

FILE NO. A11-1715

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against HARVEY N. JONES,
a Minnesota Attorney,
Registration No. 52498.

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

The above-entitled matter came on for hearing on August 28, 2012, before the undersigned, acting as Referee by appointment of the Minnesota Supreme Court.

Kevin T. Slator appeared on behalf of the Office of the Director of Lawyers Professional Responsibility. Respondent Harvey N. Jones appeared personally, together with his attorneys, Harry A. Sieben Jr. and Michael M. Miller.

Based upon the evidence adduced at the hearing, the Petitions, the Admissions of Respondent, the briefs and arguments of counsel, and all the documents and records on file herein, the undersigned Referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in the State of Minnesota on September 16, 1974. He initially practiced with Harry Schoen, in Hastings, Minnesota, and then practiced with what is now the Sieben Polk firm over twenty years. He opened a solo practice in Hastings, Minnesota, in 2002 or 2003. When he went on his own, Respondent suffered a major loss of income, from over \$200,000 per year to \$50,000 to \$100,000 per year. Respondent tried unsuccessfully to maintain the same standard of living on the lesser income.

2. Respondent also suffered serious emotional challenges. His first wife, Peg, died in 1997 after more than 20 years of marriage. Although Respondent has since

remarried, he still grieves the death of his first wife. In 2007, Respondent was diagnosed with alcoholism, and he went through treatment at Hazeldon. His recovery has been successful, and Respondent makes no claim that his alcoholism is a mitigating factor for the misconduct at issue here.

Stillwell Matter

3. In November 2008, William and Susan Stillwell, Gary and Kimberly Vinje, and Terry Kramer jointly retained Respondent to defend them against a lawsuit brought by Laxman and Judith Sundae against the clients and others.

4. Respondent and the clients agreed that Respondent would bill for his representation at \$150 per hour. The Stillwells agreed to pay 40 percent of Respondent's fees, and the Vinjes and Kramer were to each pay 30 percent.

5. Respondent counterclaimed on behalf of the clients. On July 29, 2009, the court dismissed the Sundaes' case against the clients. The clients' counterclaim was not dismissed.

6. On July 13, 2010, the Sundaes' insurer, Auto Owners Insurance, agreed to pay \$10,000 to settle the clients' counterclaim. Auto Owners sent a check payable to Respondent in the amount of \$10,000. Because the check was mistakenly made payable to both Respondent and another attorney who had no involvement in the case, Auto Owners reissued the check in the same amount, payable to Respondent's lawyer trust account, on August 11, 2010.

7. The clients agreed that they would each receive \$3,333.33 from the settlement. Because Kramer had never paid any legal fees to Respondent and the Vinjes had not paid in full, Respondent asserts he did not owe Kramer any money from the settlement and only owed the Vinjes \$668.16. Respondent owed the Stillwells \$3,152.67.

8. On or about August 19, 2010, respondent deposited the \$10,000 check into his lawyer trust account. On the same day, respondent transferred the funds to his law

office business account in two checks in the amount of \$5,000 each. Thereafter, Respondent misappropriated the funds and did not pay it to the clients until November 2011.

N.P. Matter

9. On November 3, 2010, N.P. retained Respondent to represent him regarding an automobile accident that occurred on June 23, 2010. N.P. suffered serious injuries in the accident, including a traumatic brain injury. Under the retainer agreement N.P. signed, Respondent was entitled to a contingent fee of one-third of amounts recovered on N.P.'s behalf.

10. Respondent settled N.P.'s liability claim for \$50,000. N.P. signed a release of claims on January 25, 2011.

11. Respondent received a check in the amount of \$50,000 from Progressive Insurance, the insurer for the other driver. Respondent deposited the check into his law office trust account on January 26, 2011.

12. Respondent was entitled to a contingent fee of \$16,666 from N.P.'s settlement. By February 3, 2011, respondent had disbursed substantially all that fee to himself, leaving \$33,334 due and owing to N.P. Between February 3, 2011, and April 12, 2011, respondent disbursed \$10,100 from his trust account to N.P. by means of four checks. (Respondent claims to have disbursed an additional \$1,000 in cash to N.P. and paid \$500 in costs for another legal matter on N.P.'s behalf on dates that are not known.) After these payments, respondent continued to owe at least \$21,734 to N.P.

13. Respondent misappropriated this \$21,734 by issuing the following trust account checks totaling \$16,500 to himself:

<u>DATE</u>	<u>CHECK NO.</u>	<u>CHECK AMT.</u>
02/17/11	2154	\$7,500.00
02/24/11	2125	\$500.00
03/02/11	2166	\$1,000.00
03/17/11	2168	\$2,000.00
03/25/11	2172	\$2,000.00
04/12/11	2174	\$1,500.00
04/21/11	2175	\$2,000.00

14. In addition, on March 18, 2011, Respondent issued his trust account check no. 2169 for \$7,379 to K.C., an opposing party unrelated to N.P. for whom Respondent was supposed to be holding funds in his trust account.

15. By April 30, 2011, the balance in Respondent's trust account was only \$10.69. As noted, on that date Respondent owed N.P. a balance of at least \$21,734.

16. During the period January to November 2011, Respondent failed to account to N.P. for his funds in trust.

17. In or about November 2011, N.P. demanded to be paid the remainder of his settlement.

18. Respondent borrowed \$30,000 in order to repay N.P. and two other clients. Respondent deposited the funds into his trust account on November 11, 2011. Prior to the deposit, the balance in Respondent's trust account was \$30. On November 10, 2011, Respondent issued to N.P. a trust account check in the amount of \$21,734.

K.C. Matter

19. Respondent represented A.C. in a marriage dissolution proceeding. K.C. was the opposing party in that proceeding, and was represented by attorney Ellen Wiese.

20. A.C. and K.C. reached a stipulated settlement of their dissolution of marriage that the court approved on December 31, 2009. Under the agreement,

Respondent was to deposit into his trust account funds received from A.C.'s pension plan. From the proceeds, Respondent was to make a \$26,500 payment to K.C., retain an additional \$7,500 to cover K.C.'s expected tax obligation, and pay the remainder to A.C.

21. A.C., K.C., Respondent, and Wiese all agreed to modify their agreement so that K.C. would give Respondent \$30,490.99 to cover both the payment to A.C. and K.C.'s tax obligation. On March 1, 2010, Respondent deposited this \$30,490.99 into his trust account.

22. In March 2010, Respondent paid \$21,888.34 to A.C. and fees to himself of \$1,102.65, leaving a balance of \$7,500 in K.C. funds in his trust account.

23. On April 30, 2010, the balance in Respondent's trust account was \$8,028.80, comprised of the \$7,500 in K.C. funds and \$528.80 in unknown client funds. On that date, Respondent issued his trust account check no. 2143 for \$5,000 to himself. In so doing, Respondent misappropriated \$4,471.20 in K.C. funds.

24. On May 3, 2010, Respondent issued his trust account check no. 2144 for \$2,000 to himself, thus misappropriating additional K.C. funds.

25. On May 7, 2010, Respondent issued his trust account check no. 2145 for \$1,000 to an individual with no connection to K.C., thus misappropriating additional K.C. funds.

26. After Respondent's trust account check nos. 2144 and 2145 cleared, the balance in Respondent's trust account was only \$30.07.

27. During the period March 2010 to March 18, 2011, the balance in Respondent's trust account was never sufficient to cover the \$7,379 Respondent owed to K.C..

28. On March 18, 2011, Respondent issued K.C. a check in the amount of \$7,379. This check was funded with funds belonging to N.P. (see Paragraph 14, supra).

S.B.K. Matter

29. Respondent represented S.B.K. in matters related to his mother's estate. Respondent also represented the personal representative of S.B.K.'s mother's estate.

30. Beginning in January 2010 Respondent received for S.B.K. funds (a) to which S.B.K.'s mother's estate was entitled, and (b) to which S.B.K. was entitled in his individual capacity. Respondent properly and promptly remitted the funds to which S.B.K.'s mother's estate was entitled to the personal representative.

31. Respondent received and deposited into his trust account \$29,723.23 in funds to which S.B.K. was entitled in his individual capacity, as follows:

<u>DATE</u>	<u>AMOUNT</u>
01/25/10	\$5,512.86
02/23/10	\$5,009.00
05/18/10	\$19,201.37
TOTAL	\$29,723.23

32. Respondent misappropriated \$17,200 of S.B.K.'s funds by issuing the following trust account checks to himself:

<u>DATE</u>	<u>CHECK NO.</u>	<u>CHECK AMT.</u>
02/01/10	2133	\$2,700
02/03/10	2134	\$2,000
03/10/10	2140	\$5,000
05/21/10	2147	\$1,000
05/28/10	2148	\$5,000
06/04/10	2150	\$500
06/04/10	2151	\$500
07/09/10	2152	\$500

33. In addition, on May 25, 2010, Respondent issued his trust account check no. 2146 for \$7,500 to S.M.K., a client unrelated to S.B.K. for whom Respondent was supposed to be holding funds in his trust account.

34. As of July 10, 2010, the balance in Respondent's trust account was only approximately \$230. On that date, respondent continued to owe approximately \$24,000 to S.B.K.

35. S.B.K. died on or about July 24, 2012. On that date, Respondent held \$4,922.86 in his trust account of S.B.K.'s funds that he claimed actually belonged to the estate of S.B.K.'s mother, JoAnne Kerstetter, who died in December 2009. Respondent previously told the Director's Office the money belonged to S.B.K.

36. On August 24, 2012, Respondent paid the \$4,922.86 in five checks of \$984.60 each to S.B.K.'s estate and four other purported beneficiaries of JoAnne Kerstetter.

S.M.K. Matter

37. Respondent represented S.M.K. in a personal injury matter.

38. In January 2009, Respondent received \$50,000 in settlement of S.M.K.'s personal injury claim. Respondent deposited these funds into his trust account.

39. During the period January through May 2009, Respondent paid himself \$12,500 in fees and \$257.48 in costs from the S.M.K. proceeds. Respondent also disbursed \$29,742.52 to S.M.K.

40. After making these disbursements, \$7,500 of S.M.K.'s money remained in Respondent's trust account.

41. By way of the following trust account checks that he issued to himself, Respondent misappropriated S.M.K.'s funds:

<u>DATE</u>	<u>CHECK NO.</u>	<u>CHECK AMT.</u>
08/11/09	2111	\$1,000
10/02/09	2113	\$4,000
11/09/09	2118	\$2,500

42. By January 1, 2010, the balance in respondent's trust account was only approximately \$1,800. By May 7, 2010, the balance in respondent's trust account was only approximately \$30.

43. Respondent issued trust account check no. 2146 for \$7,500 to S.M.K., which cleared Respondent's trust account on May 25, 2010. As noted above (paragraph 33), funds belonging to Respondent's client S.B.K. were used to cover check no. 2146.

Non-Cooperation with the Disciplinary Investigation

44. On February 1, 2011, the Director mailed a notice of investigation along with a copy of the Stillwells' complaint to Respondent. The notice instructed Respondent to respond in writing to the complaint to the First District Ethics Committee (DEC) within fourteen days pursuant to Rule 25, Rules on Lawyers Professional Responsibility (RLPR), and Rule 8.1(b), Minnesota Rules of Professional Conduct (MRPC). Respondent failed to do so.

45. The DEC was unable to complete an investigation because of Respondent's lack of response and cooperation. The DEC referred the matter back to the Director's Office on May 17, 2011.

46. On May 20, 2011, an attorney with the Director's Office wrote to Respondent and instructed him to attend a meeting at the Director's Office on May 31, 2011, at 1:00 p.m. Respondent was also instructed to bring a written response to the complaint and trust account books and records for August 2010 to the meeting. Respondent failed to attend the meeting or have any contact with the Director's Office prior to the scheduled meeting. Respondent also failed to provide any of the requested materials.

47. On June 1, 2011, an attorney with the Director's Office wrote to Respondent about his lack of response and failure to appear for a meeting on May 31, 2011. Respondent was instructed to provide a response to the complaint and books and

records related to the Stillwell matter within ten days or to contact the Director's Office to discuss an extension. Respondent was advised that failure to respond or cooperate could be grounds for discipline. Respondent failed to contact the Director's Office or submit any materials.

48. An attorney with the Director's Office reached Respondent by phone on June 14, 2011. Respondent acknowledged that he received the letter dated June 1, 2011, and that he owed the Stillwells money. Respondent agreed to meet at the Director's Office on June 29, 2011, and to bring a complete response to the complaint and the materials requested in the Director's letter dated June 1, 2011. In a letter to Respondent dated June 16, 2011, the Director confirmed the phone conference and what Respondent was to bring to the June 29, 2011, meeting.

49. On June 29, 2011, Respondent contacted the Director's Office to reschedule the meeting for that day, stating he was "not ready." An attorney with the Director's Office agreed, and rescheduled the meeting for July 6, 2011.

50. Respondent appeared for the July 6, 2011, meeting. Respondent provided a written response to the Stillwells' complaint and two check stubs relating to the transfer of the \$10,000 described above, but provided no other trust account books and records. Respondent later provided the materials and books and records requested by the Director's Office but never provided a copy of trust account check no. 2156 in the amount of \$5,000 and books and records from his business account for August 2010.

51. On August 17, 2011, the Director served Respondent with charges of unprofessional conduct. Pursuant to Rule 9(a)(1), RLPR, Respondent's answer to the charges of unprofessional conduct was due to the Director and Panel Chair by September 6, 2011. Respondent failed to timely answer the charges of unprofessional conduct.

Trust Account Books and Records Matter

52. During the period January 1, 2010, to the present, respondent failed to maintain the books and records required by Rule 1.15, MRPC, and Appendix 1 to the MRPC. Specifically, respondent failed to maintain subsidiary client ledgers and monthly trial balances, and has failed to perform monthly trust account reconciliations.

Mitigating and Aggravating Factors

53. Respondent has shown by clear and convincing evidence that he suffers from a psychological problem (depression or depression and anxiety), that he has sought treatment for that problem, that the treatment has stopped the misconduct, and that the misconduct is unlikely to recur. Respondent did not show by clear and convincing evidence that respondent's depression and anxiety constituted a "severe" psychological problem or that it caused his misconduct.

54. Respondent's family physician testified Respondent suffered from major depression, but did not otherwise testify to its severity. Respondent's psychologist testified that Respondent's depression, particularly in conjunction with Respondent's anxiety disorder, was "serious"; he did not find the DSM-IV-TR categories of "mild, moderate, or severe" were helpful or meaningful. Standardized tests administered to Respondent, a PHQ-9 screening test and an MMPI-2, indicated Respondent's depression fell in the moderate range.

55. Although both testifying medical witnesses testified that Respondent's illness was a cause of the misappropriations, their testimony fell well short of clear and convincing. Dr. Anthony Walsh, Respondent's family physician, was only vaguely aware of the nature of the misappropriations and other misconduct, and simply testified that Respondent's depression would have altered his judgment and reasoning. In response to a leading question from Respondent's attorney, Dr. Walsh agreed that the depression was a direct cause of the misappropriations. It is impossible from Dr. Walsh's testimony, however, to understand the mechanism or causal chain that

connected the depression and the misappropriations. It appears that Dr. Walsh was merely extrapolating from Respondent's prior exemplary professional behavior and believed that only the depression could explain Respondent's deviation from that behavior to the admitted misappropriations that Dr. Walsh had been told of.

56. Similarly, Dr. J. Patrick Cronin, a licensed psychologist who examined and treated Respondent, diagnosed Respondent with depression and anxiety, but had only cursory knowledge of the misappropriations of client funds. He frequently sparred with counsel over the confusion of legal and psychological terminology, and at least twice failed to express that Respondent's depression and anxiety was a direct cause of the misappropriations. He finally opined that Respondent's depression kept him from realizing "how big a deal" taking the money was, and in that sense the depression "caused" the misappropriations.

57. The opinions of Dr. Walsh and Dr. Cronin as to causation fall short of clear and convincing evidence.

58. Respondent produced persuasive evidence from judges and clients of his good character, professionalism, and reputation for competence, honesty and probity as an attorney. Until the misappropriations underlying this disciplinary proceeding, Respondent had led an exemplary professional life.

59. Respondent expressed remorse in his response to the Stillwells' complaint over his theft of their funds. Respondent also testified during the evidentiary hearing that he is remorseful. Although the Director accurately points out that Respondent's remorse was late in developing, the undersigned is satisfied that it is now genuine.

60. Although there remains a disagreement over whether approximately \$5000 Respondent repaid to the heirs of the estate JoAnne Kerstetter should properly have been repaid to S. B. K., now deceased (see Paragraphs 35 and 36, supra), Respondent has now repaid all of the moneys he misappropriated. For the purpose of

this proceeding, Respondent should be deemed to have made full restitution.

Respondent began making restitution to clients almost immediately after beginning to misappropriate client funds in August 2009. However, respondent continued to misappropriate client funds for another year while making restitution and after the Director's investigation had commenced. Respondent did not make full (or nearly full) restitution until just before the evidentiary hearing in August 2012.

61. Respondent failed to cooperate with the disciplinary proceeding from February 2011 until November 2011.

62. The parties disagree on the proper characterization of Respondent's misconduct for purposes of aggravation. The Director accurately enumerates 25 separate acts of misappropriation over 18 months totaling approximately \$73,000.

Respondent argues that this materially exaggerates his misconduct:

"For example, if attorney A were to take \$500 from a client inappropriately for his own use, his books would show a deficiency of \$500 in the account that the attorney uses for his clients. Until that money is returned, the attorney will be short \$500 and every transaction that occurs from that moment on will constitute misappropriation. ... While the misappropriated amount is technically growing, the amount that was taken by the attorney stays the same." *Respondent's Reply Memorandum in Support of Mitigation* at 4, note 1 (emphasis in original).

Following Respondent's logic, however, still leaves 21 separate occasions when Respondent misappropriated funds by payment of client money to himself of \$51,142.03 over 18 months:

\$3820.83 from Stillwell and Vinjes on August 19, 2010. (\$5000 check reduced to value of admittedly unearned fees.

\$16,500 from NP in 7 transactions from Feb. 7, 2011 to April 21, 2011.

\$6471.20 from KC in 2 transactions, April 30, 2010, and May 3, 2010.

\$17,200 from S.B.K. in 8 transactions from Feb. 20, 2010 to July 9, 2010.

\$7500 from S.M.K. in 3 transactions from August 11, 2009 to Nov. 9, 2009.

By either method, the record discloses a pattern of serious misconduct occurring over an extended period of time.

CONCLUSIONS OF LAW

1. Respondent's conduct in the Stillwell matter violated Rules 1.15(a), (c)(3) and (c)(4), and 8.4(c), MRPC.
2. Respondent's conduct in the N.P. matter violated Rules 1.15(a), (c)(3) and (c)(4), and 8.4(c), MRPC.
3. Respondent's conduct in the K.C. matter violated Rules 1.15(a) and (c)(3), and 8.4(c), MRPC.
4. Respondent's conduct in the S.B.K. matter violated Rules 1.15(a), (c)(3) and (c)(4), and 8.4(c), MRPC.
5. Respondent's conduct in the S.M.K. matter violated Rules 1.3, 1.15(a), (c)(3) and (c)(4), and 8.4(c), MRPC.
6. Respondent's failure to cooperate fully with the Director's investigation violated Rule 8.1(b), MRPC, and Rule 25, RLPR.
7. Respondent's conduct in failing to maintain required trust account books and records violated Rule 1.15(c)(3), MRPC, and Appendix 1 to the MRPC.
8. Respondent's good character is a mitigating factor.
9. Respondent's remorse is a mitigating factor.
10. Because Respondent was not able to meet all five of the *Weyhrich* factors by clear and convincing evidence, Respondent's depression and anxiety are not mitigating factors under for the affirmative misconduct of misappropriation of client funds. *In re Weyhrich*, 339 N.W.2d 274 (Minn. 1983). The depression is a mitigating factor for the misconduct by omission counts of failure to keep proper trust account

records and non-cooperation with the Board investigation. See In re Mayne, 783 N.W.2d 153, 159-60 (Minn. 2010).

11. Respondent's failure to cooperate with the disciplinary proceeding from February 2011 until November 2011 is an aggravating factor. In re Wolff, 810 N.W.2d 312, 318 (Minn.2012).

12. The vulnerability of the victim of respondent's largest misappropriation, client N.P., who was a young auto accident victim with a traumatic brain injury, is an aggravating factor under In re Swerine, 513 N.W.2d 463, 467 (Minn. 1994).

13. Respondent's 18 month pattern of serious misconduct is an aggravating factor under In re Brehmer, 642 N.W.2d 431, 434 (Minn. 2002).

14. Restitution is not a mitigating factor as much of it was compelled and not made until after respondent was under investigation for misappropriation. See In re Stromwall, 481 N.W.2d 60, 62 (Minn. 1992).

15. Respondent's lack of prior discipline is not a mitigating factor under In re Rebeau, 787 N.W.2d 168, 176 (2010).

16. The attached Memorandum is incorporated herein.

RECOMMENDATION FOR DISCIPLINE

The Referee recommends that respondent be disbarred.

Dated: Oct 10 _____, 2012.

BY THE COURT:

W

WILLIAM A. JOHNSON
SUPREME COURT REFEREE