

FILE NO. A09-877

STATE OF MINNESOTA

IN SUPREME COURT

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

**MEMORANDUM IN SUPPORT
OF PETITION FOR
TEMPORARY SUSPENSION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Rule 16(d), Rules on Lawyers Professional Responsibility (RLPR), authorizes the Court to issue an order for temporary suspension pending final determination of a disciplinary proceeding when the respondent attorney “poses a substantial threat of serious harm to the public.” The Court has imposed temporary suspension pending final determination of a disciplinary proceeding where a respondent has allegedly misappropriated client funds and continues to pose a substantial threat of serious harm to the public. See *In re Pang*, 502 N.W.2d 390 (Minn. 1993); *In re Shoemaker*, 494 N.W.2d 29 (Minn. 1992); *In re Clasen*, 440 N.W.2d 662 (Minn. 1989); *In re Simonson*, 376 N.W.2d 680 (Minn. 1985); *In re Okerman*, 298 N.W.2d 28 (Minn. 1980).

Although the Court has not specifically set out what facts are necessary to meet this standard, the Court has held that temporary suspension may be ordered when “it would be inappropriate, pending final determination of disciplinary proceedings, to hold out the Respondent as an attorney who poses no risk of injury to the public and who is entitled to the unquestioned trust and confidence of clients, judges, and lawyers.” *Okerman*, 298 N.W.2d at 29; *In re Plowman*, 463 N.W.2d 497 (Minn. 1990).

One factor the Court has looked at is “the extent and seriousness of the admitted misconduct.” *Plowman*, 463 N.W.2d at 497. The Court has held allegations of “repeated and extensive misappropriation of client funds and other professional misconduct” warrants temporary suspension. *Shoemaker*, 494 N.W.2d at 29; *Pang*, 502 N.W.2d at 390.

Respondent's factual admissions, coupled with the clear documentary record of respondent's written communications to the Director and respondent's trust account bank records, establish that respondent misappropriated client funds for his personal use and then engaged in a pattern of deception in order to conceal the misappropriation from the Director.

Respondent admits depositing Thomas Rodrigue's \$27,000 inheritance check into his trust account (Amended Petition for Revocation of Probation and Further Disciplinary Action ("Pet."), ¶ 3; Respondent's answer ("R. ans.") thereto). Respondent also admits sending a November 6, 2008, letter to the Director in which respondent stated, among other things, that Rodrigue had given him no funds (Pet., ¶ 23; R. ans. thereto). Respondent further admits, and respondent's bank records clearly document, that he issued a series of trust account checks against the proceeds of Rodrigue's inheritance check for personal use and without Rodrigue's permission (Pet., ¶¶ 4 and 5; R. ans. thereto).

Respondent also admits engaging in a pattern of ongoing deception to conceal the misappropriation from the client and the Director. Respondent initially claimed that he had no attorney-client relationship with Rodrigue and that Rodrigue never gave him any funds (Pet. ¶¶ 16 and 17; R. ans. thereto). Respondent now admits to receiving trust account funds from Rodrigue. Respondent admits sending Rodrigue an August 1, 2008, letter falsely stating that he had invested his inheritance proceeds in "American Funds Growth Fund of America." (Pet., ¶¶ 11 and 12; R. ans. thereto). Respondent also admits sending a November 6, 2008, letter to the Director falsely claiming that he was awaiting documentation regarding Rodrigue's funds from American Funds Growth Fund of America (Pet., ¶ 23; R. ans. thereto). Respondent further admits sending a November 28, 2008, letter to the Director in which he falsely stated that he was having difficulty reaching American Funds Growth Fund of America regarding Rodrigue's funds and had asked his local agent to provide him with the relevant statements for that account (Pet., ¶ 25; R. ans. thereto). All of the above statements were false and were

designed to conceal respondent's misappropriation. Moreover, respondent's misstatements were made during the course of the Director's investigation and while respondent was subject to public probation.

Finally, respondent also admits failing to timely file and/or pay his employer withholding taxes for every quarter during the years 2002 through 2004 (Pet., ¶¶ 43-55; R. ans. thereto). The Court has held that failure to pay employer withholding taxes is tantamount to misappropriation. *In re Gurstel*, 540 N.W.2d 838, 842 (Minn. 1995).

In determining whether a substantial threat of serious harm to the public exists, the Court has looked at whether the attorney engaged in a pattern of deceit or non-cooperation in order to conceal the misappropriation and the timing of such misconduct. The Court has found an attorney, who misappropriates funds and engages in deceit or non-cooperation during the disciplinary investigation, poses a substantial threat of serious harm to the public warranting temporary suspension. *See Okerman*, 298 N.W.2d at 29 (misuse of funds and use of deceit in attempt to cover up such violations occurring after start of disciplinary suspension, with some occurring after signing of stipulation for discipline, warrant suspension); *see also, In re Wheat*, 575 N.W.2d 101, 102 (Minn. 1998). Respondent's deceit and misappropriation similarly poses a substantial threat of serious harm to the public.

Respondent has taken no action to mitigate the risk of injury to the public. In *In re Loewenthal*, 468 N.W.2d 335 (Minn. 1991), the Court denied the Director's motion for temporary suspension of Loewenthal, who was charged with misappropriation, improper use of a trust account, and failure to pay employer withholding taxes. In denying the motion for temporary suspension, the Court found:

Respondent's efforts to make amends for his past misconduct even before the initiation of these disciplinary proceedings against him, his complete restitution of all trust account deficiencies, and his full and continued cooperation with the Director's Office mitigate against a finding of 'risk of injury to the public' under Rule 16, Rules on Lawyers Professional Responsibility, and thus, against temporary suspension.

Id. at 335-36; *see also*, *Plowman*, 463 N.W.2d at 497 (despite offer of partial restitution and cooperation with investigation, misappropriating client funds and concealing thereof warrants temporary suspension pending final determination of disciplinary proceedings).

Unlike Loewenthal, respondent has engaged in a willful, ongoing pattern of deceit and non-cooperation in order to conceal his misconduct over the course of the disciplinary investigation and proceedings, which establishes that respondent poses a substantial risk of serious harm to the public. Respondent disregarded the terms of his current public probation by engaging in serious misconduct, which resulted in the Director seeking revocation of his probation. The protection intended to be provided by respondent's probation has proven insufficient. Respondent also refused to cooperate in the Director's request for books and records, which necessitated obtaining an investigatory subpoena in order to obtain respondent's bank statements, which revealed his misappropriation (Pet., ¶ 41). Respondent also made numerous false statements, as recounted above, to the Director to conceal his misappropriation.

Respondent has also not mitigated the harm suffered by clients. Respondent issued a non-sufficient funds check in payment of a court-ordered arbitration award obtained by a client. Respondent later failed to attend a court hearing on the bounced check (Pet., ¶¶ 66 and 67). Respondent has not made complete restitution of the funds he misappropriated. Respondent has already misappropriated funds for his personal use. An attorney who knows he is soon to be suspended or disbarred poses a particular risk, especially concerning any funds that may come into his possession.

Most disturbingly, since the initiation of the Director's investigation, respondent has engaged in a pattern of threatening and harassing clients who complained against him. Respondent coerced Rodrigue into signing false affidavits attempting to withdraw his complaint by promising to repay the funds respondent had misappropriated (Pet., ¶¶ 33 through 39). Respondent later harassed Rodrigue and falsely threatened that Rodrigue and his employees could be subject to perjury for cooperating with the

Director in these proceedings. See Affidavit of Thomas Rodrigue. Another client, Steven Bohler, received a communication from an "anonymous caller" threatening that he could be subject to a defamation lawsuit or other civil litigation by respondent that would result in the loss of the client's home if Bohler continued to cooperate with the Director. See Affidavit of Steven Bohler. Respondent's willingness to engage in deceit and harassment of complainants is clearly the kind of serious threat of harm for which temporary suspension under Rule 16, RLPR, should be used to protect the public.

Finally, the conduct for which respondent has been charged is uniquely serious, and it is highly likely that given respondent's disciplinary history that substantial discipline, if not disbarment, will be imposed. Moreover, the final disposition, should it be suspension rather than disbarment, can revert to the time respondent was temporarily suspended, such that respondent would not be unfairly prejudiced by being suspended longer than ordered. See *In re Olkon*, 324 N.W.2d 192 (Minn. 1982).

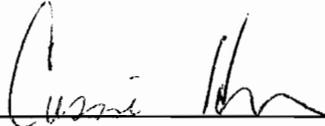
The Director requests that the Court issue an order temporarily suspending respondent Albert A. Garcia, Jr.

Dated: July 31, 2009.



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