

FILE NO. A07-563

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against JAMES L. BERG,
a Minnesota Attorney,
Registration No. 139105.

**STIPULATION
FOR DISCIPLINE**

THIS STIPULATION is entered into by and between Martin A. Cole, Director of the Office of Lawyers Professional Responsibility, hereinafter Director, and James L. Berg, attorney, hereinafter respondent.

WHEREAS, respondent has concluded it is in respondent's best interest to enter into this stipulation,

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the undersigned as follows:

1. Pursuant to the Rules on Lawyers Professional Responsibility (RLPR), the parties agree to dispense with further proceedings under Rule 14, RLPR, and respondent agrees to the immediate disposition of this matter by the Minnesota Supreme Court under Rule 15, RLPR.
2. Respondent understands this stipulation, when filed, will be of public record.
3. It is understood that respondent has certain rights pursuant to Rule 14, RLPR. Respondent waives these rights, which include the right to a hearing before a referee on the petition; to have the referee make findings and conclusions and a recommended disposition; to contest such findings and conclusions; and to a hearing before the Supreme Court upon the record, briefs and arguments.

4. Respondent withdraws the answer filed herein and, with the revision set forth below, admits the allegations of the March 13, 2007, petition for disciplinary action and June 12, 2007, supplementary petition for disciplinary action. Paragraphs 17 and 25 of the March 13, 2007, petition for disciplinary action are revised to reflect that respondent believed he had a client's authorization to sign the client's name and negotiate a settlement check. The client had not, in fact, extended such authority and respondent accepts his error in that matter.

5. Respondent understands that based upon these admissions, this Court may impose any of the sanctions set forth in Rule 15(a)(1) - (9), RLPR, including making any disposition it deems appropriate. Respondent understands that by entering into this stipulation, the Director is not making any representations as to the sanctions the Court will impose.

6. The Director and respondent join in recommending that the appropriate discipline is a five-year suspension pursuant to Rule 15, RLPR. The suspension shall be effective 14 days from the date of the Court's suspension order. The reinstatement hearing provided for in Rule 18, RLPR, is not waived. Reinstatement is conditioned upon: (1) payment of costs in the amount of \$900 plus interest and disbursements in the amount of \$583.66 plus interest, pursuant to Rule 24(d), RLPR; (2) compliance with Rule 26, RLPR; (3) successful completion of the professional responsibility examination pursuant to Rule 18(e), RLPR; and (4) satisfaction of the continuing legal education requirements pursuant to Rule 18(e), RLPR. In addition, respondent shall make restitution of \$5,000 to John and Kathy Remer and \$1,500 to Gerald Bastyr within thirty (30) days of the Court's suspension order.¹

7. This stipulation is entered into by respondent freely and voluntarily, without any coercion, duress or representations by any person except as contained herein.

¹ Respondent has indicated that he is currently obtaining a loan and that it is his intent to make full restitution to the Remers and Bastyr as quickly as possible.

8. Respondent hereby acknowledges receipt of a copy of this stipulation.

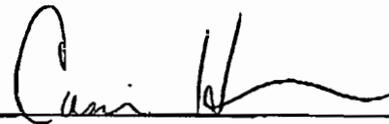
9. Respondent has been advised by the undersigned counsel concerning this stipulation and these proceedings generally.

IN WITNESS WHEREOF, the parties executed this stipulation on the dates indicated below. The attached memorandum is made a part hereof.

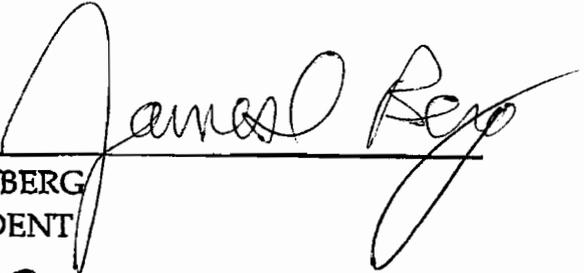
Dated: June 26, 2007.


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Dated: June 26, 2007.


CASSIE HANSON
ASSISTANT DIRECTOR
Attorney No. 303422

Dated: June 26, 2007.


JAMES L. BERG
RESPONDENT

Dated: June 26, 2007.


PHILLIP A. COLE
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MEMORANDUM

Respondent's misconduct warrants significant discipline. Attorneys who misappropriate client funds are generally disbarred. *In re Olson*, 577 N.W.2d 218, 220-21 (Minn. 1998); *see, e.g., In re White*, 677 N.W.2d 85 (Minn. 2004); *In re Keller*, 656 N.W.2d 398 (Minn. 2003); *In re Amundson*, 643 N.W.2d 280 (Minn. 2002). The Supreme Court has not always disbarred attorneys who have misappropriated client funds. *See, e.g., In re Hanvik*, 609 N.W.2d 235, 242 (Minn. 2000); *In re Pyles*, 421 N.W.2d 321, 327 (Minn. 1988); *In re DeVaughn*, 722 N.W.2d 927 (Minn. 2006) (indefinite suspension with no right to apply for reinstatement for at least 18 months for misappropriation of \$7,750 in client funds); *In re Rooney*, 709 N.W.2d 263 (Minn. 2006) (18-month suspension followed by three years of supervised probation for misappropriation of \$27,700 in client funds where attorney had no prior disciplinary history, exhibited genuine remorse, made complete restitution, performed significant pro bono work, and was a long-time public servant); *In re Disciplinary Action Against Hottinger*, 731 N.W.2d 827, *828 (Minn. 2007) (misappropriation mitigated by no prior disciplinary history in over 34 years of practice, genuine remorse for his conduct, complete restitution of all missing funds, significant pro bono work throughout the course of his legal career, and has been a long-time public servant). "In cases where this court has not imposed disbarment for extensive misappropriation of client funds, substantial mitigating circumstances were present." *In re Weems*, 540 N.W.2d 305, 308 (Minn. 1995). However, even in such cases, severe sanctions, typically lengthy suspensions, generally have been imposed. *See, e.g., Pyles*, 421 N.W.2d at 327; *In re Bernstein*, 404 N.W.2d 804, 805 (Minn. 1987).

In recommending suspension from the practice of law for a period of five years, the Director has taken several factors into consideration. Respondent suffers from depression and anxiety, which was likely an exacerbating factor in portions of respondent's misconduct. Respondent's depression is a product of respondent's terminal diagnosis of idiopathic dilated cardiomyopathy. This diagnosis was received by respondent before any of the events at issue in this proceeding. An interview with

respondent's cardiologist confirms respondent's dire medical situation. He has a 70 percent likelihood of dying within the next five years. In addition, respondent practiced law for twenty-five years with no prior disciplinary history, and respondent has made restitution in this matter to all affected clients save two. In this latter case respondent has arranged for funds to make restitution on July 2, 2007.

Depression is not a defense to misconduct. An attorney who raises a psychological disability must prove five factors: (1) that the attorney has a severe psychological problem, (2) that the psychological problem was the cause of the misconduct, (3) that the attorney is seeking treatment, (4) that the treatment has arrested the misconduct, and (5) the misconduct is not likely to recur. *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983).

Respondent likely meets the first criteria. Respondent's medical records reflect a history of depression and anxiety. Respondent was first diagnosed with a major depressive disorder in 2004, which coincided with a deterioration in respondent's general quality of living due to his diagnosis of idiopathic dilated cardiomyopathy. Over the course of the next several years, respondent was prescribed various prescription drugs, including Lexapro and Zoloft to treat his depression, although it appears that respondent did not regularly adhere to the recommended prescription doses. In 2005, respondent had a biventricular pacemaker implanted in his heart. Respondent's medical records show that his depression increased due to fear of premature death. Respondent continues to treat with his cardiologist for depression.

Respondent is unable to establish the remaining *Weyhrich* factors. Some of respondent's misconduct, such as client neglect and non-cooperation, may have been exacerbated by his depression and anxiety. There is substantial doubt that respondent's intentional misconduct, such as misappropriation and misrepresentation, were caused by either depression or anxiety. Respondent has also not regularly followed through with all recommended treatment, including taking his medication as prescribed.

Respondent's medical records show that he has missed appointments with his treating physician.

Where an attorney presents evidence of a psychological problem but fails to establish all of the *Weyhrich* factors, this Court has on occasion still taken such evidence into consideration when determining the appropriate discipline to be imposed. *See, e.g., In re Bergstrom*, 562 N.W.2d 674 (Minn. 1997) (attorney's depression played role in his misconduct and there was evidence that attorney had made improvements in both his psychological condition and his legal practice despite attorney's failure to establish all five factors under *Weyhrich*). Despite the fact that respondent could not meet all of the *Weyhrich* factors, the Director took respondent's evidence of a psychological problem into consideration when determining whether a lengthy period of suspension versus disbarment was warranted. Given that respondent's depression may have had some causative relationship to his passive misconduct, a lengthy period of suspension appears appropriate in this matter. *See, e.g., In re Jellinger*, 655 N.W.2d 312 (Minn. 2002) (attorney who claimed untreated depression in mitigation for misconduct, including misappropriation of client funds and false statements, disbarred, which was stayed subject to an indefinite period of suspension for a minimum of two years).

The Director has also taken respondent's current physical condition into consideration. Respondent has been given a terminal diagnosis of congestive heart failure. The Director spoke with respondent's treating cardiologist, Dr. Scott W. Sharkey, MD, who indicated that respondent's current heart condition essentially functions at one fourth of the average person's heart and that there is 70 percent likelihood that respondent's heart condition will prove terminal within the next five years. Although Dr. Sharkey clearly stated that respondent's heart condition was not causally connected to respondent's intentional acts of misconduct, Dr. Sharkey indicated that it had resulted in a significant deterioration in the quality of respondent's life, which may have impacted respondent's ability to effectively handle client matters.

Dr. Sharkey further indicated that respondent's fatigue, depression and anxiety may have exacerbated his non-cooperation in this matter.

Finally, Dr. Sharkey stated that respondent would be physically capable of participating in a disciplinary hearing, but that he might require frequent breaks to alleviate stress and anxiety. Respondent's medical records indicate that Dr. Sharkey advised respondent to apply for Social Security Disability in 2006, however, respondent continues to maintain a full time solo practice. Since Dr. Sharkey stated that respondent is capable of participating in the disciplinary proceedings, respondent's physical condition does not rise to the level of a condition requiring a transfer to disability inactive status pursuant to Rule 28, RLPR. The Director still took respondent's physical deterioration and susceptibility to stress into consideration and determined that a stipulated disposition is most appropriate in this matter. *See, e.g., In re Oddan*, 474 N.W.2d 596 (Minn. 1991) (attorney who mishandled estate matters, misappropriated client funds, practiced law while CLE suspended, failed to disclose conduct of another suspended attorney, and failed to cooperate in the disciplinary investigation suspended indefinitely for a minimum of three years in view of mitigating evidence concerning the effects of multiple sclerosis).

Finally, the Director took respondent's lack of disciplinary history and willingness to make restitution into consideration in determining the appropriate discipline. Respondent has also agreed in the stipulation for discipline to make prompt restitution of the \$5,000 to John and Kathy Remer and \$1,500 to Gerald Bastyr. Respondent's counsel has indicated that respondent is in the process of obtaining a personal loan to make restitution on these matters. For the above-reasons, suspension for a period of five years is appropriate in this matter.