by drafting legal documents in McKee's HFCU state court matter, while not under the supervision of an attorney, and by receiving, disbursing or otherwise handling client funds, all while his license to practice was suspended, violated Rule 5.5, MRPC, as further interpreted by Rule 5.8(b)(1) and (6), MRPC, and Minn. Stat. § 481.02.

4. The Director did not pursue other allegations in the Second Count, paragraph 7, of the Petition regarding alleged payments from clients of Thao & Li other than McKee. Those allegations are dismissed.

5. Respondent, by receiving and retaining payment for legal services that were performed in the McKee matter, and failing to report or transfer those funds to Thao & Li, P.A., violated Rules 1.15(a) and 8.4(c) and (d), MRPC.

6. Respondent, by making a false statement to the Director in the course of a disciplinary investigation, violated Rules 8.1(b) and 8.4(c) and (d), MRPC, and Rule 25, Rules on Lawyers Professional Responsibility.

7. Respondent's conduct, in that he made knowingly false and/or misleading statements to the tribunal and to the Director in his email messages of April 30, 2013, and May 8, 2013, and made knowingly false or misleading statements to the Director in his documents dated May 1, 2013, violated Rules 3.3(a)(1), 4.1, 8.1(a), and 8.4(c) and (d), MRPC.

RECOMMENDATION FOR DISCIPLINE

The Referee recommends that respondent be disbarred.

Dated: August 22, 2013.



BRUCE W. CHRISTOPHERSON
SUPREME COURT REFEREE