FILE NO. A10-1515

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against ARLIE MARTIN FUNDAUN, a Minnesota Attorney, Registration No. 202071.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE**

The above-captioned matter was heard on December 9, 2010, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court.

Kevin T. Slator, Esq., Office of Lawyers Professional Responsibility, 345 St. Peter Street, 1500 Landmark Towers, St. Paul, Minnesota 55102-1218, appeared for petitioner.

Marlie Martin Fundaun, Esq., Box 67, Remer, Minnesota 56672, the respondent, appeared *pro se*.

Based upon the testimony of the three witnesses (Thomas Hallquist, Ryan Stai and the respondent), the exhibits (six), the undersigned makes the following:

FINDINGS OF FACT

1. Thomas Hallquist (Hallquist) contacted respondent about a problem relating to access to property which he owned with his brothers, David and Richard.

2. The property which respondent and his brothers owned was on Big Thunder Lake, Cass County.

3. The adjacent land owner was his great aunt who had erected a gate thereby preventing access to respondent's property.

4. Respondent met with Thomas Hallquist and David Hallquist at respondent's office on September 19, 2008, at which time the parties (respondent, Thomas Hallquist and David Hallquist) signed a retainer agreement (Agreement) (Ex. 1).

5. At the September 19, 2008, client conference, respondent gave the Hallquist brothers a flat fee option and an hourly rate option to cover his services. The brothers chose the flat fee of $2500.00 which was to cover all the services necessary to obtain an easement by which to access their land.

6. The retainer agreement provided that:

> Thereafter, fees and expenses will be billed and payable within thirty days after each billing. If not so paid the attorney may terminate services and withdraw from any proceedings or pending case.

7. Pursuant to the attorney-client relationship, respondent did prepare the Notice of *Lis Pendens*, the Summons and Complaint relating to the property over which the brothers Hallquist sought the easement for purposes of ingress and egress.

8. The investigation and preparation of the documents required time in excess of $2,500.00 when calculated at $200.00 per hour.

9. Respondent believed that the entire retainer amount had been earned when the time expended on the Hallquist file exceeded $2500.00, when calculated at hours spent times $200.00.

10. Hallquist attempted to contact respondent in early October without success but did reach him later in the month and let respondent know how upset he was by respondent's deposit of the post-dated check.

11. The October 28, 2008, phone call was Hallquist's first contact with respondent since the September 19, 2008, meeting at which he signed the retainer agreement.

12. After October 2008, the respondent did not communicate with Hallquist, did not send him copies of the documents prepared, and did not contact the property owner whose land he sought to encumber with an easement an did not file the Notice of *Lis Pendens*.

13. At the September 19, 2008, client conference, respondent told Hallquists he would talk to the aunt and see if she was willing to settle the matter without litigation to which Thomas Hallquist said, "don't bother, she'll never agree."

14. Respondent told Hallquists that people often change their mind when faced with litigation, assuring the Hallquists that the aunt would know that if she refused he would immediately commence suit.

15. Hallquist, after unsuccessfully attempting to contact respondent in November, December and January, contacted Ryan Stai (Stai), an attorney who was the son of his friend in February because he had not heard from respondent and suspected that respondent may have taken his money and done nothing to earn it..

16. Stai called respondent on February 9, 2009, in which conversation respondent told Stai that he had filed the Lis Pendens and was awaiting a court date, implying the law suit was filed.

17. Hallquist also spoke to respondent on February 9, asking for copies of the drafted documents and a statement showing his activities and the time required for each.

18. Stai called respondent after speaking to Hallquist on February 9 and 10, because he had not returned his subsequent phone calls and had not provided copies of the drafted documents.

19. When requested to refund his $2,500.00 retainer, respondent refused claiming that it had been entirely earned according to his March 29, 2009, statement (200.00/hour X 12.75 = $2,550.00) but forgetting that his retainer agreement contemplated and included all services necessary to obtain the easement which necessarily includes the trial or hearing.

20. Hallquist discharged respondent on March 1, 2009. Stai had demanded a refund of the $2,500.00 retainer on February 19, 2009. Respondent did not refund the retainer. Neither did he provide documents or a statement of services rendered.

21. Stai again demanded a return of the retainer on March 4, 2009.

22. Hallquist complained to Director's Office on March 27, 2009.

23. Respondent replied on April 30, 2009.

24. Respondent finally sent copies of the pleadings to Hallquist in early June 2009 contemporaneously with his response to the District Ethics committee.

25. Respondent did not return Hallquist's folder of real estate documents until the evidentiary hearing of December 9, 2010, a period of nine months from the termination of the attorney-client relationship.

CONCLUSIONS OF LAW

1. Respondent violated Rule 1.3, Minnesota Rules of Professional Conduct (MPRC) by failing to pursue the Hallquists' matter with reasonable diligence and promptness.

2. Respondent violated Rule 1.4(a)(3) and (4), MRPC by failing to keep Thomas Hallquist informed about the progress of the litigation and by failing to promptly respond to his requests for copies of documents.

3. Respondent violated Rule 1.15(a), MRPC by failing to deposit the retainer in a trust account.

4. Respondent violated Rule 1.5(a), MRPC by retaining the entire retainer when he had not fully performed the obligations undertaken or fully earned the entire retainer.

5. Respondent violated Rule 1.16(d), MRPC by failing to refund the unearned portion of the retainer and by failing promptly to return the documents prepared and the original documents provided by the Hallquists.

6. Respondent violated Rules 4.1 and 8.4(c), MRPC by representing to Ryan Stai that the Notice of Lis Pendens had been filed and, on a separate occasion, claiming he had mailed it.

7. Respondent's conduct is aggravated by the following:

   a. The May 7, 2009, admonition

   b. His failure fully to acknowledge his misconduct

   c. His failure to understand how his conduct frustrated the clients' goals, objectives and timetable

d. His lack of remorse and his failure to understand how his self-centered approach substantially contributed to his violations.

8. None of respondent's claimed excuses mitigate his conduct because each was either transitory or could have been remedied by alternative action.

9. The attached Memorandum is made a part of this Recommendation for Discipline.

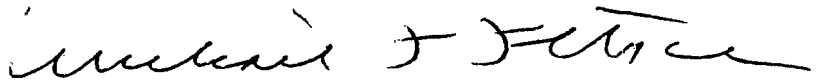
RECOMMENDATIONS FOR DISCIPLINE

Based upon the above Findings of Fact and Conclusions of Law the undersigned makes the following:

1. That the respondent, Arlie Martin Funduan, be publicly reprimanded by the Minnesota Supreme Court.

2. That the respondent pay costs, disbursements and interest pursuant to Rules of Lawyers Professional Responsibility.

DATED: January 21, 2011

BY: 

HON. MICHAEL F. FETSCH
SUPREME COURT REFEREE

MEMORANDUM

The relationship between respondent and Thomas Hallquist started to become strained when respondent deposited the remaining retainer check of $1500.00 on October 9, 2008.

Respondent deposited the retainer check which had been posted for that date without prior notice to Hallquist. Thomas Hallquist understood that respondent would not deposit the post-dated check before authorized by Hallquist.

The Hallquists were in a hurry because their access to the property had been blocked by their aunt, the owner of the property over which ingress and egress was required.

Respondent normally closed his office from September to January to go hunting, servicing those few files that have matters requiring attention during that period.

Respondent contends that he took no action, after completing the Notice of *Lis Pendens*, Notice of Motion, Motion, Summons and Complaint because Hallquist did not provide the filing fees. Respondent says that he repeatedly asked that those fees to be advanced. Hallquist's testimony is credible; respondent's is not.

Respondent was not justified in his failure to move forward. The retainer agreement requires those fees to be paid "within thirty days after each billing." Respondent made no billing nor request in writing for the filing fees.

Respondent claimed to Stai that the Notice of *Lis Pendens* had been filed, later, had been mailed for filing but also claimed that he didn't file the same because the fee was not advanced by the client.

Respondent's failure promptly to provide the documents prepared and statement of services rendered coupled with his different statements about the filing of the Notice of *Lis Pendens* convinced Hallquist and Stai that the respondent was not performing as promised.

Respondent clearly but inaccurately felt that 12.75 hours expended covered the entirety of the retainer received.

From the time of the first demand for copies of the documents (February 9, 2009) until their production (early June 2009) three months passed.

From the time of respondent's termination (March 1, 2009) until he returned the real estate documents which provided the Hallquists entrusted him (December 9, 2010) nine months passed before respondent returned the original documents.

Respondent justified his delays in various ways:

1. The filing fee for the *Lis Pendens* was not paid. Respondent, however, had claimed it was filed, or that it had been mailed.
2. Respondent claimed the documents had been prepared in a timely fashion. Their existence was not, however, demonstrated until June 2009.
3. His office was locked by the landlord. The landlord promptly responded to his request when called.

4. Twenty plus years of his files were a mess. His active files numbered only about ten.

5. His fax machine wasn't working. He failed to consider or ignored the option of the U.S. Mail, saying he was told to fax the documents.

6. He failed to contact the aunt to see, as he had originally suggested, whether the prospect of litigation changed her mind about the easement.

The respondent's view of the attorney-client relationship was myopic and extremely self-centered.

M.F.F.