

FILE NO. A05-646

STATE OF MINNESOTA

IN SUPREME COURT

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In Re Petition for Disciplinary Action  
against Brian J. Peterson  
a Minnesota Attorney,  
Registration No. 85625.  
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**FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW AND**  
**RECOMMENDATION FOR**  
**DISCIPLINE**

The above-captioned matter was heard on the following dates: August 17, 2005, August 24, 2005, August 31, 2005, October 14, 2005 and November 1, 2005 by the undersigned acting as Referee by appointment of the Minnesota Supreme Court. Betty M. Shaw, Esq., appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Mark W. Gehan, Esq., appeared on behalf of the Respondent Brian J. Peterson, who was personally present throughout the proceedings.

The Director filed a Petition for Disciplinary Action against Respondent March 30, 2005. The Director filed a Supplemental Petition against Respondent May 10, 2005. The Director filed a Supplementary Petition for Disciplinary Action May 10, 2005 to add the allegation of Misappropriation of Funds. The majority of the allegations in this Petition involve Respondent's relationship and conduct in regard to his client Mildred Johnson. The Director has also alleged Respondent committed unauthorized practice of law while he was suspended in 2001. This charge does not involve facts relating to Ms. Johnson.

Respondent was temporarily suspended from the practice of law pending final determination of these disciplinary proceeding by Order of the Supreme Court dated June 15, 2005.

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**

**Background**

**Brian J. Peterson**

**I.**

Respondent was born August 18, 1950. As of the date of this hearing Respondent was 55 years old. Respondent graduated from William Mitchell Law School in 1976. Respondent was admitted to practice law in Minnesota on October 1, 1976. Respondent was employed with Leech Lake Legal Aid in the fall of 1976 for three years. In 1979, Respondent was employed with the Minnesota Office of the Public Defender in Chaska, Minnesota until 1982. Respondent partnered with another attorney (Mr. Hemmingsen) in general practice in Brooklyn Park from 1982-1987. In 1987, Respondent began a solo practice in Brooklyn Park, engaging in a general practice of law.

**II.**

Respondent is currently temporarily suspended from the practice of law pending final determination of these disciplinary hearings. Respondent was so suspended by an Order of the Minnesota Supreme Court dated June 15, 2005.

**III.**

Respondent has practiced in a general practice of law. Respondent is familiar with elder law and is familiar with the Minnesota Rules of Professional Conduct and the Minnesota Rules of Professional Responsibility.

#### IV.

Respondent practiced law out of his law office in Brooklyn Park, Minnesota as a solo practitioner until Respondent was suspended from the practice of law based on an Order of the Minnesota Supreme Court dated December 21, 2000. The Order gave Respondent until February 1, 2001 to settle matters with his clients before his first suspension was to take effect. In February 2001, Respondent began working at the law firm of Chadwick and Mertz (C&M) as a paralegal. Respondent's employment with C&M ended in November 2001. It is unclear whether Respondent was involuntarily terminated from his employment with C&M or whether his employment ended by mutual agreement. Respondent claims his departure from C&M was voluntary.

#### V.

Respondent next worked for his brother, attorney Mark Peterson, as a paralegal for approximately two weeks. After that time, on or about mid November 2001, Respondent began working as a paralegal as an independent contractor for attorney Donald Fraley. Donald Fraley is a solo practitioner located in Wayzata, Minnesota who practices a general practice of law.

#### VI.

Respondent was reinstated to practice law May 2, 2003 and placed on two years probation. After Respondent was reinstated to practice law May 2, 2003, Respondent ceased working with Donald Fraley and began worked on his own. Respondent remained practicing law in his solo practice until his suspension June 15, 2005, pending outcome of this matter.

**Mildred Johnson**

**VII.**

The subject of the majority of the current allegations arise out of Respondent's associations with a client, Mildred Johnson. Mildred Johnson is an elderly widow who was born in 1909. Respondent met Ms. Johnson in 1994 after Ms. Johnson had obtained Respondent's name from a Christian legal directory. Ms. Johnson retained Respondent in 1994 to prepare her Will, which Respondent drafted. Respondent obtained a list of Ms. Johnson's assets in 1995 totaling approximately \$108,000.00. This list represented an accurate list of her assets at that time.

**VIII.**

Ms. Johnson began living in an assisted living apartment complex called Maranatha Place in Brooklyn Center in 1988. Respondent helped Ms. Johnson move into her apartment at Maranatha Place. Respondent, in addition to being Ms. Johnson's attorney, was also a good friend to her. The two would talk often and Respondent would often visit Ms. Johnson on both a professional and a personal basis.

**IX.**

Respondent received a telephone call from Maranatha Place Resident Services Manager Kathleen McGuinty in April 2000. Ms. McGuinty informed Respondent that Ms. Johnson was not managing her financial affairs promptly and that she was beginning to forget to write checks for her expenses. Ms. McGuinty informed Respondent that Ms. Johnson wanted him to become her attorney in fact. Respondent asked Ms. McGuinty if Ms. Johnson had any other friends or relatives that would become her attorney in fact because Respondent was not

interested in becoming her attorney in fact. However, Ms. Johnson insisted that Respondent become her attorney in fact.

#### **X.**

On August 3, 2000, Ms. Johnson signed a Power of Attorney (POA) drafted by Respondent and naming Respondent as her attorney in fact. Despite naming Respondent as her attorney in fact, Ms. Johnson continued to manage her finances after signing the POA. Respondent personally visited Ms. Johnson on a friendly basis approximately one time per month after becoming her attorney in fact. Respondent did not charge Ms. Johnson for these visits. Respondent engaged in friendly conversation with Ms. Johnson and Ms. Johnson appreciated his company.

#### **XI.**

After breaking her pelvis in December 2002, Ms. Johnson moved from her assisted living apartment complex to the Maranatha Care Center (MCC) nursing home. Respondent met with Ms. Johnson after her fall and observed her to be angry, belligerent and "out of it". Respondent had never seen Ms. Johnson in such a mental state. Ms. Johnson began to miss making required bill payments and began to neglect her financial affairs. It became evident to Respondent that he would have to begin handling her financial affairs at this point.

#### **XII.**

Ms. Johnson refused to move out of her single room at MCC. After being contacted by MCC staff regarding this matter, Respondent was the only individual able to persuade Ms. Johnson to move to a double room so that she could be more social.

### **XIII.**

Shortly after her admission to MCC on December 22, 2002, Mildred Johnson was diagnosed by Dr. Angela Medina as suffering from moderately severe dementia. Ms. Johnson scored 17 out of 30 on a mental competency examination administered to her by medical staff at MCC upon her arrival. Such a score demonstrates moderately severe dementia, resulting in significant impairment to care for oneself, take care of one's finances and make decisions for oneself.

### **XIV.**

Dr. Medina testified that once dementia is observed, there is no treatment to reverse the effects and that the best medicine can do at this time is to attempt to halt its progression. Dr. Medina opined that Ms. Johnson's dementia would prevent her from ever returning to reside in a community as she had prior to her admission to MCC. On January 9, 2003, Ms. Johnson's physician Dr. Medina signed a document indicating that Ms. Johnson would require long term care for more than 180 days.

### **XV.**

Geriatric Nurse Shelley Alfson testified that Ms. Johnson was a patient of hers at MCC. Ms. Alfson supported the testimony of Dr. Medina that Ms. Johnson was diagnosed with moderately severe dementia upon her arrival to MCC. It was Ms. Alfson's opinion that in light of Ms. Johnson's condition, she would require permanent long term care for the rest of her life. It was Ms. Alfson's opinion that Ms. Johnson's condition would not improve with time.

## XVI.

A care conference was held on January 3, 2003 at MCC, which the Respondent attended. Also in attendance was medical staff from MCC, Geriatric Nurse Shelley Alfson and Lora Vassar, Ms. Johnson's social worker. The long term prognosis of Ms. Johnson was discussed at this conference. Ms. Alfson stated at the conference that, in her opinion, Ms. Johnson's condition would not improve and that she would require long term care for the rest of her life.

## XVII.

Ms. Vassar stated her opinion, at the conference, that Ms. Johnson's condition and long term diagnosis was such that she would need 24 hour long term permanent care in a nursing home. Ms. Vassar composed a document entitled "Social History" of Ms. Johnson on January 1, 2003 in which she commented "the hope is that Mildred will be able to return to her apartment at Maranatha Place". It is unclear why Ms. Vassar held two separate opinions.

## XVIII.

At the time Ms. Johnson was admitted to MCC, Respondent believed there was a possibility that she would be released from the nursing home. Respondent based his belief upon the comment by Ms. Vassar above in which Ms. Vassar stated "the hope is that Mildred will be able to return to her apartment at Maranatha Place", the discharge report from the hospital that treated Ms. Johnson's pelvis, which stated her prognosis for recovery was good and from the attitude of Ms. Johnson, who did not want to remain at MCC. Respondent stated he believed it was possible that Ms. Johnson could be moved to an assisted living center at some point in her future.

**XIX.**

Although it is unclear whether or not Ms. Johnson may return to independent or assisted living, the undersigned does not believe this fact is relevant to the underlying alleged rule violations.

**Spend-Down of Assets**

**XX.**

After Ms. Johnson was placed in MCC upon breaking her pelvis in December 2002, Respondent was informed by staff at MCC that Ms. Johnson was not taking care of her finances and that checks were not being paid. Respondent, at this time, assumed full control of Ms. Johnson's finances as her attorney in fact. Respondent immediately began to prepare for a "spending down" of her assets to qualify her for Medical Assistance. A spend-down is a term of art in the elder law field for the act of transferring an elderly person's assets to qualify that person for Medical Assistance. This is accomplished either by spending down a person's assets or transferring them to sheltered assets.

**XXI.**

Because Respondent was suspended from the practice of law at this time (suspended February 1, 2001 until May 2, 2003), Respondent retained Attorney Donald Fraley to perform the legal work that he could not regarding the Medical Assistance spend-down.

**XXII.**

In January of 2003, Respondent believed that Ms. Johnson had approximately \$108,000 in assets, as evidenced from an asset summary of 1995. The asset summary of 1995 indicated Ms. Johnson had the following assets:

American Capital Gov't Securities	\$16,155.34
TCF Checking	\$6,780.46
TCF CD	\$5,001.19
Daytons/Target Credit Union Savings	\$3,292.48
Daytons/Target CD	\$3,000.00
Daytons Stock	\$6,672.00
Nicholas Family of Funds	\$291.00
IDS Federal Income Fund	\$14,003.64
American Enterprise Life Annuity	\$12,756.06
National Covenant Properties	\$40,500.00
<b>Total</b>	<b>\$108,452.45</b>

**XXIII.**

Respondent believed he would have to spend-down approximately \$105,499 of Ms. Johnson's assets so that she could qualify for Medical Assistance. Respondent wanted to have her assets spent down to this amount by February 2003 so that she could begin receiving Medical Assistance as soon as possible. Respondent believed that the best method to spend-down the assets of Ms. Johnson would be through the purchase of an automobile, the purchase of furniture, the purchase of a pre-paid funeral account, the payment of bills and attorney and attorney in fact fees and the development of a Pooled Trust for any remaining funds not expended through the purchase of the automobile and furniture. Respondent calculated that Ms. Johnson would have to spend between six and seven thousand dollars per month for her long term care and estimated that she would expend all of her assets within one year if he did not spend-down her assets.

**XXIV.**

Respondent acknowledged that additional assets were known to him in early 2003, but he did not know their specific amounts. Respondent applied these funds to the spend-down of her assets and or deposited into the Pooled Trust account developed for her in January 2003.

## Automobiles

### XXV.

Acting as Ms. Johnson's attorney in fact, on January 20, 2003, as an early spend-down device, Respondent purchased a 1998 Infinity with check number 1003 drawn on Ms. Johnson's TCF Account #2852093655, the POA Account for Ms. Johnson, for \$10,018.38. The vehicle was titled in Johnson's and Respondent's name and jointly owned by Respondent and Ms. Johnson.

### XXVI.

Respondent stated that he originally purchased the Infinity believing that he was only entitled to claim \$4,500 as an allowable exemption for purposes of a Medical Assistance Application on behalf of Mildred Johnson. After obtaining oral information from Hennepin County Social Services that he could claim the entire amount of an automobile as an exempt asset for purposes of a Medical Assistance Application on behalf of Mildred Johnson if the vehicle was used for her purposes, he purchased an Acura. Specifically, Respondent spoke to a Hennepin County Social Services staff member January 21, 2003 and inquired about the limits, if any, on the purchase of a vehicle for a proposed medicare recipient in a nursing home. Respondent was told by the staff member that there was no dollar limit to the purchase of an automobile and was told "we don't care if she has a \$40,000.00 car, we presume it will be used to visit her or drive her around".

### XXVII.

On February 4, 2003 Respondent purchased the Infinity from Ms. Johnson for \$10,018.38. Respondent purchased the vehicle from Ms. Johnson for the same price as was paid for the vehicle in January. On February 16, 2003, Respondent transferred title of the Infinity

from Ms. Johnson to himself. There was no evidence produced at the hearing that the purchase of the Infinity automobile represented a self dealing violation. The Referee does not find any self dealing with respect to the purchase of the Infinity.

**XXVIII.**

On January 31, 2003, acting as Ms. Johnson's attorney in fact, Respondent purchased a 2003 Acura 3.5RL for \$40,383.25 with check number 1006 drawn on Johnson's TCF Account #2852093655, the POA Account. After purchase rebates, the final purchase amount of the Acura was \$37,300.00. The vehicle was titled in Johnson's and Respondent's name. Respondent purchased the vehicle for Ms. Johnson's benefit and to aid in the spend-down of her estate to make her eligible for Medical Assistance. The automobile was purchased as a new vehicle with approximately 26 miles.

**XXIX.**

On January 31, 2003, Respondent filed a Medical Assistance application on behalf of Ms. Johnson to Hennepin County Social Services requesting Medical Assistance become effective February 1, 2003. In the section where the applicant must list assets, Respondent stated that Ms. Johnson had an "auto". However, neither the value nor make of the automobile was listed.

**XXX.**

Respondent met with Rita Daigle February 18, 2003 in regard to clarifying information related to the Medical Assistance Application. Ms. Daigle provided Respondent with a letter that day requesting the following information: copy of checking statements as of February 1, 2003 from TCF and US Bank; verify cremation package purchase; produce the

automobile title; verify the Target CD balance as of February 1, 2003 and verify asset reduction to \$3,000.00.

**XXXI.**

Respondent responded to these requests of Ms. Daigle by a letter to her dated February 27, 2003. In the letter, Respondent provided a copy of a printout from US Bank dated February 1, 2003, reflecting a balance of \$54.50; a copy of a TCF account representing the closing of that account; a copy of the pre-paid cremation account from Washburn McReavy for \$820.00; a statement that the automobile title had been requested but not yet received; a copy of the CD from Target maturing on March 28, 2003 for \$3,000 and a statement that "offsetting her assets and debts would leave a net balance of less than \$3,000.00, unless the medicare appeal is granted, in which case she would still be under, if that amount is used to pay her share of the January or March 2003 coinsurance billings".

**XXXII.**

On March 4, 2003, Hennepin County Social Services issued a Notice to Respondent that the Medical Assistance Application of Mildred Johnson was approved as of January 1, 2003. The Notice stated that the spend-down was met on January 1, 2003.

**XXXIII.**

On March 10, 2003, Hennepin County Social Services Department of Economic Assistance issued a Notice that the Medical Assistance benefits for Ms. Johnson would be terminated and the case closed March 31, 2003 due to excess assets "if it cannot be substantiated that in fact this car is used for hospital and doctor appointments". The Notice, signed by Rita Daigle, stated that "It appears there was misinformation given to you regarding the exclusion of a motor vehicle". The Notice referred to the vehicle in question as the Acura, and commented that

“only the first \$4,500 is excluded when that vehicle is used to perform daily activities”. The Notice continued “Per my conversation with personnel at Maranatha, all of Mildred’s doctor appointments are held at the care center. In addition no one has come to visit or taken her for an outing of any kind.”

**XXXIV.**

Prior to drafting the March 10, 2003 letter, Ms. Daigle spoke to staff at MCC to verify if the Acura was being used in any way for the benefit of Ms. Johnson. Ms. Daigle asked MCC staff if the Acura was being used to transport Ms. Johnson to any appointments or matters to her benefit. Ms. Daigle was informed by MCC staff that Ms. Johnson’s condition prevented her from leaving MCC and that the Acura was not being used in any way to benefit Ms. Daigle.

**XXXV.**

Hennepin County Economic Assistance Department disallowed the purchase of the Acura as an invalid spend-down of funds and Mildred Johnson’s Medical Assistance Application was terminated March 18, 2003.

**XXXVI.**

Attorney Stuart Bear testified at the hearing in relation to the purchase and events following the purchase of the Acura. Mr. Bear was called to testify as an expert in the area of elder law. Mr. Bear is employed with the law firm of Chestnut and Cambronne P.A. and has been so employed since 1988. Mr. Bear practices primarily in the area of elder law and estate planning. Mr. Bear has handled approximately 3,000 estate planning and/or elder law matters. Mr. Bear has spoken often at Continuing Education courses for attorneys on topics of importance in elder law and estate planning. Mr. Bear has published two law review articles on elder law.

**XXXVII.**

Mr. Bear was of the opinion that the law regulating the automobile exemption when applying for Medical Assistance, while now requiring that the automobile be used by the recipient as part of essential daily activities, had no such requirement prior to May 2005 (when the Acura automobile was purchased by Respondent). Mr. Bear was of the opinion that Respondent acted lawfully in purchasing a new Acura on behalf of Ms. Johnson with the intent to claim the Acura as an exempt asset on the Medical Assistance Application.

**XXXVIII.**

Attorney Frances Long testified at the hearing in relation to the purchase and events following the purchase of the Acura. Ms. Long was called to testify as an expert in the area of Medical Assistance planning. Ms. Long is an attorney who practices primarily in Medical Assistance planning and elder law. Ms. Long has advised approximately two thousand clients on Medical Assistance planning issues, many of which involved the issue of spend-downs. Ms. Long has spoken often at Continuing Education courses for attorneys on topics of importance in Medical Assistance planning.

**XXXIX.**

Ms. Long stated that an automobile may be excluded as an asset when applying for Medical Assistance as long as the automobile is used by the recipient as part of her essential daily activities. Ms. Long was of the opinion that the circumstances surrounding the purchase and use of the Acura automobile in this case was not for her essential daily activities and thus would not render the automobile an excluded asset. Ms. Long testified that if an individual forgot to list such a non-excludable asset when applying for Medical Assistance, as soon as the

individual becomes aware of the oversight, the individual has a duty to report the item as an asset. Ms. Long stated that Medical Assistance will be stopped if it is discovered that non-excludable assets have not been reported.

**XL.**

Because the undersigned finds the testimony of both experts credible, the Referee cannot find the purchase of the Acura was an invalid Medical Assistance spend-down tool.

**XLI.**

Donald Fraley filed an 'Appeal of Medicare Determination Dated March 18, 2003' to appeal the decision to terminate Mildred Johnson's Medical Assistance Application. In a letter written by Donald Fraley to Richard Newstrom of Hennepin County Social Services Department of Economic Assistance (supervisor of Rita Daigle), dated May 2, 2003, the Medical Assistance Application appeal was withdrawn. The letter stated, "Since my filing the pending appeal, Mr. Peterson has discussed Mildred's situation with three other attorneys and me; although the appeal is believed to be meritorious, particularly if the vehicle in question [Acura] is modified to accommodate Ms. Johnson's disabilities, Mr. Peterson has determined not to proceed further with the appeal".

**XLII.**

In early May 2003, Respondent decided to sell the Acura to requalify Ms. Johnson for Medical Assistance. Respondent obtained quotes on the value of the 2003 Acura from two Twin Cities based Acura dealerships; Bloomington Acura and White Bear Lake Acura. Respondent obtained the highest quote from the sales manager of the Bloomington Acura dealership, who stated he would purchase the vehicle for \$27,300.00. Respondent spoke to

Richard Newstrom on the phone and orally provided him the quote he received from Bloomington Acura.

**XLIII.**

The Donald Fraley letter of May 2, 2003 to Richard Newstrom also indicated Respondent would either trade in the Acura, receiving the maximum \$27,300 current value in trade against the full price of another Acura (Acura MDX), or else keep the Acura and purchase it for \$27,300 from Ms. Johnson. The letter contained written confirmation of the quote from Bloomington Acura of \$27,300 and directed such confirmation to Richard Newstrom. Respondent was of the belief that in performing these actions, he was authorized by Hennepin County Social Services to purchase the Acura for \$27,300 and retain the Acura for his own use. While it may be true that the representative of Hennepin County Social Services did suggest to Respondent that Ms. Johnson would qualify for Medical Assistance upon resale and spend-down of \$27,300, that does not represent legally sufficient authorization for Respondent to personally purchase the vehicle for \$27,300 and retain the Acura for his own use.

**XLIV.**

On May 13, 2003, acting on behalf of the Peterson J Family Ltd. Partnership, Respondent purchased the Acura from Ms. Johnson for \$27,300. Upon purchasing the vehicle from Ms. Johnson, the vehicle had approximately 2,000 miles.

**XLV.**

Richard Hibbing testified on behalf of the Director in relation to the value of Acura automobiles. Mr. Hibbing works at Buerkle Acura in the Twin Cities of Minnesota as a used vehicle buyer and seller. Mr. Hibbing routinely buys and sells used Acuras as a regular part of his employment. Mr. Hibbing testified that average retail sales price of a 2003 Acura 3.5RL

with 2,000 miles in May 2003 would have been \$34,000. Mr. Hibbing testified that average private sales price of a 2003 Acura 3.5RL with 2,000 miles in May 2003 would have been \$32,000. Mr. Hibbing stated an average auction price of a 2003 Acura 3.5RL with 2,000 miles in May 2003 would have been \$31,000. Mr. Hibbing stated that the purchase a 2003 Acura 3.5RL with 2,000 miles in May 2003 for \$27,300 was purchasing the vehicle for a much lower price than it was worth and such a purchase, in his opinion, was a “steal”.

#### **XLVI.**

Respondent disagreed with the comments of Mr. Hibbing and stated that his Acura had none of the “bells and whistles” of a custom Acura as analyzed by Mr. Hibbing. Respondent stated that his Acura did not have a global navigation device as do some Acuras.

#### **XLVII.**

Mr. Hibbing provided rebuttal testimony on behalf of the Director. Mr. Hibbing acknowledged that the Acura in question did not have a global navigation device but stated that his price estimations took that fact into account. Mr. Hibbing stated that the model Acura purchased by Respondent comes standard with loaded features and that there are few “bells and whistles” that can be added that would affect the value of the automobile. Mr. Hibbing stated that he stood by his original estimations of the value of the Acura purchased by Respondent. The Court finds the testimony of Mr. Hibbing credible.

#### **XLVIII.**

It is clear from the evidence that even for a private party sale, the Respondent purchased the Acura vehicle for his personal use for less than fair market value. Though it is clear that a car dealer would not pay Respondent \$34,000 since the car dealer would have to re-

sell the vehicle, it remains evident that Respondent did not obtain the maximum price for the vehicle that he could have received, based upon all the testimony.

**Purchase of Furniture, Artwork, 2003**

**XLIX.**

Respondent acknowledged that the purchase of furniture was a major component of his spend-down of the assets of Ms. Johnson to enable her to become eligible to receive funds from Medical Assistance. Respondent contacted Thomas Moser Cabinetmakers in January 2003 and requested a catalogue be sent to him so he could browse through their furniture selections. Thomas Moser Cabinetmakers is a furniture store based in Maine that specializes in quality furniture. Respondent previously purchased furniture from Moser in 1991 and 1993 and appreciated the high quality of the furniture.

**L.**

Chris Orput, manager of Thomas Moser Cabinetmakers, testified on behalf of the Director. In January 2003, Respondent contacted him in regard to a large furniture order. Respondent wanted to purchase a large order of furniture as a surprise for his wife. Mr. Orput sent Respondent a catalogue and Respondent returned the catalogue with check marks next to the items he wished to purchase.

**LI.**

On February 11, 2003, Respondent ordered \$32,760 worth of Moser furniture. Among the items requested by Respondent included multiple book cases, multiple tables, multiple ottomans, a wall clock and two chairs.

**LII.**

Mary Ann Peterson, Respondent's wife, provided a depositions transcript in lieu of her live testimony. Mrs. Peterson was deposed August 5, 2005 in the presence of both attorneys for the parties. Mrs. Peterson made clear to Respondent that she did not know much about elder law and that she was morally opposed to the idea of a spend-down prior to knowledge of the Moser furniture purchase. At the time she discovered the Moser furniture purchase, Mrs. Peterson believed the furniture was purchased for her family home.

**LIII.**

Mrs. Peterson became aware of the Moser furniture purchase after hearing a telephone message left by Mr. Orput and after having spoken with Mr. Orput over the telephone. Mrs. Peterson was told by Mr. Orput that Respondent had ordered over \$32,000 worth of furniture. Mrs. Peterson was surprised by the size of the order. Mrs. Peterson told Mr. Orput, "What, has he (Respondent) lost his mind, there's no room in this house, our house is overflowing".

**LIV.**

Mrs. Peterson confronted Respondent over the large purchase of furniture and questioned Respondent on where such a large purchase would be stored, stating that the home was already full of furniture. Mrs. Peterson demanded the furniture be stored outside the home. This demand was due both to the size of the order and the fact Mrs. Peterson has allergies to new furniture that requires furniture be "off gassed".

**LV.**

During a telephone conversation with Mr. Orput, Mrs. Peterson commented as well to Mr. Orput that due to her allergies to furniture oils, the entire shipment of furniture would have to be "off gassed." Mr. Orput explained that off gassing involves leaving furniture in a separate dry room to allow the gasses from the oils to evaporate. Mr. Peterson demanded the furniture be "off gassed" before it could be delivered. Mr. Orput had numerous telephone conversations with Mrs. Peterson in regard to the shipment so that the order satisfied her demands including "off gassing" and the method of shipment.

**LVI.**

Mr. Orput verified that Respondent's previous order from Moser in 1993 also came with the requirement that the furniture be off gassed so that it would not affect the allergies of Respondent's wife.

**LVII.**

The first shipment of Moser furniture arrived on or about May 21, 2003. The furniture was initially stored outside the Peterson home in the gazebo for purposes of "off gassing" and because there was not enough room in the Peterson house. After the first shipment, Mrs. Peterson called Mr. Orput and was irate that the furniture was shipped with other materials in the truck that would affect her allergies. Mr. Orput stated that Respondent cancelled the final deliveries of the furniture and explained the reason for the cancellation was that he was not able to convince his wife to accept the delivery method of the furniture.

**LVIII.**

The Moser furniture was removed from the gazebo and placed in a storage facility off the Peterson property, although it is not clear when this storage occurred. Mrs. Peterson affirmed that none of the Moser furniture purchased in 2003 was ever used by the family.

**LIX.**

Respondent paid for the furniture through the following transactions. Respondent opened the TCF POA account on January 10, 2003 by transferring \$30,000 from Mildred Johnson's existing TCF account. On January 22, 2003, Respondent transferred an additional \$22,000 from Ms. Johnson's TCF account to the TCF POA account. Respondent paid for the February 11, 2003 Moser order with check number 1013 drawn on the TCF POA account.

**LX.**

Between February 11, 2003 and June 27, 2003, Respondent ordered additional furniture from Moser bringing the total amount of the order to \$71,160. Respondent paid an additional deposit of \$12,000 to Moser using his personal Visa credit card on May 8, 2003.

**LXI.**

On May 13, 2003, Respondent wrote check number 1036 from the TCF POA account to the Peterson's personal account for \$38,365. Respondent later justified this payment by claiming that the \$38,365 was to repay himself for charges he had made on his Visa card for the purchase of Moser furniture. On the memo of that check Respondent wrote "reimbursement for Visa charges." The credit card company unexpectedly imposed a \$12,000 limit on purchases with his card. The remaining of the \$38,365 was charged in several subsequent transactions involving artwork.

**LXII.**

Ms. Long testified that, in her opinion, spending an elderly person's money on furniture is not a wise spend-down of funds. Ms. Long stated that the purchase of furnishings could be considered an excludable asset only if the furnishings were actually used by the recipient. Ms. Long stated that since the furnishings purchased for Ms. Johnson were never actually used by Ms. Johnson, they could not be considered an excludable asset.

**LXIII.**

Mr. Bear testified that, in his opinion, spending an elderly person's money on furniture is a poor spend-down strategy. However, Mr. Bear did state that spending money on furniture could be an excludable asset. Mr. Bear did not elaborate on the specific items of furniture purchased in this matter.

**LXIV.**

Ms. Gunberg, Ms. Johnson's friend from church, testified and stated she has known Ms. Johnson for over 40 years. Ms. Gunberg stated that she assisted Ms. Johnson in moving into the Maranatha Place assisted living apartment complex in 1988. Ms. Gunberg stated that she was familiar with the furnishings of Ms. Johnson's apartment and that it was fully furnished with her own furnishings, including but not limited to a 7 piece bedroom set, a china cabinet, collectibles, a crystal lamp, many drawers and much high quality furniture.

**LXV.**

Ms. Gunberg stated that after Ms. Johnson began living at MCC, Respondent contacted the organization "Bible for Missions" to remove all the furniture from her apartment and donate it to the organization. Respondent told her to obtain some of Ms. Johnson's clothes

prior to the arrival of the organization to remove the furniture from the apartment. Ms. Gunberg retrieved several valuables from the apartment to hold for Ms. Johnson so the organization would not take them. Ms. Gunberg stated Ms. Johnson has very little furnishings in her room at MCC and explained that she has a chest of drawers that does not belong to her, no radio and a small, inoperative television set.

#### **LXVI.**

Kathleen McGuinty, the Resident Services Manager of the Maranatha Place when Ms. Johnson so resided, testified on behalf of the Director. Ms. McGuinty confirmed that Ms. Johnson had a fully furnished apartment containing her furnishings upon her move to MCC. Ms. McGuinty confirmed that the organization Bibles for Missions removed most of the furniture from her apartment at Maranatha Place at the direction of Respondent and stated that she did not believe Ms. Johnson knew that her furniture was being donated to the organization.

#### **LXVII.**

Respondent also purchased furniture from other sources as part of a spend-down of Ms. Johnson's assets. Respondent paid \$2,068.06 on February 4, 2003 and \$2,428 on March 5, 2003 from Ms. Johnson's funds to purchase furniture from the furniture company Seasonal Concepts. The furniture purchased was outdoor and patio furniture. The furniture was delivered to Respondent's home and stored at his home until its seizure in 2005.

#### **LXVIII.**

Respondent explained that he had stored the Seasonal Concepts furniture in his outdoor gazebo and in large plastic storage containers located on his property. Respondent stated that neither he nor his family ever used the Seasonal Concepts furniture. Mrs. Peterson stated that none of the Seasonal Concepts furniture was ever used by the family and that it

remained stored on the family's property. The Referee finds the statements of Respondent and Mrs. Peterson credible.

**LXIX.**

On September 29, 2003, Moser sent Respondent a refund check for \$6,275. Respondent deposited this amount into his personal account. Respondent testified that this represented partial storage costs for the Seasonal Concepts furniture which was kept at his house for a period of 29 months. Respondent charged Ms. Johnson an additional \$2,982 for such storage costs. Respondent thus retained \$9257 for storage of the Seasonal Concepts furniture. This amounts to a charge of approximately \$319.22 per month.

**LXX.**

Respondent indicated that he inquired into storage costs for the Seasonal Concepts furniture and was told that storage of that amount of furniture would cost approximately \$350 per month. The Referee finds the fees retained by Respondent for storage of the Seasonal Concepts furniture reasonable.

**LXXI.**

Respondent, on January 31, 2003 ordered \$5,050.25 worth of furniture from the Room and Board store. The furniture was delivered to the Peterson home on March 11, 2003 and funds for the furniture were taken from the Johnson Power of Attorney Account. There is no dispute the furniture was delivered to the Peterson home and stored there for a short period of time. Respondent returned all of the furniture purchased from Room and Board a few days after its delivery because it gave his wife allergies.

**LXXII.**

Respondent admitted to purchasing artwork on behalf of Ms. Johnson as a spend-down of her assets. Respondent has no knowledge of art and as such brought his wife with him to oversee the purchase of the art. Respondent has pottery in his house and never intended to keep the artwork.

**LXXIII.**

On September 24, 2003 Respondent charged \$1,926 to Primarius Ltd. for the purchase of a "Pente Model" bronze sculpture. On September 25, 2003, Respondent charged \$2,950 to the Jean Stephen Galleries for the purchase of a "Daughters of Odessa" acrylic sculpture. On September 30, 2003, Respondent charged \$15,650 to the Jean Stephen Galleries for the purchase of two sculptures entitled "Hope" and "Woman with Outstretched Arms". The sculptures were stored at Respondent's residence until their seizure in 2005.

**LXXIV.**

Kelvin Millar testified on behalf of the Director. Mr. Millar has owned an art gallery in the Twin Cities area since 1978. Mr. Millar testified to purchasing and selling artwork as part of his business since 1978. Mr. Millar testified that artwork is not a good long term investment. Mr. Millar stated that artwork "almost always has a lower resale value". Mr. Millar opined that the artwork and sculptures purchased by Respondent, the "Pente Model" bronze sculpture, the "Daughters of Odessa" acrylic sculpture, and the two sculptures entitled "Hope" and "Woman with Outstretched Arms" would not have resale values higher than the amount spent by Respondent on each piece, respectively.

**LXXV.**

Jean Danko testified on behalf of the Director. Ms. Danko is a co-owner of an art gallery in the Twin Cities for the past few years. Ms. Danko testified to purchasing and selling artwork as a part of her business. Ms. Danko stated that in her opinion, artwork is not a wise investment. Ms. Danko stated that artwork rarely appreciates much in value and that rarely is art re-sold for a profit. Ms. Danko stated that she would purchase artwork at approximately fifty percent of its value in order for her to make a profit reselling the art.

**LXXVI.**

The evidence indicates that though some of the furniture was stored at the residence of the Respondent, it was not purchased for his use. Further, though the evidence does suggest that the purchase of this furniture and artwork may not be a prudent Medical Assistance spend-down tool, it does suggest that it was purchased by Respondent as a spend-down tool. Therefore, the undersigned cannot find from all of the evidence that Respondent was involved in self dealing with these purchases.

**Pooled Trust**

**LXXVII.**

Development of a Pooled Trust for Ms. Johnson was another component of Respondent's spend-down plan of her assets. Respondent believed that he could spend-down the majority of her assets through the purchase of an automobile and through the purchase of furniture. In the event that Respondent could not spend-down all of the assets through purchasing an automobile and furniture, Respondent developed a Pooled Trust for Ms. Johnson to "hedge his bets" on the transfer of her assets to make her eligible to receive Medical Assistance.

**LXXVIII.**

Respondent developed the idea of a Pooled Trust because he believed it the best additional method in which to shelter her assets. Respondent admitted that he had never before established a Pooled Trust. Respondent did some research and discovered that a Pooled Trust was a new concept in the area of elder law and for the purposes of a spend-down and shelter of assets. Respondent contacted several attorneys in Minnesota to advise him on the use of a Pooled Trust for the purposes of a spend-down of assets for purposes of the Medical Assistance application.

**LXXIX.**

Respondent indicated that he was told by other attorneys that a Pooled Trust was a permissible tool for the transfer of funds of an elderly person applying for Medical Assistance, but that a Pooled Trust in that situation was not routinely used. Respondent was determined to establish the Pooled Trust for Ms. Johnson.

**LXXX.**

Respondent and Ms. Johnson signed a Pooled Trust Agreement January 30, 2003. Respondent named Donald Fraley as the trustee in the Pooled Trust agreement. The funds went into Donald Fraley's trust account. The interest earned on the funds were payable to an IOLTA (Interest on Lawyer Trust Account) account and therefore not for the benefit of Ms. Johnson. The Pooled Trust was established through Anchor Bank. The Pooled Trust did not contain any assets at the time of its execution in January 30, 2003. The Pooled Trust account was not listed as an asset in the first Medical Assistance application.

**LXXXI.**

The first deposit into the Pooled Trust account was on February 14, 2003 when \$8,000.00 was deposited into the account. Throughout the term of the Pooled Trust, funds were deposited and withdrawn into the account an irregular basis. Funds were withdrawn from the Pooled Trust agreement to pay for items such as outstanding attorney fees and attorney in fact fees.

**LXXXII.**

The actual balance of the Pooled Trust fluctuated from month to month. On April 25, 2003, the Pooled Trust account had funds of \$48,594.54, the highest recorded balance in the Pooled Trust account. Between the dates of February 2003 and December 2004, approximately one to as much as four or five transactions per month were completed using the Pooled Trust account. As of September 2, 2003, the date of the second Medical Assistance application, the Pooled Trust contained funds in the amount of \$20,640.59.

**LXXXIII.**

In a letter written by Respondent to Mr. Daniel Steinhagen, (Managing Attorney of the public conservatorship program in Minnesota) December 22, 2004, in response to information requests by Mr. Gruber on the managing of Ms. Johnson's funds, Respondent wrote Mr. Steinhagen the following: "We do not currently have available balances, deposits or withdrawals at any given time since the account was funded, due to a substantial data loss on this (and numerous other) files from prior time periods." Respondent included in that letter a check to Mildred Johnson, dated December 16, 2004, for \$5,000.00 representing the final balance of the Pooled Trust account.

**LXXXIV.**

Frances Long testified that, at the time Mr. Peterson established a Pooled Trust for Ms. Johnson, the idea of a Pooled Trust for assets of the elderly was not a common practice. Ms. Long opined that money invested in a properly operated Pooled Trust could be an excludable asset for Medical Assistance purposes. However, Ms. Long stated the Pooled Trust established by Mr. Peterson for Ms. Johnson did not meet the requirements of a valid Pooled Trust and thus was not an excludable asset.

**LXXXV.**

Ms. Long stated the Pooled Trust established by Mr. Peterson for Ms. Johnson did not meet the requirements of a valid Pooled Trust for the several reasons. First, the trustee of a Pooled Trust must be a non-profit entity. Since Mr. Fraley was listed as the trustee on the Pooled Trust, this was a violation. Second, income derived from the interest of such an account must go to the recipient. The interest derived from these funds was directed into an IOLTA (Interest on Lawyer Trust Account) account, thus violating this rule. Third, a recipient has to be medically evaluated and determined to be “disabled” for such a trust to be effective. Ms. Long stated that there was no such evidence Ms. Johnson was evaluated or found disabled for the Pooled Trust at hand. Ms. Long testified that because of these deficiencies, the Pooled Trust was not an excludable asset.

**LXXXVI.**

Stuart Bear agreed substantially with the testimony of Ms. Long that a valid Pooled Trust could be an excludable asset upon applying for Medical Assistance. Mr. Bear stated the Pooled Trust established by Mr. Peterson for Ms. Johnson was deficient for the same

reasons explained by Mr. Long. Mr. Bear stated that he has never used a Pooled Trust in his elder law practice and at the time Mr. Peterson established the Pooled Trust for Ms. Johnson, such a practice was not a common practice in elder law.

#### **LXXXVII.**

Respondent improperly established a Pooled Trust agreement for Ms. Johnson. The Pooled Trust agreement was flawed in the most basic requirements and, as such, was an improper spend-down tool. However, there is no evidence Respondent, by improperly creating the Pooled Trust, did so for any self beneficial purpose. Further, as set forth below, any funds transferred from that trust for purposes of paying of fees has not been determined to be a rule violation. Issues related to the propriety of failing to disclose the existence of the Pooled Trust in the Medical Assistance application are set forth below.

#### **Reasonability of Fees Charged**

#### **LXXXVIII.**

Respondent was suspended from the practice of law from February 1, 2001 until May 2, 2003. During the time Respondent was suspended from the practice of law, the evidence shows that Respondent performed work as Ms. Johnson's attorney in fact. As such, as set forth below in a separate section involving the unauthorized practice of law, the Referee finds insufficient evidence to support the charge Respondent practiced law during this period.

#### **LXXXIX.**

Submitted into evidence was Respondent's list of billable hours on Ms. Johnson's file from December 20, 2002 until December 3, 2004. This information is located in Exhibit 119. Respondent compiled the data of this exhibit. This period includes time when Respondent was suspended from the practice of law and when he was not. The timesheets break down the

amount of time Respondent billed Ms. Johnson for attorney fees and for his fees as attorney in fact. The timesheets indicate that when Respondent was suspended from the practice of law, Attorney Donald Fraley billed Ms. Johnson for attorney work. Respondent continued to bill Ms. Johnson for his work as her attorney in fact throughout this time.

**XC.**

Respondent testified that when he was practicing law, he would regularly charge clients approximately \$210 per hour for his services prior to his suspension in 2001. Respondent testified that when he was employed as a paralegal for Chadwick and Mertz, from February 2001 until November 2001, he regularly charged clients \$100 per hour for his work as a paralegal. Respondent charged Ms. Johnson a rate of \$110 for work performed as her attorney in fact. There was no testimony regarding the amount Respondent regularly charged after his reinstatement to practice law in May 2003. The Referee presumes, however, his rates were similar to his pre-suspension period subject to inflation adjustments.

**XCI.**

Respondent did not often charge Ms. Johnson for many of the services he provided. Respondent claims he did not charge Ms. Johnson for mileage when he drove her vehicle and charged her fifty cents per mile in mileage when he was not using her vehicle in performing services for her. Respondent claims that Ms. Johnson never complained about any of his billing practices. The Referee has no basis to disregard these statements.

**XCII.**

The Director presented no evidence that the fees Respondent charged as an attorney were unreasonable. Most of the relevant time period involved fees charged as an attorney in fact. The Director presented no evidence that the rate of \$110 per hour was

unreasonable. Because the evidence indicates that Respondent was acting in a professional capacity as an attorney in fact and because the evidence shows he did not charge for all his actions, the Referee can not find evidence of unreasonable fees.

**Medical Assistance Applications**

**Medical Assistance Application January 31, 2003**

**XCIII.**

As previously stated, Respondent estimated, based on Ms. Johnson's asset list of 1995, that she had approximately \$108,000.00 in assets as of the date of the Medical Assistance application.

**XCIV.**

Respondent stated he was aware of the following assets, but did not know the value of the following assets as of January 2003: American Enterprise Investment Account and a Primerica Account. Neither asset was listed as an income source in either application for Medical Assistance.

**XCV.**

On January 31, 2003, Respondent filed a Medical Assistance application on behalf of Ms. Johnson to Hennepin County Social Services requesting Medical Assistance become effective February 1, 2003. Respondent included the following assets in the Medical Assistance application:

Checking Account US Bank	\$2,750.00 - \$3,000.00
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**XCVI.**

Respondent included the following sources of income in the Medical Assistance application:

BGEA (Billy Graham) Gift Annuities	\$283.42
Dayton's Pension	\$114.89
Social Security Payments	\$791.00

**XCVII.**

In the application, Respondent did not disclose the purchase of the 1998 Infinity (purchased January 20, 2003), did not disclose the purchase of the 2003 Acura (purchased January 31, 2003) and did not disclose the existence of the unfunded Pooled Trust Agreement. In the asset section Respondent did list the word "auto". Also, the Medical Assistance application did not list the balance of the approximately \$108,000 in assets known by Respondent to be in existence at the time of the Medical Assistance application.

**XCVIII.**

In a letter written from Respondent to TCF Bank dated August 15, 2000, Respondent informs TCF Bank that he has recently become the attorney in fact for Ms. Johnson and encloses a copy of his Power of Attorney of Ms. Johnson. Respondent requested that future deposits and withdrawals which are routine monthly transactions be done on an automatic basis for the convenience of himself and Ms. Johnson. Thus, Respondent also was aware of the existence of the TCF account as of August 15, 2000. The TCF Account was not listed as an asset in the Medical Assistance application of January 2003.

**XCIX.**

In a letter written from Respondent to Ms. Johnson August 31, 2000, Respondent notes the existence of an IDS account on behalf of Ms. Johnson. Respondent notes that Ms. Johnson was looking for the account and that she would forward him information on the account

when she received it. There was no mention of an IDS account on the Medical Assistance application of January 2003.

**C.**

Respondent acknowledged the existence of a TCF Account #5851457202 statement from January 9, 2003, which listed the American Enterprise Annuity deposit under the section "Deposits and Other Additions" as follows:

409.04	Automated Deposit AM Enterprise Ann Payout
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**CI.**

There is no dispute Respondent did not list the annuity amount as an income source in the first Medical Assistance application. Respondent admitted knowledge of such statement and knowledge of such entry prior to filling out the first Medical Assistance application. Respondent stated the reason he did not include the annuity in the application was because he believed the reference "Ann Payout" meant annual payout and not annuity payout. The Referee does not find this explanation credible.

**CII.**

The application for Medical Assistance was approved March 4, 2003 by Hennepin County Social Services. However, on March 18, 2003, Hennepin County Economic Assistance Department disallowed the purchase of the Acura as an invalid spend-down of funds and terminated the application.

**CIII.**

Attorney Donald Fraley signed an "Appeal of Medicare" form March 21, 2003 in which he appealed the Notice of the Department of Economic Assistance. Pursuant to the filing

of the appeal, the Department of Economic Assistance delayed closing the file pending outcome of the appeal.

**CIV.**

Respondent claims that he received information from a staff member at the Hennepin County Social Services, prior to the purchase of the Acura, that there was no dollar limit to the amount an applicant for Medical Assistance can exclude as an asset upon the purchase of an automobile if that automobile is used to transport the applicant.

**CV.**

In a letter written by Donald Fraley to the Department of Economic Assistance, dated May 2, 2003, Mr. Fraley stated that "Mr. Peterson has determined not to proceed further with the appeal". The appeal was thus abandoned.

**Medical Assistance Application September 2, 2003**

**CVI.**

On September 2, 2003, Respondent, acting as Ms. Johnson's attorney in fact, signed a re-application for Medical Assistance. Respondent listed the following assets in the application:

Checking Account US Bank	\$3,000.00
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**CVII.**

Respondent included the following sources of income in the Medical Assistance application:

BGEA (Billy Graham) Gift Annuities	\$283.42
Dayton's Pension	\$114.89
Social Security Payments	\$791.00

**CVIII.**

The application indicated Ms. Johnson sold a vehicle (the Acura) for \$27,300 in May 2003 and transferred \$11,106 from Billy Graham Gift Annuities up to August 1, 2003.

**CIX.**

Respondent understated the balance in Ms. Johnson's US Bank account at \$3,000, rather than the actual balance on the account, which was as of September 2, 2003, \$7,306.75. Respondent did not disclose on the Medical Assistance application that he had purchased furniture and artwork with more than \$70,000.00 of Ms. Johnson's funds. Respondent did not disclose all of Ms. Johnson's assets, which he knew at this time to be approximately \$170,000.

**CX.**

Respondent did not disclose the existence or balance of the Pooled Trust on the second Medical Assistance application. The Pooled Trust had a balance of \$20,640.59 as of September 2, 2003.

**CXI.**

Respondent believed he did not have to disclose the existence of the Pooled Trust account on the first or second Medical Assistance application from information he received from reading the State Medical Manual. Respondent reviewed the State Medical Manual and believed from this manual that he did not have to list any exempt assets as assets in any of the Medical Assistance Application. He did not point to any such provision at the hearing. It was Respondent's belief that the Pooled Trust was an excludable asset when applying for Medical Assistance.

**CXII.**

Attorney Arthur Katzman provided expert testimony on behalf of the Director. Mr. Katzman is an Assistant Hennepin County Attorney. Mr. Katzman graduated law school from the University of Minnesota Law School in 1969 and has been employed as an Assistant County Attorney for over thirty years. Mr. Katzman has been reviewing trusts for over ten years in his capacity and has reviewed over seven hundred trusts.

**CXIII.**

Mr. Katzman stated that all assets must be included in a Medical Assistance Application, even assets that are excluded. Mr. Katzman identified that it is not up to the applicant to decide what funds are excluded assets, but that it is the job of the county to determine which assets are excluded for purposes of a Medical Assistance Application. Mr. Katzman stated that the Medical Assistance Application is clear the applicant must list all assets. Mr. Katzman stated he did not find any reasonable basis for which an applicant can avoid listing assets as required on the Medical Assistance Application. Mr. Katzman stated that as soon as an applicant becomes aware of an asset, the applicant has ten days in which to inform the County of the asset. Mr. Katzman stated it is illegal not to list an asset in a Medical Assistance Application even if the item is an excludable asset.

**CXIV.**

Mr. Katzman stated that the existence of a Pooled Trust account must be identified in an Medical Assistance application. It is Mr. Katzman's opinion that whether a trust account, including a Pooled Trust account, is an excludable asset or whether the trust account has any funds are not relevant to the duty to report the existence of the trust account. Mr. Katzman was of the opinion that any reasonable attorney would include the existence of a Pooled Trust

account on a Medical Assistance application. The Court finds the testimony of Mr. Katzman credible.

**CXV.**

Ms. Long and Mr. Katzman stated that if any assets are not listed on a Medical Assistance Application, but become aware to an applicant after submission of the application, the applicant must disclose the existence of the assets within ten days of their discovery.

**CXVI.**

The evidence demonstrates that Respondent had knowledge of a substantial amount of assets that he did not disclose on the second Medical Assistance application. Further, the Referee does not find credible Respondent's explanation that he did not believe he was legally obligated to disclose such assets because they are exempt. Both application forms for Medical Assistance submitted on behalf of Ms. Johnson suggest, on page 12 of the applications, that all assets and transfers of assets within a three year period (five years if the transfer involves a trust) must be disclosed. Respondent provided no satisfactory explanation for failure to do so.

**Failure to Pay Motor Vehicle Tax**

**CXVII.**

During the summer of 2004 (exact date unknown), Respondent was charged with Failure to Pay Motor Vehicle Tax Over \$300, in violation of Minn. Stat. § 297B.10(a) and Theft by Swindle in violation of Minn. Stat. § 609.52 in regard to the purchase and transfer of title of the Acura. Respondent entered into an agreement with the Hennepin County Attorney's Office to plead guilty to the charge of Failure to Pay Motor Vehicle Tax Over \$300, in violation of Minn. Stat. § 297B.10(a) in return for a dismissal of the Theft by Swindle charge. Pursuant to

the agreement of the parties, in return for the Defendant's guilty plea, the crime would be sentenced as a gross misdemeanor and not a felony.

**CXVIII.**

Respondent was found guilty of Failure to Pay Motor Vehicle Tax Over \$300, in violation of Minn. Stat. § 297B.10(a) by Judge of Hennepin County District Court Daniel Mabley, January 10, 2005, File No. 04-2339. The court found that, acting as Ms. Johnson's attorney in fact and on her behalf, Respondent on January 31, 2003 purchased a 2003 Acura 3.5RL. Ms. Johnson was in a nursing home at the time. The court found the vehicle was registered in Ms. Johnson's and Respondent's name April 3, 2003.

**CXIX.**

The trial court found that on May 22, 2003 a Correction of Title was filed with the Minnesota Department of Public Safety, naming the Respondent as the incorrect buyer "both personally and as the power of attorney for Mildred Johnson" and naming Respondent's wife as the correct buyer on behalf of the Peterson J. Family Ltd. Partnership. Respondent filed the Correction of Title to avoid paying Minnesota sales tax on the transaction. The court made a specific finding that Respondent's wife "acted at the direction of Defendant" Brian Peterson. The trial court found that the failure to report the May 13, 2003 transaction as a sale resulted in the failure to pay the Minnesota State tax in the amount of \$1,774.50.

**CXX.**

Respondent, in explanation of the findings of the court, claimed that he visited the Department of Motor Vehicles in Excelsior, Minnesota, and informed them that he was not in the family partnership but that his wife was. Respondent claims the staff member at the Department of Motor Vehicles instructed him to have his wife named as the correct buyer. Respondent

claims no one at the Department of Motor Vehicles informed him he would have to pay a tax on the transaction. The Referee finds that, while this may be true, it is of little defense to the Respondent's actions, especially considering Respondent's legal background.

**CXXI.**

The Referee finds sufficient evidence that Respondent's conviction by the Hennepin County District Court for Failure to Pay Motor Vehicle Tax Over \$300 does reflect adversely on Respondent's honesty, trustworthiness and fitness as a lawyer in other respects.

**Unauthorized Practice of Law**

**CXXII.**

Respondent was suspended from the practice of law effective February 1, 2001, until May 2, 2003. Respondent was reinstated to the practice of law from May 2, 2003 until June 15, 2005, when Respondent was temporarily suspended from the practice of law pending final determination of these hearings.

**CXXIII.**

Prior to his suspension in February 2001, Respondent maintained a legal office in Brooklyn Par, Minnesota, 7101 Northland Circle, where he engaged in a solo practice of law. In February 2001, Respondent began working at the law firm of Chadwick and Mertz (C&M) as a paralegal. Respondent was terminated from his employment with C&M November 2001. After Respondent's termination from C&M, Respondent worked for his brother, attorney Mark Peterson, as a paralegal for approximately two weeks. After that time, on or about mid November 2001, Respondent began working as a paralegal on an independent contractor basis for attorney Donald Fraley.

**CXXIV.**

Respondent and Craig Mertz signed a "Memorandum of Understanding" upon Respondent's commencement of work for C&M. The Memorandum of Understanding stated Ms. Bledsaw would be supervising Respondent during his work at C&M and that Respondent was not to meet or speak with prospective clients or make appearances on behalf of clients outside the presence of his supervising attorney, Ms. Bledsaw.

**CXXV.**

While employed with C&M, Respondent was supervised by attorney Lynette Bledsaw. Ms. Bledsaw, as part of her duties as an associate with C&M, was to supervise Respondent's work as a paralegal. Ms. Bledsaw accompanied Respondent to visits with prospective clients at his Brooklyn Park law office.

**CXXVI.**

While working for C&M as a paralegal, Respondent maintained his Brooklyn Park law office. Respondent continued to be listed in the Yellow Pages and in a Christian Legal Directory. Both listings had been placed prior to his suspension from the practice of law. Respondent continued to receive phone calls from prospective clients. Respondent continued to meet with prospective clients at his Brooklyn Park law office during this time. Respondent continued to post a sign on the door of his law office.

**CXXVII.**

Respondent testified that there was a sign outside his office door stating "Brian J. Peterson, P.A." but there was never any indication on the sign the office was a law office. Respondent stated that he had on multiple occasions placed tape on the "P.A." portion of the sign

but that the tape had on multiple occasions fallen off. Ms. Bledsaw could not recall whether the sign outside the law office indicated that indeed it was a law office. There exists conflicting testimony whether the sign indicated the office was a law office. It cannot be determined Respondent had a sign outside his office indicating he was an attorney during the time he was under suspension from the practice of law.

**CXXVIII.**

Theresa Fossell testified for the Director. Ms. Fossell stated that she was a former client of Respondent and contacted Respondent after seeing his name in a Christian Legal Directory. Ms. Fossell contacted Respondent in the fall of 2001, while Respondent was suspended from the practice of law. During Ms. Fossell's first contact with Respondent over the telephone, Ms. Fossell was not sure that Respondent was suspended from the practice of law. Ms. Fossell did state that Ms. Bledsaw represented her in court.

**CXXIX.**

William Saxowsky testified for the Director. Mr. Saxowsky stated that he called Respondent in 2001 in regard to a legal matter and that he met with Respondent in May 2001 at Respondent's legal office in Brooklyn Park. Respondent was suspended from the practice of law at this time. Mr. Saxowsky stated that he observed a sign outside Respondent's door indicating the office was a law office. Mr. Saxowsky stated that Ms. Bledsaw was present at the meeting but that he was told by Respondent that she would be helping out with the case. Mr. Saxowsky stated that it was his impression that Respondent was an attorney at that time.

**CXXX.**

Hennepin County Mental Health Professional Anne McNattin provided testimony on behalf of the Director. Ms. McNattin was appointed by Hennepin District Court to represent

parents Jonathan Yackel and Shirley Yackel as a parenting consultant upon a parenting time dispute. Ms. McNattin met with Respondent, Mr. Yackel and Mr. Donald Fraley at a hearing in February 2002. At this time, February 2002, Respondent was suspended from the practice of law. Respondent was assisting in the legal representation of Mr. Yackel under the supervision of attorney Donald Fraley. Ms. McNattin was under the assumption that Respondent was Mr. Yackel's attorney.

**CXXXI.**

On cross examination at the hearing, Ms. McNattin admitted that she based her opinion that Respondent was Mr. Yackel's attorney from observing Respondent conversing with Mr. Yackel in the courtroom. Ms. McNattin admitted that she did not observe the Respondent sitting at the counsel table during the hearing. Respondent observed the judge in the matter admonish Respondent for speaking at the hearing when he was not sitting at the witness table.

**CXXXII.**

Ms. Bledsaw testified that she had written Respondent several letters in which she voiced her concern of his behavior in speaking to clients without her permission. In a letter written to Respondent June 23, 2001, Ms. Bledsaw voiced her concern over Respondent having "a substantial amount of client contact" outside her presence. The letter instructed Respondent "to refrain from all client contact and conversations with clients unless it is a rare occasion in which you need to simply gather information." Said letter also indicated concerns over billing practices of Respondent in over charging clients for services C&M does not regularly charge clients.

**CXXXIII.**

Ms. Bledsaw stated at the hearing that it was her opinion that Respondent was holding himself out as an attorney and that he was providing legal advice to clients outside her presence and outside the presence of any attorney, all while he was suspended from the practice of law.

**CXXXIV.**

Respondent denies that he ever practiced law while he was under suspension. Respondent claims that any time he met with a client, a licensed attorney was present. Respondent claims he never gave legal advice to a client while on the telephone or in his office without an attorney present. Respondent claims he never signed a pleading, never appeared in Court while he was suspended, and never introduced nor held himself out to be a lawyer. Respondent claims that he "never crossed the line".

**CXXXV.**

The evidence is in significant dispute as to whether Respondent practiced law during the period in which he was suspended. Further, there is no evidence presented to the Referee as to the limits of which a paralegal may be involved lawfully with such actions as drafting documents, etc. Therefore, the Referee is unable to find that, at any period of time, Respondent was practicing law while under suspension.

**AGGRAVATING/MITIGATING FACTORS**

**Aggravating Factors**

**CXXXVI.**

Respondent has been suspended from practice of law three times. Respondent was first suspended by the Supreme Court of Minnesota December 21, 2000 for six months for dishonest conduct. This suspension took effect February 1, 2001. The Court found Respondent fabricated a client waiver of a homestead exemption and filed an attorney's lien against the client's homestead based upon the invalid waiver. See In Re Peterson, 620 N.W.2d 29 (Minn. 2000).

**CXXXVII.**

While suspended, the Director brought a second Petition for Disciplinary Action. On October 25, 2002, the Minnesota Supreme Court found Respondent altered a legal services agreement and a homestead waiver without the client's knowledge after the documents had been signed by the client. The Court found Respondent included new language in the agreement and changed the address on the homestead waiver. The Court found Respondent continued to hold \$47,102 of client funds and attempted to establish investment accounts in his own name. The Court Ordered the suspension of Respondent continue until at least February 1, 2003. See In Re Peterson, 658 N.W.2d 875 (Minn. 2003).

**CXXXVIII.**

On May 2, 2003, the Court reinstated Respondent and placed him on two years probation. On June 15, 2005, Respondent was temporarily suspended from the practice of law pending final determination of these disciplinary hearings. Thus, Respondent's actions in this case occurred either while Respondent was suspended from the practice of law or on probation.

**CXXXIX.**

Respondent has been admonished by the Director six times. Respondent was admonished August 8, 1985 for participating in the preparation of an estate planning analysis which would have benefited Respondent to the detriment of his client, billing his client for those services and subsequently suing his client to collect fees for those services.

**CXL.**

Respondent was admonished on January 7, 1992 for providing incomplete and misleading information to the court in regard to an affidavit filed in a dissolution file. Respondent was admonished February 7, 1994 for providing proposed Findings of Fact to opposing counsel and the court that failed to list a mortgage and attorney liens against a homestead of his client.

**CXLI.**

Respondent was admonished February 7, 1994 for violating an agreement with a client that Respondent would not charge his client over an agreed upon amount. He then sued his client for services rendered in excess of said amount. Respondent was admonished June 10, 1994 in regard to unprofessional conduct relating to failing to return a client's file and failing to promptly notify his client of receipt of a check. Respondent was admonished on December 9, 2002 for his conduct in failing to suggest or enter into a reasonable settlement negotiation, in bringing a paternity action contrary to law and in attempting to obtain lost wages without notice.

**CXLII.**

By Order of the Minnesota Supreme Court October 25, 2002, Respondent's suspension, which became effective February 1, 2001, was extended indefinitely. The Order of October 25, 2002 indicated that Respondent could not apply for reinstatement until February 1,

2003. By Order of the Minnesota Supreme Court on May 2, 2003, Respondent was reinstated to practice law in Minnesota and placed on two years probation. Respondent maintained in lawful status to practice until the Minnesota Supreme Court Order of June 15, 2005 that placed temporarily suspended Respondent from the practice of law pending final determination of these disciplinary hearings.

**Mitigating Factors**

**CLXIII.**

No mitigating factors were presented.

**CONCLUSIONS OF LAW**

1. **Rule of Conduct 1.7(b):** A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Findings of Fact XXV to XLVIII (Acura automobile), establishes by clear and convincing evidence Respondent violated Minnesota Rule of Professional Conduct 1.7(b).

The Director has failed to prove, by clear and convincing evidence, as demonstrated in Findings of Fact XLIX to LXXVI (Furniture and artwork purchases), LXXVII to LXXXVII (Pooled Trust) Respondent violated Minnesota Rule of Professional Conduct 1.7(b).

2. **Rule of Conduct 1.15(a):** All funds of clients or third persons held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable interest bearing trust accounts as set forth in paragraphs (d) through (g). No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein.
- (2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein.

The Director has failed to prove by clear and convincing evidence, as demonstrated by Findings of Fact XLIX to LXXVI, Respondent violated Minnesota Rule of Professional Conduct 1.15(a).

3. **Rule of Conduct 1.5(a):** A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

The Director has failed to prove by clear and convincing evidence, as demonstrated in Findings of Fact LXXXVIII to XCII, Respondent violated Minnesota Rule of Professional Conduct 1.5(c).

4. **Rule of Conduct 8.4(c):** It is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Findings of Fact

XCIII to CXVI (Omissions in the Medical Assistance Applications) establish by clear and convincing evidence Respondent violated Minnesota Rule of Professional Conduct 8.4(c).

5. **Rule of Conduct 8.4(b):** It is professional misconduct for a lawyer to: commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Findings of Fact CXVII to CXXI (Failure to Pay Motor Vehicle Tax) establish by clear and convincing evidence Respondent violated Minnesota Rule of Professional Conduct 8.4(b).

6. **Rule of Conduct 5.5:** A lawyer shall not:

- (a) practice law in a jurisdiction where to do so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The Director has failed to prove by clear and convincing evidence, as demonstrated by Findings of Fact CXXII to CXXXV, Respondent violated Minnesota Rule of Professional Conduct 5.5.

7. **Rule of Conduct 8.4(d):** It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. The Director has failed to prove by clear and convincing evidence Respondent violated Minnesota Rule of Professional Conduct 8.4(d). No evidence presented by the Director supports this charge.

8. **Rule of Conduct 3.4(c):** A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. The Director has failed to prove by clear and convincing evidence Respondent violated Minnesota Rule of Professional Conduct 3.4(c). No evidence presented by the Director supports this charge.

9. **Rule of Conduct 1.8(c):** A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. The Director has failed to prove by clear and convincing evidence Respondent violated Minnesota Rule of Professional Conduct 1.8(c). No evidence presented by the Director supports this charge.

10. Once misconduct is established, aggravating and mitigating factors should be considered in determining appropriate discipline. In re Boyd, 430 N.W.2d 663, 664-65 (Minn.1988). A lawyer's prior disciplinary history is relevant to determining appropriate sanctions, and we review the discipline to be imposed in light of the earlier misconduct. In re Ruffenach, 486 N.W.2d 387, 390 (Minn.1992); In re Getty, 452 N.W.2d 694, 698 (Minn.1990). Prior disciplinary action taken against an attorney is an aggravating factor. In re Disciplinary Action Against Milloy, 571 N.W.2d 39, 45 (Minn.1997). "The court expects an attorney to exhibit a renewed commitment to ethical behavior following a disciplinary proceeding." In re Iliff, 487 N.W.2d 234, 236 (Minn.1992). A finding in previous disciplinary proceedings that a lawyer committed conduct warranting discipline is, in proceedings under these Rules, conclusive evidence that the lawyer committed the conduct. Lawyers Professional Responsibility Rule 19(b)(3).

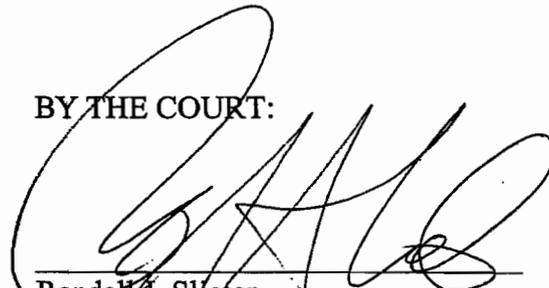
11. Findings of Fact CXXXVI to CXLII demonstrate Respondent's prior history of discipline. The prior discipline history of Respondent, some for which he was suspended during the commission of these new violations, is an aggravating factor in the Referee's recommendation.

**RECOMMENDATION**

Respondent shall be disbarred from the practice of law.

Dated: November 14, 2005

BY THE COURT:



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Randall J. Sheter  
Judge of District Court