

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against ALBERT A. GARCIA,
a Minnesota Attorney,
Registration No. 219472.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition upon the parties' agreement pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 25, 1991. Respondent currently practices law in Minneapolis, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

DISCIPLINARY HISTORY

A. On March 22, 2006, respondent received an admonition for failing to place an advance fee payment into his client trust account and failing to comply with the requirements for a nonrefundable fee agreement, in violation of Rule 1.15, Minnesota Rules of Professional Conduct (MRPC).

B. On February 8, 2006, respondent was suspended from the practice of law, effective February 22, 2006, for a period of 30 days for failure to supervise a non-lawyer employee resulting in a forged signature on a document being filed with the district

13. Renville became dissatisfied with respondent's representation and decided to retain attorney Mary McMahon to represent him. McMahon prepared a substitution of counsel form, which Renville signed and returned to her on February 21, 2006. On March 3, 2006, McMahon forwarded the substitution of counsel forms to respondent and asked him to execute and return them. At the time that McMahon sent the substitution of counsel, respondent had been suspended since February 22, 2006.

14. In early March 2006, McMahon contacted the district court administrator about Renville's case and learned that there was a March 20, 2006, hearing date on Renville's criminal matters.

15. On March 8, 2006, respondent sent Renville a letter acknowledging receipt of the substitution of counsel forms. Respondent alleged in his letter that he had signed the substitution of counsel forms; however, respondent did not forward them to the court administrator.

16. Since respondent failed to return the substitution of counsel form, Renville was forced to send a letter, dated March 23, 2006, to the district court administrator indicating that he had terminated respondent; that respondent had failed to return a substitution of counsel form that had been sent to him; and that McMahon was his counsel of record. On March 24, 2006, the district court administrator sent McMahon and respondent a letter confirming receipt of Renville's letter and directing that the substitution of counsel forms be filed with the court. Respondent still failed to file or return the substitution of counsel forms.

17. On March 26, 2006, Renville filed an ethics complaint with the Director alleging that respondent had refused to sign and return a substitution of counsel form.

18. On March 30, 2006, McMahon sent respondent a second letter again requesting the substitution of counsel forms and that respondent forward Renville's client file. McMahon also enclosed a copy of the letter from the district court

court and failure to refund the unearned portion of a client retainer in violation of Rules 1.15(c)(4), 1.16(d), 3.4(b), 5.3(b) and (c), and 8.4(c) and (d), MRPC.

FIRST COUNT

Failure to Comply with Rule 26, RLPR

1. On February 8, 2006, the Supreme Court issued an order suspending respondent from the practice of law for a period of 30 days. Respondent's suspension was to take place effective 14 days from the date of the Court's order. Respondent's suspension became effective February 22, 2006.

2. Pursuant to Rule 26(b) and (c), RLPR, respondent was to notify all clients in litigation of his suspension from the practice of law by no later than February 18, 2006.¹ On February 22, 2006, respondent submitted a notarized affidavit to the Director certifying that he had notified all current clients of his suspension pursuant to Rule 26(b), RLPR. On March 10, 2006, respondent submitted an amended notarized affidavit certifying his compliance with Rule 26, RLPR.

3. Respondent provided the Director with a copy of a letter dated February 18, 2006, and a copy of a certified mail slip, which respondent claims was sent to John Raymond Renville in order to inform him of his suspension. Respondent did not provide a copy of a certified mail return slip indicating that Renville had signed for and received the letter.

4. Respondent had been retained to represent Renville in a criminal matter as further outlined in paragraphs 8-17 below. Renville did not receive any correspondence by respondent notifying him of his suspension. Respondent should have notified Renville of his suspension by no later than February 18, 2006, pursuant to Rule 12(c), RLPR. Renville learned of respondent's suspension from the practice of law as follows:

¹ Rule 26(c), RLPR, requires a suspended attorney to notify clients in pending litigation within 10 days of the Court's order issuing the suspension.

a. In mid-February 2006, Renville became dissatisfied with respondent's representation and decided to retain attorney Mary McMahon to represent him. McMahon prepared a substitution of counsel form and mailed it to Renville, who signed the document on February 21, 2006, and returned it to her in the mail.

b. On March 3, 2006, McMahon forwarded the substitution of counsel forms to respondent and asked him to execute and return them. McMahon also indicated in the letter that she had learned from the district court administrator that there was a March 20, 2006, hearing date on Renville's criminal matters, and that respondent would not need to make an appearance at the hearing.

c. On March 8, 2006, respondent sent Renville a letter acknowledging receipt of the substitution of counsel forms. Respondent stated, "Although I was perplexed by your desire to change counsel, having signed my standard general availability non-refundable fee contract, and paying most of the fee—I nevertheless signed the substitution." Respondent's letter does not mention his suspension from the practice of law or otherwise indicate that he had provided Renville with the required notice of his suspension.

d. In mid-March 2006, McMahon contacted the district court administrator in order to continue the March 20, 2006, hearing date. McMahon was informed by the court administrator that respondent had already continued the hearing date in Renville's case to April and that respondent was suspended from the practice of law.

e. On March 15, 2006, Renville contacted McMahon and left a voicemail stating that respondent refused to withdraw or refund any portion of his retainer. Renville asked McMahon to act as co-counsel with respondent, since he had no choice but to pay for respondent's legal services. That same day McMahon sent Renville a letter stating that she was unable to serve as co-counsel

with respondent. Renville then called McMahon asking why she could not assist him. At this time, McMahon informed Renville that the district court administrator had told her that respondent was suspended. This was the first time that Renville learned of respondent's suspension. McMahon agreed to represent Renville as further outlined in paragraphs 8-17 below.

5. Respondent's conduct in failing to notify a client of his suspension from the practice of law pursuant to Rule 26, RLPR, violated Rules 1.4, 3.4(c) and 8.4(d), MRPC.

SECOND COUNT

Unethical Provisions in Fee Agreement

6. On or about August 25, 2005, Renville signed a written fee agreement with respondent which provided for a nonrefundable retainer of \$15,000 of which Renville paid a total of \$12,000. Respondent's fee agreement with Renville contained the following provision:

Even if Garcia [respondent] is forced to terminate said representation because of court order, conflict, **licensure issue** (emphasis supplied), said fee is non-refundable and client is deemed to consent to said termination.

At the time Renville signed the fee agreement, respondent was already the subject of an April 11, 2005, petition seeking his suspension from the practice of law.

7. On January 17, 2006, respondent signed a stipulation for discipline that would suspend him from the practice of law for 30 days. Respondent was subsequently suspended from the practice of law effective February 22, 2006. Respondent refused to refund any portion of the \$12,000 that Renville paid him, which constituted an unreasonable fee as further discussed in paragraphs 10 and 17 below.

8. Respondent's inclusion of the provision stating that any fee paid by Renville would be nonrefundable in the case of licensure issues when respondent was

the subject of a petition seeking his suspension from the practice of law directly conflicts with respondent's ethical obligations under Rule 1.5(a), MRPC, which requires that an attorney's fee be reasonable.

9. Respondent's conduct in including a provision in his fee agreement that a paid retainer would not be refundable in the event of his suspension, when respondent was the subject of a petition for discipline seeking his suspension at the time the fee agreement was signed violated Rules 1.5(a) and 8.4(d), MRPC.

THIRD COUNT

Unreasonable Fee and Failure to Take Reasonable Steps to Protect a Client's Interests Upon Termination of the Representation

10. John Raymond Renville was charged in three criminal matters stemming from the theft of a vehicle, possession of a firearm as a convicted felon, and fleeing a police officer.

11. On or about August 25, 2005, Renville retained respondent to represent him on all three criminal matters. Renville signed a written fee agreement which provided for a nonrefundable retainer of \$15,000 of which Renville paid a total of \$12,000.

12. Respondent made one court appearance on behalf of Renville which was a pretrial hearing that occurred on October 17, 2005. Respondent made no motions on behalf of Renville, made no discovery demands, and also continued then waived Renville's right to a contested omnibus hearing.² Respondent met in person only twice with Renville, once during the October 17, 2005, hearing, and a second time on January 23, 2006.

² The Director requested a copy of respondent's entire client files on all three criminal matters. Review of the files showed no discovery requests or motions on behalf of Renville. Attorney Mary McMahon, who was substituted as counsel for Renville after respondent's termination, also verified that no discovery, requests for discovery or motions were present in the client files she received from respondent.

administrator. On April 7, 2006, McMahon received the signed substitution of counsel forms from respondent, who had signed the forms on March 7, 2006.³

19. During this period, Renville also contacted respondent and requested a refund of the unearned retainer. Respondent refused to refund any portion of the unearned retainer. Respondent's retention of the entire \$12,000 constitutes an unreasonable fee in light of the legal services provided and the fact that respondent became suspended from the practice of law.

20. Respondent's conduct in failing to return the unearned portion of a retainer and failure to timely return a substitution of counsel form upon termination of the representation violated Rules 1.5(a) and 1.16(d), MRPC.

FOURTH COUNT

Unauthorized Credit Card Transactions

21. On or about November 24, 2003, respondent was retained to represent Bradley Kath on criminal charges involving first degree possession of methamphetamine and conspiracy to manufacture a controlled substance. Bradley Kath did not sign a written fee agreement, instead his father, Cliff Kath, signed a written fee agreement stating that he would be jointly responsible for respondent's attorney fees.

22. Respondent's written fee agreement provided for a \$15,000 nonrefundable retainer. The fee agreement also provided that the Kaths would be responsible for costs and expenses, such as copying costs, transcripts and phone calls. The fee agreement did not specify that the Kaths would be responsible for any surcharges on credit card transactions for payment of attorney fees.

23. Minn. Stat. § 325G.051, subd. 1(a), provides that a seller of goods or services may only impose a surcharge on a purchaser who elects to use a credit card in

³ Respondent returned the executed substitution of counsel forms to McMahon only after he received a notice of investigation on Renville's ethics complaint.

lieu of payment by cash, check or similar means if the seller informs the purchaser orally at the time of the sale and has a sign conspicuously posted on the seller's premises.

24. Cliff Kath agreed to pay respondent a \$15,000 retainer for representing his son. On November 25, 2003, Cliff Kath agreed to pay the retainer using his State Farm Bank Visa credit card. Cliff Kath provided respondent with the necessary credit card information.

25. Shortly thereafter, respondent charged the \$15,000 to Cliff Kath's credit card. In making the transaction, respondent learned from State Farm Bank that there would be a \$450 surcharge for the credit card transaction. Respondent subsequently contacted Cliff Kath and his wife, June Kath, who offered to make the transaction on another credit card to avoid the \$450 surcharge. Respondent advised that he would contact State Farm Bank and get back to them. Respondent failed to get back to the Kath's.

26. On November 28, 2003, respondent charged the \$450 surcharge to the Kath's' credit card without their permission or knowledge. The surcharge posted to the Kath's' credit card on December 1, 2003.

27. On or about December 20, 2003, the Kath's received their credit card statement from State Farm Bank, which reflected the unauthorized \$450 surcharge by respondent. Cliff Kath contacted respondent and disputed the unauthorized charge. Respondent alleged that the terms of the parties' fee agreement provided for the charge.

28. Cliff Kath subsequently contacted State Farm Bank and disputed the \$450 surcharge by respondent. On January 5, 2004, Cliff Kath received a letter from State Farm Bank indicating that the disputed amount had been removed from their account and that they were investigating the matter. On February 23, 2004, State Farm Bank sent Cliff Kath a letter indicating that the \$450 surcharge had been charged back to respondent's law firm.

29. Respondent's conduct in making an unauthorized surcharge on a credit card transaction violated Rules 1.4, 1.5(a) and (b), and 8.4(c), MRPC.

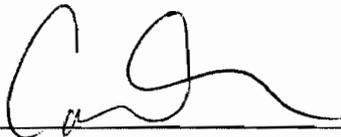
WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: Sept. 19, 2007.



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