

FILE NO. A07-2332

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against BENJAMIN S. HOUGE,  
a Minnesota Attorney,  
Registration No. 47387.  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION  
FOR DISCIPLINE**

The above-captioned matter was heard on April 11 and May 3, 2008, by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Timothy M. Burke appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Respondent Benjamin S. Houge appeared *pro se* and was personally present throughout the proceedings. The hearing was conducted on the Director's November 30, 2007, petition for disciplinary action. Mr. Houge testified at the hearing. Both parties submitted exhibits.

This matter was originally scheduled for an all-day hearing on April 11, 2008. Evidence and partial testimony was received on that date. However, Respondent's disclosed witness, his former client, Thomas von Behren, asserted his Fifth Amendment right and claimed attorney-client privilege. However he testified under oath that after he was sentenced on April 29, 2008, in a pending criminal case, that he would waive his Fifth Amendment right and the attorney-client privilege. Thus, the Referee continued the matter until Saturday, May 3, 2008 for the remainder of Respondent's testimony and for Mr. von Behren's testimony.

The sentencing on April 29, 2008 did not take place. During a phone conference on May 2, 2008, Respondent stated that Mr. von Behren was willing to waive his

attorney-client privilege so that Respondent could testify, but that Mr. von Behren was not willing to waive his Fifth Amendment rights. By agreement, Mr. von Behren did not appear on the May 3 hearing date, and Respondent offered a letter from von Behren's attorney in the criminal case dated May 2, 2008, wherein Mr. von Behren waived his attorney-client privilege, but revoked his agreement to waive his Fifth Amendment right. (Trial Exhibit 126.) Respondent advised the Referee that he would not require Mr. von Behren's testimony. In doing so, Respondent voluntarily waived any testimony or right to question Mr. von Behren. Respondent did not request a further continuance.

In his answer to the petition for disciplinary action, Respondent admitted certain factual allegations made by the Director, denied others, and denied any rule violations. The findings and conclusions made below are based upon Respondent's admissions, the documentary evidence the parties submitted, the testimony presented, the testimony of Respondent, the demeanor and credibility of Respondent as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony. If Respondent's answer to the petition for disciplinary action ("R. ans.") admits a particular factual finding made below, then no other citation will necessarily be made even though the Director may have provided additional evidence to establish the finding.

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

#### **FINDINGS OF FACT**

1. Respondent was admitted to practice law in the State of Minnesota on September 16, 1974.

Testifying Falsely, Submitting False Evidence, Failing to Correct False Testimony, Making Other False Statements, Assisting in Violation of Court Orders, Failing to Supervise Non-Lawyer Assistant

2. In or about November 2000 Respondent began to represent Thomas

von Behren in multiple legal matters (R. ans., p. 2).

3. Before von Behren retained Respondent, von Behren had been convicted twice for crimes involving theft and dishonesty (R. ans., p. 3).

- On or about January 19, 1999, von Behren was sentenced to five months in prison followed by three years of supervised release and ordered to pay \$80,954.01 in restitution after he was convicted in federal court of bank fraud.
- On or about April 13, 1999, von Behren was sentenced to 13 months in prison and ordered to pay \$46,956 in restitution after he was convicted in state court of theft by swindle. Execution of the sentence was stayed and von Behren was placed on probation for four (4) years.

Respondent was aware of von Behren's criminal record (R. ans., p. 3).

4. On June 6, 2002, Respondent and von Behren entered into an independent contractor agreement (R. ans., p. 3; Ex. 3). This agreement established an independent contractor relationship, whereby von Behren would provide services to Respondent in exchange for \$2000 per month credit against von Behren's outstanding bill to Respondent (Ex. 3, pp. 2-3). The agreement stated that at this rate, the bill would be paid off by January 2003 (Ex. 3, pp. 2-3). However, von Behren continued to work for Respondent after January 2003 on a barter basis, and Respondent continued to represent von Behren on one or more additional matters (R. ans., p. 3). The agreement also provided:

It is the parties [sic] intentions that [von Behren] shall have an independent contractor status and not be an employee for any purposes, including, but not limited to, the application of the Federal Insurance Contribution Act, the Social Security Act, the Federal Unemployment Tax Act, the provisions of the Internal Revenue Code, the State Revenue and Taxation Code relating to income tax withholding at source of income . . . .

(Ex. 3, p. 1.)

5. On October 30, 2002, Respondent wrote a To Whom It May Concern letter

outlining von Behren's duties and responsibilities (Ex. 4; R. ans., p. 3). Respondent stated that von Behren was performing tasks such as title research, lien searches, abstracting services and negotiating with lenders, judgment creditors and lien holders (R. ans., p. 3; Ex. 4).

6. At this time, von Behren was scheduled to be sentenced on November 1, 2002, after he was again convicted in state court of theft by swindle (R. ans., pp. 3-4; R. test.). This was von Behren's third felony conviction (R. ans., p. 3; R. test.). Respondent prepared the October 30 letter to help von Behren receive work release privileges while in jail (R. ans., pp. 3-4; R. test.).

7. Respondent's October 30 letter did not state that at that time von Behren was operating as an independent contractor engaging in real estate transactions, did not identify von Behren's compensation, did not state that von Behren would negotiate or otherwise communicate with homeowners and did not state that von Behren was assisting Respondent with an Internet publishing business (Ex. 3).

8. On November 1, 2002, von Behren was sentenced to 17 months in prison. Execution of the sentence was stayed for two years. Von Behren was required to serve 365 days in the Hennepin County Adult Corrections Facility ("Workhouse"). Von Behren was allowed work release privileges, on the condition that he not engage in self-employment in the real estate or mortgage financial fields without court or probation department authorization. (R. ans., p. 5; Ex. 5, pp. 24-26; Ex. 6.)

9. Respondent knew shortly after von Behren's sentencing that a condition of work release was that von Behren could not be self-employed in the real estate or mortgage fields (R. ans., p. 5).

10. As set forth in detail below, Respondent and von Behren created a sham employment relationship that permitted von Behren to engage in real estate and financial transactions in violation of the judge's sentencing order. To hide this sham, Respondent among other things testified falsely, submitted false documents, and

allowed von Behren to testify falsely.

11. On November 5, 2002, five (5) days after sentencing, Respondent entered into an employment agreement with von Behren and Clarice von Behren (Ex. 7).

12. Thomas and Clarice von Behren are legally divorced. However, the von Behrens resided together when von Behren was not incarcerated. Ms. von Behren received proceeds from von Behren's financial transactions. All of their income and assets were placed in Ms. von Behren's name, including the home they lived in together and vehicles they drove. (R. ans., p. 6.)

13. The November 5 agreement provided in pertinent part:

- Clarice von Behren is Respondent's client.
- von Behren's outstanding legal bill to Respondent would be reduced at the rate of \$750 per week;
- von Behren transferred all his interest in pending real estate deals to Clarice von Behren.
- von Behren would work on real estate transactions as Respondent's employee but for the benefit for Clarice von Behren.
- Clarice von Behren would pay Respondent a percentage of the profits on all successful deals for supervising Mr. von Behren in his work on those deals for Clarice von Behren.

(Ex. 7.)

14. At least three transactions were pursued pursuant to the November 5, 2002, agreement (R. ans., p. 6).

15. Respondent provided Forms 1099-B to von Behren for 2002 and 2003 (R. ans., pp. 6-7; Exs. 8 & 17; Ex. 22, p. 442). Each of the Forms 1099-B states that Respondent paid no cash to von Behren and no withholding was made for federal individual income taxes (R. ans., pp. 6-7; Exs. 8 & 17; Ex. 22, p. 443). Respondent subsequently testified, under oath, that he did not pay cash wages to von Behren during

2003 and did not make any withholdings (R. ans., pp. 6-7; Ex. 22, pp. 439-40).

16. During 2003, Respondent prepared and signed two (2) time sheets and provided them to von Behren to provide to the Workhouse as evidence of his gainful employment by Respondent (R. ans., p. 7; Exs. 9 & 16). These time sheets stated that Respondent paid cash wages to von Behren and that Respondent withheld funds from von Behren's pay for federal and state individual income taxes, FICA and Medicare (Exs. 9 & 16). These time sheets were false. Respondent did not pay any cash wages to von Behren (Ex. 22, pp. 439-40; R. test.). Von Behren did not receive cash income, and there were no withholdings (Ex. 22, pp. 439-40, 445; R. test.).

17. On February 18, 2003, a hearing was held in a civil matter titled *Lohr v. von Behren* (R. ans., p. 7; Ex. 10). Respondent represented von Behren during that hearing (R. ans., p. 7; Ex. 10, pp. 2-3). Respondent identified himself on the record as counsel for von Behren (R. ans., p. 7; Ex. 10, p. 3).

18. During that hearing, von Behren testified that he was meeting with homeowners and doing real estate work (R. ans., p. 7; Ex. 10, pp. 23-33).

19. Also, during that February 18 hearing, von Behren testified that Respondent paid him \$750 per week gross pay, von Behren's net pay was approximately \$600 per week because he paid \$153 of his gross pay to the Workhouse, and von Behren was willing to give his net pay, minus some money for gasoline, to Lohr (R. ans., p. 8; Ex. 10, pp. 21, 23).

20. Von Behren's testimony was false. Respondent did not pay cash to von Behren, von Behren did not remit any of his pay to the Workhouse, there were no withholdings, and he did not receive net pay after withholdings (Ex. 22, pp. 439-40, 445; R. test.).

21. Respondent knew von Behren's testimony was false. Nevertheless, Respondent failed to take reasonable remedial measures.

22. In Respondent's presence, von Behren also testified that he was to receive

a commission of \$15,000 to \$18,000 out of an upcoming closing on a real estate transaction, and that he could receive commissions in two (2) other real estate matters on which he was working (R. ans., p. 9; Ex. 10, pp. 24-25, 27-28, 30-33).

23. On February 24, 2003, a restitution hearing was held in von Behren's criminal matter (Ex. 33). Respondent represented von Behren at that hearing (Ex. 33, p. 1). During the hearing, there was a discussion of Respondent's employment of, and compensation to, von Behren, and of how that compensation affected restitution payments (Ex. 33, p. 6). Respondent stated, "Well, right now he is earning on a month -- on a weekly basis \$750. I don't know what the -- what does the amortized schedule come out to?" (Ex. 33, p. 6).

24. Respondent's statement was false and misleading. Respondent intended to mislead the judge into understanding (incorrectly) that Respondent was giving monetary compensation to von Behren, from which restitution payments would be made (Ex. 33, p. 8).

25. On or about March 28, 2003, Philip Rosar wrote a letter to the court which had sentenced von Behren in November 2002 (R. ans., pp. 9-10; Ex. 11). Rosar's letter alleged that von Behren's employment with Respondent was a sham designed to create an appearance of legality when, in fact, von Behren was continuing to engage in prohibited transactions in the real estate and mortgage fields (R. ans., pp. 9-10; Ex. 11).

26. On April 17, 2003, Respondent signed an affidavit in response to Rosar's letter (Ex. 12). Respondent submitted his affidavit to the court in *State v. von Behren* (R. test.). In that affidavit, Respondent stated that he had originally hired von Behren in June 2002 and under that agreement von Behren provided certain services to Respondent in exchange for a reduction of the legal fees von Behren owed to Respondent (Ex. 12, pp 3-5). Respondent's affidavit failed to disclose Respondent's November 5, 2002, agreement with von Behren and Clarice von Behren (Ex. 12). Respondent's affidavit did not disclose that von Behren's duties included work on

transactions in the real estate and mortgage fields or contacts and negotiations with homeowners, even though von Behren was doing that work at this time (Ex. 12). Respondent's affidavit also failed to disclose that von Behren was also expecting to receive commissions from work in this field (Ex. 12).

27. Also on April 17, 2003, a hearing was conducted in *State v. von Behren* (R. ans., p. 11; Ex. 13). At the beginning of the hearing, Respondent identified himself as counsel for von Behren (R. ans., Ex. 13, p. 2). Respondent discussed von Behren's employment for him (R. ans., p. 11; Ex. 13, pp. 5-11, 26). However, Respondent failed to disclose the November 5 agreement between Respondent, von Behren and Clarice von Behren, and failed to disclose all of von Behren's actions as Respondent's employee regarding real estate transactions and deals (Ex. 13).

28. During this hearing, von Behren testified that he received the same amount of pay from Respondent each week and that he told the Workhouse that his check from Respondent was the same every week (R. ans., p. 11; Ex. 13, p. 38). These statements were false. Von Behren received no monetary pay from Respondent, and von Behren did not receive a check from Respondent (R. ans., pp. 6-7; Ex. 22, pp. 439-40; R. test.).

29. Respondent knew these statements were false. Nevertheless, Respondent failed to take reasonable remedial measures.

30. During April 17 hearing, Respondent, the judge and the prosecutor had a discussion in chambers. During that conversation, Respondent stated that von Behren did document work for Respondent; Respondent failed to disclose that von Behren was working on real estate transactions and deals (R. ans., p. 12).

31. At the conclusion of the April 17 hearing, the court determined that there was insufficient evidence to institute a formal probation revocation proceeding at that time (R. ans., p. 12; Ex. 13, pp. 41-42).

32. The court reaffirmed in Respondent's presence that von Behren was not

allowed to be self-employed in the real estate or other financial areas without court approval, stated that von Behren needed to receive a salary for his work, and stated that von Behren needed to do document and title review work. The court specifically stated that von Behren was prohibited from doing freelance work even if it was described as work for Respondent (R. ans., p. 12; Ex. 13, pp. 42-44).

33. In Respondent's presence, the judge told von Behren:

[Y]ou need to be working under the, you know, supervision of someone, working for them, getting a salary and not be involved in the kinds of deals and problems that have existed in the past.

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[W]hat I want to make clear to you, the idea behind the conditions of probation in allowing you work release with a job was -- my understanding of the job was that you had skills in the area of document review and titles and that kind of thing and that there were specific projects where [Respondent] was employed that you were working for him and assisting him. And if it turns out that other things are going on beyond that where you are freelancing or, even with [Respondent's] supervision, in essence working for yourself but calling it work for [Respondent], that is not within the conditions of probation that were envisioned at the time of sentencing.

(Ex. 13, pp. 43-44.)

34. On April 23, 2003, Respondent helped to establish Fitek, Inc (R. ans., p. 12). Respondent was a fifty percent (50%) owner of Fitek, one of two members of the board of governors, and drafted the incorporation documents (R. ans., p. 12; Ex. 14, p. 4). Fitek's registered office was Respondent's office address at that time (R. ans., p. 12; Ex. 14, p. 4; R. test.). Respondent paid no money for his shares of Fitek (R. ans., p. 12; Ex. 22, pp. 427-29). On or about May 6, 2003, Respondent transferred his shares in Fitek to Charles Johnson, a resident of Liberia (R. ans., pp. 12-13). Respondent received no money for transferring his shares to Johnson (R. ans., pp. 12-13). On or about June 3, 2003, Respondent ceased to be a governor of Fitek (R. ans., pp. 12-13).

35. Von Behren ceased working for Respondent and began to work for Fitek (R. ans., pp. 12-13). Von Behren was supervised by Bruce Livingood, the other fifty percent (50%) owner of Fitek (R. ans., p. 13).

36. Respondent received compensation from Fitek for legal services rendered (R. ans., p. 13; Ex. 22, p. 450).

37. During the time that Respondent "employed" von Behren, von Behren engaged in real estate and financial transactions in violation of the terms of von Behren's probation (R. test.).

38. On October 27, 28 and 29 and November 4, 2004, a probation revocation hearing was conducted in *State v. von Behren* (Exs. 20-23).

39. At the conclusion of the probation revocation hearing, the judge found that von Behren had violated the conditions of work release and ordered him to be incarcerated (Ex. 23).

#### Aggravating Factors and Claimed Mitigation

40. Respondent's misconduct as set forth above constitutes a pattern of misconduct.

41. Respondent failed to produce all required documents he was subpoenaed to produce at the probation revocation hearing.

a. Respondent testified at that hearing pursuant to subpoena (Ex. 21, pp. 209-23; Ex. 24, tab 39; R. test.). The subpoena required Respondent to produce:

All employment and/or independent contractor agreements and other documents concerning the employment and/or independent contractor relationship between Thomas Von Behren and Benjamin Houge or any corporation, LLC, partnership or other business concern in which Houge is or was a partner, officer, shareholder, incorporator, governor, or had any other interest between 2002 and the present; records documenting Von Behren's employment or

independent contractor status, W2 forms, W4 forms, 1099 forms, and documents showing Benjamin Houge's supervision of Thomas Von Behren in real estate and financial transactions.

(Ex. 24, tab 39.)

b. Pursuant to the subpoena, Respondent produced documents at the probation revocation hearing (Exs. 7; 8; 17; 26-32; 21, pp. 209-23; 24, tab 39). Most of the documents Respondent produced did not relate to Respondent's contractual arrangement with von Behren or to Respondent's representation of von Behren (Exs. 26-32).

c. During the hearing in the present matter before the undersigned, Respondent offered into evidence several documents as to which Respondent had initially claimed attorney-client privilege (Exs. 107-113). These documents involve and relate to the contractual relationship between Respondent and von Behren or to Respondent's supervision of von Behren. Respondent failed to produce these documents at the probation revocation hearing (R. test.).

42. During the hearing before the undersigned, Respondent testified to inconsistent and irreconcilable explanations for his failure to produce these documents (Exs. 107-113) at the probation revocation hearing. Respondent alternatively testified that he was busy and did not do a thorough enough search for the documents; that he believed the documents were covered by the attorney-client privilege (but he had produced in response to the subpoena other documents as to which he claimed privilege); and that the subpoena was not broad enough to cover these documents. These explanations are inconsistent and irreconcilable, and Respondent lacks credibility as to their persuasive merit.

43. Respondent made multiple efforts with the substantial purpose of delay in this disciplinary matter.

a. The petition arises out of complaints filed with the Director. As

part of the investigation of these complaints, the Director detailed the allegations against Respondent and requested Respondent to address these allegations (Ex. 34).

b. Respondent declined to respond fully, citing attorney-client privilege (Ex. 35). Respondent did not produce requested materials he subsequently acknowledged to be non-privileged (Ex. 40, p.1), nor a privilege log of alleged privileged documents. Instead, Respondent commenced an action in Ramsey County District Court (Ex. 36<sup>1</sup>).

c. The Director offered to resolve this dispute through a stipulated protective order (Exhs. 38 & 39). Respondent proposed a protective order that in no way related to the Director, but sought to constrain agencies prosecuting von Behren (Ex. 40).

d. On March 20, 2007, the Ramsey County District Court dismissed Respondent's action because it lacked jurisdiction (Ex. 41). Respondent did not appeal.

e. On July 6, 2007, Respondent signed a Stipulation of Benjamin S. Houge (Ex. 42). Respondent's stipulation reads:

Benjamin S. Houge, the Respondent in the above-referenced [lawyer discipline] matter, hereby stipulates and agrees that the date for the [Lawyers Professional Responsibility Board] Panel hearing as selected by the Panel Chair during the week of November 19, 2007, shall be a date certain. Respondent agrees not to seek any, and there shall be no, continuance, postponement, rescheduling, extension or the like of the hearing date.

(Ex. 42.) The Panel Chair selected November 19.

f. Despite his agreement not to do so, on November 14, 2007, Respondent served a petition for declaratory judgment and/or mandamus from

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<sup>1</sup> In the Ramsey County action, Respondent is identified as "S.H."

the Supreme Court (Ex. 43). The petition did not specifically identify how Respondent believed the procedures should be modified and did not specify the relief requested (Ex. 43).

g. On November 19, 2007, Respondent requested the Supreme Court to stay the Panel hearing pending resolution of Respondent's declaratory judgment and/or mandamus petition (Ex. 44). The Court denied the request that day (Exh. N). The Panel hearing was conducted on November 29, 2007 (Ex. 45).

h. On January 10, 2008, the Supreme Court appointed the undersigned as Referee to hear this matter (Ex. 46). On January 18, 2008, the undersigned directed the parties to appear for a telephone conference on February 6, 2008 (Ex. 47). Respondent failed to appear on February 6 (Ex. 48, p. 2).

i. On February 19, 2008, the undersigned ordered the parties to (1) exchange exhibit and witness lists on March 21, 2008, (2) appear on March 28, 2008, for a telephone scheduling conference and (3) appear on April 11, 2008, for the evidentiary hearing (Ex. 48). On March 21, 2008, Respondent served and filed a motion to delay the hearing. Respondent did not serve an exhibit list or witness list at that time despite the order that he do so.

44. Respondent refused to acknowledge the wrongful nature of his misconduct.

45. Respondent exhibited no recognition or remorse for his misconduct. To the contrary, Respondent offered a number of explanations and excuses, many implausible, for his conduct as set forth above. Respondent offered no evidence or assurance that misconduct similar to that described in these findings will not be avoided in the future.

46. Respondent has substantial experience in the practice of law (R. test.).

47. Respondent testified that he is familiar with the Minnesota Rules of

Professional Conduct (MRPC), believes that it is important for lawyers to follow these Rules, and believes that it is important for lawyers to be honest and candid in their dealings.

48. Respondent has substantial experience in the area of professional responsibility (R. test.). For more than 20 years, Respondent's practice has included legal malpractice matters (R. test.). Respondent has handled at least 50 such cases (R. test.). Respondent has hired experts on professional responsibility topics in at least 15 to 20 cases (R. test.). Virtually all of Respondent's legal malpractice work has been representing clients (R. test.). In particular, Respondent has been involved in bringing claims on behalf of clients who claimed that the lawyers got the clients involved with con men (Ex. 22, p. 461; R. test.). Respondent has been retained as an expert in professional responsibility matters at least 10 to 15 times (R. test.).

49. Respondent's strongest element of mitigation is his lack of prior discipline. The Referee understands that a respondent's history of discipline is independently weighed by the Supreme Court in fashioning the appropriate discipline. However, the Referee finds it important to note that Respondent has practiced in highly-contested fields of litigation that often generate professional complaints. In spite of this, Respondent has never been disciplined by the Supreme Court or the Director.

50. Perhaps relevant to mitigation, but far less weighty, is Respondent's testimony that:

- a. Relating to his relationship with von Behren:
  1. His dealings with von Behren were partially motivated by his concerns about von Behren's health; and
  2. He has suffered other adverse consequences from his relationship with von Behren.
- b. He has performed *pro bono* or quasi *pro bono* legal activities.
- c. He has engaged in charitable activities (some of these involved an

orphanage in Liberia, the pedigree of which appeared to the Referee to be cloudy).

### CONCLUSIONS OF LAW

1. Respondent's conduct in assisting a client to engage in fraudulent conduct in a criminal proceeding violated Rule 1.2(c), MRPC.<sup>2</sup>
2. Respondent's conduct in making false statements to tribunals violated Rule 3.3(a)(1), MRPC.
3. Respondent's conduct in offering evidence he knew was false violated Rule 3.3(a)(4), MRPC.
4. Respondent's conduct in knowingly making false statements violated Rule 4.1, MRPC.
5. Respondent's failure to make reasonable efforts to ensure that the conduct of his non-lawyer assistant was compatible with Respondent's professional obligations violated Rule 5.3(a), MRPC.
6. Respondent's ordering and/or ratifying of the misconduct of his non-lawyer assistant violated Rule 5.3(c), MRPC.
7. Respondent's conduct involving dishonesty, fraud, deceit and misrepresentation violated Rule 8.4(c), MRPC.
8. Respondent's conduct which was prejudicial to the administration of justice violated Rule 8.4(d), MRPC.
9. Respondent's pattern of misconduct aggravates the sanction for his misconduct.
10. Respondent's failure to produce all documents he was required to produce pursuant to the subpoena for the probation revocation hearing aggravates the sanction for his misconduct.

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<sup>2</sup> Respondent's misconduct occurred before October 1, 2005. Therefore, all citations to the MRPC are to the Rules as they existed before the amendments effective October 1, 2005.

11. Respondent's non-credible testimony during the disciplinary hearing in explanation of why he failed to produce all documents he was required to produce pursuant to the subpoena for the probation revocation hearing aggravates the sanction for his misconduct.

12. Respondent's refusal to acknowledge the wrongful nature of his misconduct aggravates the sanction for his misconduct.

13. Respondent's lack of prior discipline, despite his lengthy practice in fields particularly susceptible to professional complaints, mitigates the sanction for his misconduct.

### **RECOMMENDATION FOR DISCIPLINE**

#### Misconduct

Respondent on multiple occasions created and submitted false documents to, and made false oral representations to, the Court and governmental officials; testified falsely in court; and knowingly allowed a client to testify falsely in court without revealing the false testimony to the Court.

Respondent argues essentially that all of the elements of civil fraud have not been proven since the Director has not offered proof that the persons to whom the false representations were directed believed and acted in reliance upon them. This however misses the point that the professional misconduct is rooted in the false actions and non-actions of Respondent, regardless of whether the misconduct had its desired improper effects. For example, if an attorney authored exhibits in a criminal case designed to benefit a defendant client, testified falsely on his behalf, and allowed without correction testimony by the defendant known by him to be false, the misconduct could be found under the canons even if the fact finder nonetheless found the defendant guilty of the alleged crime.

Respondent further argues that certain terms such as "employee" and "paid"

were susceptible to the independent contractor, barter compensation arrangement that he actually maintained with von Behren. However the central thrust of his communications were false statements that the arrangement with von Behren involved that of an employer/employee with specific hours and cash payment with usual payroll deductions. All other representations must be viewed in the context of, and be reflective of, those basic false representations. The facts indicate that when subsequent court hearings threatened to uncover the true nature of Respondent's relationship with von Behren, they quickly changed course to evade disclosure of these false representations. Examples include von Behren's payments after the hearing with Judge Marrinan, and Respondent's sudden transition of his business relationship with von Behren from Respondent to the newly-formed Fitek entity after the false statements to Judge Bush (although Respondent nonetheless subsequently individually signed a paystub for von Behren to submit to the workhouse regarding his work release).

#### Appropriate Discipline

While recognizing the ultimate responsibility of the Supreme Court to determine the appropriate discipline, the undersigned has sought guidance from previous disciplinary cases.

The comparisons begin with Respondent's lack of prior discipline over his lengthy career. While a significant factor, it does not negate discipline for misconduct of the nature by Respondent.

The misconduct involved the misrepresentation of the nature of von Behren's business relationship with Respondent, a "single continuous course of conduct," language analogous with a limitation upon punishment in a criminal complaint. However, the misconduct involved multiple numbers and forms of misrepresentations, made to multiple courts and other governmental entities, over an extended period of time.

The undersigned concludes that an appropriate discipline would be suspension.

Examples of precedent suggesting longer periods of suspension are *In re Head*, 557 N.W.2d 167 (three-year suspension, stipulation by parties); and *In re Kaine*, 424 N.W.2d 64 (five-year suspension, aiding misappropriation of client assets). Examples suggesting lesser periods of suspension are *In re Jagiela*, 517 N.W.2d 333 (six-month suspension, multiple false representations relating to a single document); *In re Kopeska*, 638 N.W.2d 196 (six-month suspension, stipulation, single act of false sworn testimony); and *In re Salmen*, 484 N.W.2d 253 (one-year suspension, single incident of false sworn testimony in court).

After consideration of all factors, the undersigned respectfully recommends that:

1. Respondent Benjamin S. Houge be suspended from the practice of law in the State of Minnesota, ineligible to apply for reinstatement for a minimum of two years, pursuant to Rule 15, Rules on Lawyers Professional Responsibility (RLPR).
2. Respondent comply with the requirements of Rule 26, RLPR.
3. Respondent pay to the Director \$900 in costs, plus disbursements, pursuant to Rule 24, RLPR.
4. Reinstatement be conditioned upon:
  - (a) Completion of the minimum period of suspension;
  - (b) Compliance with Rule 26, RLPR;
  - (c) Payment of \$900 in costs, plus disbursements, pursuant to Rule 24, RLPR;
  - (d) Successful completion of the professional responsibility examination pursuant to Rule 18(e), RLPR;
  - (e) Satisfaction of the continuing legal education requirements pursuant to Rule 18(e), RLPR; and
  - (f) Clear and convincing evidence from Respondent that he is fit to practice law and that his misconduct is not apt to recur.

Dated: May 29, 2008.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "B. W. Christopherson", written over a horizontal line.

BRUCE W. CHRISTOPHERSON  
SUPREME COURT REFEREE