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

The above-captioned matter was heard on September 22 and 23, 2009, by the undersigned acting as referee by appointment of the Minnesota Supreme Court. Cassie Hanson, Senior Assistant Director, appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director). Edward F. Kautzer appeared on behalf of respondent, Albert A. Garcia, Jr., who was personally present throughout the proceedings.

The hearing was conducted on the Director's June 12, 2009, amended petition for revocation of probation and for further disciplinary action ("amended petition"). The Director presented the testimony of Antwan Scarver (by deposition transcript), Evette Scarver, Thomas Rodrigue, Michael Condon, Steven Bohler, Anthony Wacker, Mary McMahon (by telephone) and Julie Rodrigue (by telephone). Respondent testified at the hearing and presented the testimony of Lena Garcia. Director's exhibits 1-4 and 6-54 were received into evidence. Respondent's exhibits 101-104 and 106-130 were received into evidence.

The parties were directed to submit on or before October 24, 2009, proposed findings of fact, conclusions of law, a recommendation for appropriate discipline and a

brief. The referee's findings of fact, conclusions of law and recommendation are due to the Supreme Court no later than November 15, 2009.

In his answer to the amended petition, respondent admitted certain factual allegations made by the Director, and denied others. Respondent denied all alleged rule violations. The findings and conclusions made below are based upon respondent's admissions, the documentary evidence the parties submitted, the testimony presented, the demeanor and credibility of respondent and the other witnesses as determined by the undersigned and the reasonable inferences to be drawn from the documents and testimony.

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

DISCIPLINARY HISTORY

1. 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 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)(1), and 8.4(c) and (d), Minnesota Rules of Professional Conduct (MRPC). *In re Garcia*, 709 N.W.2d 237 (Minn. 2006)

2. On March 22, 2006, respondent was issued 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, MRPC .

3. On January 23, 2008, respondent was publicly reprimanded and placed on two years of probation for including unethical terms in a fee agreement, failure to promptly return a substitution of counsel form following his suspension in 2006, and making an unauthorized charge to a client's credit card, in violation of Rules 1.4, 1.5(a) and (b), 1.16(d), and 8.4(c) and (d), MRPC. *In re Garcia*, 746 N.W.2d 126 (Minn. 2008)

4. Among the conditions of respondent's January 23, 2008, probation were the following:

a. Respondent shall cooperate fully with the Director's Office in its efforts to monitor compliance with this probation by promptly responding to the Director's correspondence by the due date. Respondent shall provide to the Director a current mailing address and shall immediately notify the Director of any change of address. Respondent shall cooperate with the Director's investigation of any allegations of unprofessional conduct which may come to the Director's attention. Upon the Director's request, respondent shall provide authorization for release of information and documentation to verify compliance with the terms of this probation; and

b. Respondent shall abide by the Minnesota Rules of Professional Conduct.

RODRIGUE MATTER

5. At all times relevant, Thomas Rodrigue ("Mr. Rodrigue"), Julie Rodrigue ("Mrs. Rodrigue"), and Mr. and Mrs. Rodrigue's two adult daughters have operated Cedar Towing Company ("Cedar Towing").

6. For many years, respondent represented Mr. Rodrigue and Cedar Towing in a variety of personal and business matters, both as a lawyer and a lobbyist . Respondent was paid a monthly retainer of $1,500 for his legal and lobbyist work for Cedar Towing. In addition, Mr. Rodrigue sometimes provided respondent with automotive services in exchange for legal services.

7. Prior to November 2007 respondent and Mr. Rodrigue enjoyed a good business relationship. In addition to their business dealings, respondent and Mr. Rodrigue were also friends.

8. In November 2007, Mr. Rodrigue received a $27,000 inheritance check from the estate of a deceased relative. Mr. Rodrigue wanted to ensure the availability of the funds for possible investment in a biodiesel operation and wanted to document his biodiesel expenditures, so he asked respondent to safeguard the funds in respondent's trust account. Mr. Rodrigue required that respondent have Mr. Rodrigue's permission before disbursing any of the funds from his trust account. At the time Mr. Rodrigue gave the inheritance funds to respondent, Mr. Rodrigue considered respondent to be his attorney.

9. Mr. Rodrigue did not give the inheritance funds to respondent in payment of any attorney's fees. Mr. Rodrigue did not owe respondent any outstanding attorney's fees at the time the inheritance funds were given to him.

10. Respondent testified that Mr. Rodrigue gave him the funds in connection with the Q.R. matter . Respondent further alleged that Mr. Rodrigue placed no restrictions on respondent's use of his inheritance funds and that respondent was free to use those funds for any purpose, so long as the funds were available when Mr. Rodrigue requested them. Finally, respondent testified that the funds were at all times available in other of his accounts, but produced no documentary verification of his claim .

11. Respondent's testimony regarding the purpose for which Mr. Rodrigue gave him the inheritance funds, the lack of any restriction on his ability to use the funds and the availability of Mr. Rodrigue's funds in other of respondent's bank accounts is not credible.

a. Respondent's testimony conflicts with the credible testimony of Mr. Rodrigue regarding his purpose in providing the inheritance funds to respondent and his numerous attempts to obtain the funds back from respondent. Mr. Rodrigue's testimony is further corroborated by the consistent testimony of other witnesses.

b. Respondent did not claim that the inheritance funds were given to him in payment of attorney's fees in his answers to the original or amended petitions or in any of his correspondence to the Director. Respondent's claim is further clearly contradicted by his written responses to the Director regarding his handling of the inheritance funds during the course of the disciplinary investigation.

c. Respondent was unable to give any credible reason as to why he placed Mr. Rodrigue's funds in a trust account, rather than a personal or operating account if the funds were earned fees as respondent claimed.

d. Respondent's claim that Mr. Rodrigue gave him the funds in connection with representation in the Q.R. matter is in direct conflict with substantial documentary evidence and testimony that respondent was not involved in the Q.R. matter until late February 2008.

e. Respondent's claim that the funds were available in other of his bank accounts conflicts with his testimony that he had to withdraw funds from his life insurance policy in order to pay Q.R. Respondent also provided no evidentiary support, such as bank statements, documenting the availability of these funds in another bank account.

12. On November 13, 2007, respondent deposited Mr. Rodrigue's $27,000 inheritance check into his US Bank trust account On that date, and at Mr. Rodrigue's direction, respondent issued his trust account check no. 2578 in the amount of $5,000 to Gary Rodrigue, Mr. Rodrigue's brother, in repayment of a loan.

13. Respondent issued, and his bank paid, the following additional trust account checks in November 2007:

DATE ISSUED	CHECK NO.	AMOUNT	PAYEE
11/14/2007	2577	$ 19,759.95[1]	Golden Valley Country Club
11/15/2007	2579	$ 973.00	Lena Garcia
11/20/2007	2580	$ 1,400.00	Lena Garcia

14. The balance in respondent's US Bank trust account prior to the deposit of Mr. Rodrigue's inheritance funds was $175.78. Respondent deposited no funds into his trust account other than Mr. Rodrigue's inheritance prior to payment of the trust account checks listed above. After payment of the trust account checks listed above, the balance in respondent's US Bank trust account was $142.83. Clearly, the trust account checks listed above were paid with Mr. Rodrigue's inheritance funds.

15. The trust account checks listed above were not issued on Mr. Rodrigue's behalf. Mr. Rodrigue was not aware of these checks and did not authorize respondent to issue them. Respondent's issuance of the above checks constituted misappropriation of Mr. Rodrigue's funds.

16. Respondent testified that his issuance of the trust account checks listed above was consistent with his understanding that he was permitted to spend Mr. Rodrigue's inheritance funds as he wished so long as the funds were available to pay to Mr. Rodrigue when he so requested. In an August 17, 2009, affidavit respondent signed in connection with the Director's petition for his temporary suspension, respondent stated that in issuing the checks listed above he was disbursing "earned fees that were in said trust account". Respondent's testimony regarding issuance of the trust account checks is inconsistent with his statements in his August 17, 2009, affidavit.

17. On several occasions during the years 2006 and 2007, respondent allowed a non-lawyer to sign his name to checks issued on his trust account.

18. Lena Garcia is respondent's 28-year-old daughter. Ms. Garcia testified that she did not sign any checks on respondent's trust account. When she was presented with respondent's trust account check no. 2577 payable to the Golden Valley Country Club in the amount of $19,759.95 and a related letter to which she had signed respondent's name Ms. Garcia admitted that she did, in fact, sign respondent's name to trust account check no. 2577. Ms. Garcia also identified other trust account checks that had been signed by someone other than respondent.

19. Respondent did not return any portion of the Rodrigue funds to his trust account at any time through at least February 2009.

20. Mr. Rodrigue was involved in a lawsuit with Q.R. Mr. Rodrigue was originally represented in the matter by attorney Lawson Waturuocha, but, by February 2008, Mr. Rodrigue had discharged Waturuocha as his attorney . Q.R. was represented by attorney Anthony Wacker . Trial in the matter was scheduled for April 14, 2008.

21. In February 2008, after he had discharged Waturuocha, Mr. Rodrigue contacted Q.R. directly and agreed to pay Q.R. $7,000 in settlement of their lawsuit. Mr. Rodrigue intended to pay the $7,000 from the funds he believed respondent was holding in his trust account. Mr. Rodrigue contacted Wacker and informed him of the settlement.

22. On February 19, 2008, Wacker sent Mr. Rodrigue a proposed settlement agreement. Wacker understood that Mr. Rodrigue would pay the $7,000 contemporaneous with the signing of the agreement. Mr. Rodrigue believed he was not able to sign the settlement agreement until the $7,000 was paid from respondent's trust account.

23. Sometime during the period February 19 to 21, 2008, Mr. Rodrigue contacted respondent and directed him to issue a $7,000 trust account check to Q.R. from the proceeds of his inheritance. Mr. Rodrigue did not hire respondent to represent him in the matter, he merely directed respondent to issue the check to Q.R. Sometime

during that time period, respondent contacted Wacker and advised that he was representing Mr. Rodrigue in the matter. On February 21, 2008, Wacker faxed a copy of the proposed settlement agreement to respondent.

24. During the period February through April 2008, Mr. Rodrigue repeatedly requested that respondent issue a $7,000 trust account check to Q.R.

25. Also during that period, Wacker contacted respondent regarding payment. Respondent told Wacker that the money with which Mr. Rodrigue was to pay the settlement was "in some kind of account, mutual fund, something like that, and it was not immediately accessible". Wacker understood that the problem with accessing the money was Mr. Rodrigue's and not respondent's. Respondent's statements to Wacker were false and were made to justify his delay in paying the $7,000 and to conceal his misappropriation of Mr. Rodrigue's inheritance funds.

26. By April 14, 2008, the date of trial, respondent still had not paid the $7,000. On that date, respondent and Mr. Rodrigue signed a confession of judgment and Mr. Rodrigue signed a settlement agreement agreeing to pay the $7,000 by April 30, 2008 .

27. On April 30, 2008, respondent paid $7,000 to Wacker by way of a cashier's check. On that date, the parties also executed a final settlement agreement.

28. Respondent did not purchase the cashier's check with funds from his trust account because, as noted above, he had disbursed the Rodrigue funds in their entirety in November 2007 and the balance in his trust account was never again sufficient to pay the $7,000.

29. During 2008 Mr. Rodrigue made repeated requests to respondent to distribute to him the balance of his inheritance funds he understood respondent was holding in his trust account. In response to his requests, respondent gave a series of excuses, which Mr. Rodrigue soon came to suspect were not true.

30. Respondent told Mr. Rodrigue that he had invested Mr. Rodrigue's funds and that it would take a month to retrieve . Respondent also told Mr. Rodrigue that the

IRS would capture the funds if respondent released them to Mr. Rodrigue. Respondent's statements in this regard were false and were made to conceal respondent's misappropriation of Mr. Rodrigue's funds.

31. Michael Condon provides security detail to Cedar Towing. Condon is not an employee of Cedar Towing, but is employed through a security company that provides security to Cedar Towing. Condon is also a friend of Mr. Rodrigue. Condon was present for some of the discussions between respondent and Mr. Rodrigue and provided corroborating testimony regarding them. Condon also had some conversations with respondent directly in which he requested return of Mr. Rodrigue's funds.

32. On August 1, 2008, respondent gave Mr. Rodrigue a letter claiming to have invested $17,000 of Mr. Rodrigue's inheritance funds in "American Funds Growth Fund of America" (hereinafter "American Funds"). In his letter, respondent stated that (a) if the funds were released from the American Funds account they would be captured by the IRS due to a July 10, 2008, tax lien, (b) the IRS had agreed to sign a release and that the funds would be available in ten working days, and (c) he had advanced Mr. Rodrigue $1,200 leaving $15,800 to be repaid from the American Funds account. This letter served to summarize and document the various excuses respondent had given to Mr. Rodrigue to that point for his inability to pay Mr. Rodrigue his funds . While he was unwilling to acknowledge that Mr. Rodrigue had made repeated requests for his funds, respondent did acknowledge in his testimony that by the date of the August 1, 2008, letter, "[Mr. Rodrigue] wanted to start getting free what the money was that was owed".

33. Respondent's statements that he had invested Mr. Rodrigue's funds in American Funds, that he was unable to access the funds because they would be captured by the IRS and that the IRS had agreed to sign a release were false and made

with the purpose of concealing respondent's misappropriation of Mr. Rodrigue's funds..

34. Condon investigated the statements respondent made in the August 1, 2008, letter and, based on that investigation, concluded that respondent's statements were not truthful. Condon informed Mr. Rodrigue of the results of his investigation. This information influenced Mr. Rodrigue's ultimate decision to file a complaint against respondent with the Director..

35. By the date of respondent's August 1, 2008, letter, respondent had repaid Mr. Rodrigue $14,500 of his $27,000 inheritance. In addition to having issued the trust account check to Mr. Rodrigue's brother and paid the Q.R. settlement, respondent had issued Mr. Rodrigue a $2,500 check.

36. In late August 2008 Mr. Rodrigue filed his complaint against respondent with the Director. Mr. Rodrigue also filed a complaint with the Minneapolis police department.

37. After Mr. Rodrigue filed his complaint with the Director, respondent made three cash payments to Mr. Rodrigue totaling $7,000. Thus, the balance due from respondent to Mr. Rodrigue currently stands at $5,500.

38. Respondent has produced a December 19, 2007, letter purportedly signed by Mr. Rodrigue and purporting to provide that Mr. Rodrigue had authorized respondent to "transfer . . . $5,000 from the Garcia Trust account to the Garcia & Associates, P.A. business account for the payment of legal services", This document appears to be fabricated and is another attempt by respondent to conceal his misappropriation of Mr. Rodrigue's inheritance funds. As of December 19, 2007, respondent was not actually holding any of Mr. Rodrigue's funds in his trust account, having disbursed those funds in their entirety in November 2007.

39. In addition, Mr. Rodrigue testified that he did not sign the December 19, 2007, letter, and that the first time he saw the document was when respondent

presented it to him at Cedar Towing's offices sometime in 2008 or 2009 after he had filed an ethics complaint. Condon testified that he first saw the December 19, 2007, letter in late 2008, after Mr. Rodrigue had filed his complaint with the Director and that, when respondent presented the letter to Mr. Rodrigue, he told Mr. Rodrigue to "make sure the lawyer's board goes away".

40. Mr. Rodrigue was consistent in his testimony that, by virtue of the monthly $1,500 retainer he was paying to respondent, he owed respondent no fees for legal services. Further, Mr. Rodrigue did not contact respondent regarding the Q.R. matter until February 2008, two months after the December 19, 2007, letter was purportedly signed and respondent was not working on any legal matters for which he would have been due any fees. In light of these factors, this referee finds Mr. Rodrigue's testimony regarding the December 19, 2007, letter to be credible and concludes that Mr. Rodrigue did not sign the December 19, 2007, letter.

41. Respondent's daughter, Lena Garcia, is a 2004 college graduate and is currently pursuing a graduate degree. Ms. Garcia has worked as a legal secretary in respondent's office since late 1997. Since June 2007, she has been employed full-time by respondent.

42. Ms. Garcia testified regarding the circumstances under which various documents at issue in this proceeding were prepared and executed. With respect to each of those documents, Ms. Garcia's testimony was favorable to respondent and in direct conflict with the testimony provided by Mr. Rodrigue and Condon. This referee finds Ms. Garcia's testimony to be not credible given her family and employment relationship with respondent and her demeanor on the witness stand. In addition, Ms. Garcia's credibility is affected by her inconsistent testimony and the fact that she was a recipient of $2,373 from the $27,000 in inheritance funds respondent misappropriated from Rodrigue.

43. Ms. Garcia testified that she typed the December 19, 2007, letter at respondent's request and witnessed Mr. Rodrigue's signature on the document. Ms. Garcia's testimony is in direct conflict with the testimony provided by Mr. Rodrigue that he did not sign this document and the testimony provided by both Mr. Rodrigue and Condon that respondent first presented the document to them in 2008 or 2009. Ms. Garcia's testimony is further inconsistent with Mr. Rodrigue's testimony that he would not have agreed to pay respondent any legal fees because none were owed. Finally, and perhaps most compellingly, Ms. Garcia's testimony ignores the fact that as of December 19, 2007, respondent was not working on the Q.R. or any other legal matter for Mr. Rodrigue and that respondent was already receiving a $1,500 monthly retainer from Mr. Rodrigue. In light of these factors, this referee finds that Ms. Garcia's testimony regarding the December 19, 2007, letter is not credible.

44. Respondent testified that he paid Mr. Rodrigue an additional $5,000 in October 2008. This is the first time that respondent made this claim, which is not reflected in either his answer or amended answer. Respondent produced pages two and eight of his nine-page October 2008 business account bank statement. Those pages reflect a $7,300 deposit and a $5,000 "Customer Withdrawal" on October 20, 2008. Respondent testified that he gave the $5,000 in cash he received from the October 20, 2008, withdrawal to Mr. Rodrigue. Respondent did not produce verification that the $5,000 was paid to Mr. Rodrigue. Further, respondent did not question Mr. Rodrigue regarding this purported payment, made no previous reference to it and only mentioned it in response to questions posed to him on cross-examination. This referee concludes that respondent's testimony regarding the purported October 20, 2008, payment to Mr. Rodrigue is not credible.

45. Mr. Rodrigue testified that respondent's failure to timely or completely disburse to him his inheritance funds resulted in his losing the opportunity to more promptly pursue a biodiesel operation and the loss of substantial revenues.

46. On September 10, 2008, the Director sent respondent a notice of investigation of Mr. Rodrigue's complaint. The notice of investigation requested respondent's written response to Mr. Rodrigue's complaint.

47. On September 24, 2008, the Director sent respondent a letter granting respondent the two-week extension he had requested and requesting that respondent include the following materials with his response: (a) his trust account books and records, including bank statements, for the period beginning with the deposit of Mr. Rodrigue's funds, (b) books and records for any other account into which he deposited Mr. Rodrigue's funds, and (c) his entire Mr. Rodrigue file.

48. On October 16, 2008, the Director sent respondent a letter denying the 30-day extension respondent had requested and requesting respondent's response to the Director's September 10, 2008, notice of investigation and September 24, 2008, letter by October 27, 2008 .

49. On October 27, 2008, respondent faxed the Director a letter. Respondent's letter did not contain a substantive response to Mr. Rodrigue's complaint. Instead, respondent stated, "I never represented Mr. Rodrigue in any personal matter so there is no file to forward to your office" and enclosed an affidavit of Thomas Rodrigue. Respondent further stated, "I join Mr. Rodrigue in asking that said matter be dismissed".

50. Respondent's statement that he never represented Mr. Rodrigue in any personal matters is false. As noted above, respondent had a long-standing professional relationship with both Mr. Rodrigue and Cedar Towing, which relationship included representation of Mr. Rodrigue in several legal matters. As also noted above, Mr. Rodrigue paid respondent a monthly retainer for professional services. Respondent himself testified that he had "acted as Mr. Rodrigue's attorney on several business and personal matters".

51. The affidavit of Thomas Rodrigue that respondent enclosed with his October 27, 2008, letter contained the following statements:

a. Mr. Rodrigue wished to withdraw the complaint he filed against respondent.

b. Mr. Rodrigue received funds from a family settlement in July 2006.

c. Mr. Rodrigue did not want to tell his wife that he had used the family settlement funds to start a biodiesel operation, so he instead told his wife that he had given the funds to respondent.

d. In August 2008, Mr. Rodrigue asked respondent to give him "something" to prove to his wife that he had not used personal funds to start the biodiesel operation.

e. In August 2008, Mr. Rodrigue told his wife that he would have to file a complaint in order to get back the personal funds entrusted to respondent.

f. Mr. Rodrigue's complaint was taken from his desk and faxed to the Director without Mr. Rodrigue's knowledge or permission.

g. Mr. Rodrigue first learned of the complaint being filed after receiving a September 12, 2008, telephone call from respondent. Mr. Rodrigue became upset after learning the Director received the complaint.

h. Mr. Rodrigue wanted the complaint dismissed and that respondent had never received any of the funds in question.

52. The above statements are false and were contrived by respondent to conceal his misappropriation of Mr. Rodrigue's funds:

a. Paragraph 1 of the affidavit is false. Mr. Rodrigue purposefully drafted and faxed the complaint against respondent to the Director . Condon assisted Mr. Rodrigue in preparing the complaint and Condon faxed the complaint to the Director at Mr. Rodrigue's direction.

b. Paragraph 2 of the affidavit is false. Mr. Rodrigue did not want to withdraw his complaint.

c. Paragraphs 4-9 of the affidavit are false. As described above, Mr. Rodrigue gave respondent the $27,000 to safeguard in trust. Mrs. Rodrigue was aware of the estate distribution and also knowledgeable and supportive of Mr. Rodrigue's business plan for a biodiesel operation. Mr. Rodrigue never solicited respondent's complicity in hiding the operation or any personal funds from Mrs. Rodrigue. Further, it was not possible to "hide" the biodiesel operation from anyone because it requires large propane cylinders, which are obvious on Cedar Towing's premises.

d. Paragraph 10 of the affidavit is false. Mr. Rodrigue filed the complaint with the Director .

e. Paragraph 12 of the affidavit is false. Mr. Rodrigue filed the complaint; therefore, he could not have first learned about it in September 2008 after respondent allegedly called him.

f. Paragraph 13 of the affidavit is false. Mr. Rodrigue gave respondent $27,000 to hold in trust, which respondent misappropriated.

53. Respondent appeared at Cedar Towing with the October 27, 2008, affidavit already drafted and notarized by Lena Garcia. Mr. Rodrigue did not draft the affidavit, did not ask respondent to draft it and did not read it carefully before he signed it. Mr. Rodrigue did not discuss the affidavit with Ms. Garcia and she was not present when he signed it. Mr. Rodrigue felt "pressured" to sign the affidavit in order to get his money back from respondent. Respondent told Mr. Rodrigue that the affidavit would convince the Director that no further investigation of Mr. Rodrigue's complaint was necessary.

54. Condon was present for the meeting in which respondent presented and Mr. Rodrigue signed the October 27, 2008, affidavit. Condon likewise testified that

Lena Garcia was not present during that meeting, that respondent stated that he would repay Mr. Rodrigue his money if he signed the affidavit, and that respondent needed the affidavit to persuade the Director to terminate his investigation.

55. At some point, respondent told Mr. Rodrigue that by virtue of his having signed the October 27, 2008, affidavit, the Director could prosecute him for contempt or some other violation.

56. Regarding the October 27, 2008, affidavit Lena Garcia testified that Mr. Rodrigue dictated to her the contents of his October 27, 2008, affidavit over the telephone, that she faxed a copy of the typewritten affidavit to Mr. Rodrigue for his approval and that, later that day, Mr. Rodrigue appeared in respondent's office to sign the affidavit.

57. Ms. Garcia's testimony is in direct conflict with the credible testimony provided by Mr. Rodrigue that respondent drafted and presented the affidavit to Mr. Rodrigue, that Mr. Rodrigue did not discuss the affidavit with respondent or Ms. Garcia in advance of respondent's presenting it to him for signature and that Ms. Garcia was not present when Mr. Rodrigue's affidavit was signed. Much of Mr. Rodrigue's testimony in this regard was corroborated by Condon. This referee finds that Ms. Garcia's testimony regarding the October 27, 2008, affidavit is not credible.

58. Respondent denied drafting the October 27, 2008, affidavit. For many of the same reasons described above, this referee finds that respondent's testimony in this regard is not credible. In attaching the affidavit to his October 27, 2008, fax transmission, respondent submitted false information to the Director.

59. On October 28, 2008, the Director sent respondent a letter pointing out the following inconsistencies in Mr. Rodrigue's affidavit:

a. Mr. Rodrigue's complaint attached respondent's handwritten letter claiming the funds were invested in American Funds. The letter also acknowledged that respondent owed Mr. Rodrigue approximately $15,800. The

letter also stated the funds could not be released due to an IRS tax lien. All of these statements directly conflicted with the claim in Mr. Rodrigue's affidavit that respondent had never received any funds from Mr. Rodrigue.

b. Respondent stated that he did no legal work for Mr. Rodrigue, but Mr. Rodrigue's affidavit claimed that he was a "lobbyist" for Cedar Towing.

60. The Director's October 28, 2008, letter further requested an accounting of the Rodrigue funds, July 2006 through September 2008 books and records for the account into which respondent had deposited the Rodrigue funds, including proof of deposits and bank statements and a description of the circumstances giving rise to Mr. Rodrigue's affidavit. Finally, the Director indicated that Mr. Rodrigue would not be permitted to withdraw his complaint.

61. On November 6, 2008, respondent faxed a letter to the director containing false statements in order to conceal his misappropriation of Mr. Rodrigue's funds.

a. Respondent stated Mr. Rodrigue gave no funds to him. In fact, both Mr. Rodrigue and respondent testified that Mr. Rodrigue gave the $27,000 in inheritance funds to respondent and respondent's trust account records confirm that fact.

b. Respondent stated he was awaiting documentation from American Funds and would provide such statements upon receipt. He stated the balance was minimal. The Directors's requests for respondent's American Funds account statements were based on respondent's claim that he had placed Mr. Rodrigue's inheritance funds in that account. In fact, respondent never placed Mr. Rodrigue's funds in his American Funds account. Respondent 's statements in this and other letters to the Director that he had requested and would be providing his American Funds account statements served to perpetuate his false

claim. Respondent himself testified that he should have told the Director that Mr. Rodrigue's funds were never placed in his American Funds account.

c. Respondent stated that Mr. Rodrigue drafted his affidavit and respondent's staff made minimal changes. In Fact, Respondent drafted the affidavit and presented it to Mr. Rodrigue for signature.

d. Respondent stated that Mr. Rodrigue never intended to file a complaint.In fact, Mr. Rodrigue purposefully drafted and submitted his complaint to the Director.

e. Respondent stated that he made no promises to Mr. Rodrigue to get him to withdraw his complaint. Infact, respondent told Mr. Rodrigue that he would give Mr. Rodrigue his money if he signed the affidavit.

62. Respondent further stated in his November 6, 2008, letter that if Mr. Rodrigue was interviewed or deposed by the Director, respondent wanted to be present and have counsel present "to avoid any confusion that a lay person [Mr. Rodrigue] may have regarding issues that your office may raise in said interview". Finally, respondent provided the Director with only his July 2008 through October 2008 trust account bank statements. Respondent claimed, "Given the balance of $80.00 there exist no client funds held in trust".

63. On November 7, 2008, the Director sent respondent a fourth request for respondent's trust account books and records. The Director specifically requested respondent's trust account bank statements, cancelled checks, deposit slips, checkbook register, client subsidiary ledgers, trial balances and reconciliations for the period July 2006 to the present. Respondent was given three weeks to respond .

64. On November 28, 2008, respondent sent the Director another letter containing false statements made to conceal his misappropriation of Mr. Rodrigue's funds . Respondent made the following false statements:

a. Respondent stated he had difficulty reaching American Funds personnel to get an accounting.

b. Respondent asked his local agent to get said statements and was assured he would receive them as soon as possible.

Respondent's repeated statements to the Director that he was attempting to obtain American Funds account statements served to perpetuate respondent's false claim that he had placed Mr. Rodrigue's funds in that account.

65. Respondent enclosed with his November 28, 2008, letter an amended affidavit of Thomas A. Rodrigue dated November 12, 2008. This affidavit contained the same false statements as the original affidavit. Respondent stated in his November 28, 2008, letter:

> When I first submitted my October 27, 2008 response to the above complaint, I dictated it over the phone after Mr. Rodrigue read his October 27, 2008 affidavit. He specifically referenced to me that the date in question was July 2008, not July 2006. Prior to the October 27, 2008 submission I was able to return to the office to sign the original submission. I did not feel the need to proof the submission. My November 6, 2008 submission was made over my signature.

66. Thus, respondent amended Mr. Rodrigue's affidavit to reflect that Mr. Rodrigue had received his inheritance funds in July 2008 rather than July 2006. (In fact, Mr. Rodrigue received his inheritance funds, and respondent misappropriated those funds, in November 2007.) By November 12, 2008, the date of Mr. Rodrigue's amended affidavit, respondent had produced to the Director only his July 2008 through October 2008 trust account bank statements, which bank statements reflected no client activity and only a nominal balance. On November 7, 2008, the Director had requested for the forth time respondent's trust account books and records for the period from July 2006 to the present These books and records obviously included November 2007, *i.e.*, the

month in which respondent misappropriated Mr. Rodrigue's funds, and respondent's production of those books and records would have revealed his misappropriation. Respondent amended Mr. Rodrigue's affidavit to mislead the Director into abandoning the request for respondent's July 2006 through June 2008 trust account books and records.

67. Mr. Rodrigue did not draft the November 12, 2008, affidavit, did not ask respondent to draft it and did not read it carefully before he signed it. Mr. Rodrigue did not discuss the affidavit with Lena Garcia and she was not present when he signed it. Mr. Rodrigue felt compelled to sign the affidavit in order to get his money back from respondent.

68. Lena Garcia's testimony regarding the November 12, 2008, amended affidavit was not believable and conflicted with the credible testimony provided by Mr. Rodrigue. Ms. Garcia testified that that Mr. Rodrigue signed the amended affidavit in her presence in a truck outside the Cedar Towing offices. Ms. Garcia described that Mr. Rodrigue was sitting in the driver's seat of the truck and that Ms. Garcia was standing directly outside the driver's door of the truck, Ms. Garcia testified that respondent and Condon were also present and that respondent was sitting in the truck's passenger seat. Ms. Garcia could not recall where Condon was when Mr. Rodrigue signed the affidavit. Finally, Ms. Garcia testified that she happened to have her notary stamp with her and notarized the document outside the truck .

69. On cross-examination, Ms. Garcia testified that the "truck" in which the affidavit was signed was actually a "tow truck". After counsel noted that a tow truck has only driver and passenger seats, and there would have been no place for Condon, Ms. Garcia became unsure regarding the type of truck . Ms. Garcia testified that Mr. Rodrigue signed the affidavit on the steering wheel of the truck and that she notarized it somewhere on the exterior of the truck. This referee finds that Ms. Garcia's description of events is not believable.

70. Ms. Garcia's testimony is in direct conflict with the credible testimony provided by Mr. Rodrigue that he did not draft the affidavit, did not discuss it with respondent or Ms. Garcia and that Ms. Garcia was not present when he signed the affidavit.

71. As noted, the only information that had been changed in the amended affidavit was the date on which Mr. Rodrigue purportedly received his inheritance funds. The date given for that event in the original affidavit was July 2006. The date given in the amended affidavit was July 2008. This change served to benefit only respondent who by November 12, 2008, the date of the amended affidavit, had produced to the Director only his July 2008 through October 2008 trust account bank statements, which bank statements reflected no client activity and only a nominal balance. On November 7, 2008, the Director had requested for the forth time respondent's trust account books and records for the period from July 2006 to the present. These books and records would have disclosed respondent's misappropriation of Mr. Rodrigue's inheritance funds. Clearly, it was the Director's continuing requests for these books and records that prompted the amended affidavit. In light of these and the other factors set forth above, this referee finds that Ms. Garcia's testimony regarding the November 12, 2008, affidavit is not credible.

72. Respondent denied any role in the preparation of the amended affidavit. However, in attaching the amended affidavit to his November 28, 2008, letter, respondent knowingly submitted false information to the Director.

73. On December 4, 2008, the Director sent respondent a letter again requesting the following:

a. All original files maintained on behalf of Cedar Towing while employed as a "lobbyist" by Mr. Rodrigue.

b. Documentation regarding Mr. Rodrigue's claim in the affidavit that the complaint against respondent was a "ruse" to mislead his wife, including the

contact information for the individual who mistakenly faxed the complaint; documentation of Mr. Rodrigue's receipt of the family settlement funds; and verification the funds were invested into a biodiesel operation.

c. An explanation for respondent's false statement that he never represented Mr. Rodrigue in any personal matters.

d. Statements and an accounting regarding respondent's claim that Mr. Rodrigue's funds were invested in American Funds.

e. Respondent's trust account books records for the period July 2006 through present.

74. The Director's December 4, 2008, letter also requested, for the fifth time, respondent's trust account books and records for the period July 2006 through the present. Respondent was given two weeks to respond.

75. Respondent failed to respond to the Director's December 4, 2008, letter. On December 19, 2008, respondent sent the Director a letter stating that he was unable to respond due to a busy court schedule and that he intended to seek counsel.

76. In light of respondent's continued failure to produce trust account books and records and his false and misleading statements, the Director obtained an investigatory subpoena on February 18, 2009, pursuant to Rule 8(c), Rules on Lawyers Professional Responsibility (RLPR), in order to obtain respondent's trust account books and records directly from the bank. Those books and records reflected that respondent received Mr. Rodrigue's inheritance funds, deposited them into his trust account and misappropriated those funds as described above.

77. In a letter to the Director dated May 1, 2009, respondent, through counsel, stated, "Mr. Rodrigue has currently retained Mr. Garcia with respect to representation on a personal legal matter". In fact, Mr. Rodrigue and Cedar Towing discharged respondent as their attorney/lobbyist in 2007 or 2008 and did not retain respondent to

represent him on any legal matters after that date. Respondent's statement, through counsel, was false.

EMPLOYER WITHHOLDING TAXES MATTER

78. Despite having employees and an obligation to do so, respondent failed to timely file and/or pay employer withholding taxes for every quarter during the years 2002 through 2004.

79. **1st Quarter 2002.** The filing deadline for respondent's first quarter 2002 federal employer withholding tax return was April 30, 2002. Respondent did not file his return until June 16, 2002, or 47 days late. Late filing and payment penalties and interest totaling $908 were assessed against respondent. Respondent made a $2,000 tax deposit on May 14, 2002, which was applied to and fully satisfied his first quarter 2002 taxes, penalties, and interest even before he filed the underlying return.

80. **2nd Quarter 2002.** The filing deadline for respondent's second quarter 2002 federal employer withholding tax return was July 31, 2002. Respondent did not file his return until September 6, 2002, or 37 days late. The return reflected $3,229 in employer withholding taxes, over and above the tax deposits respondent had made through the filing deadline, due from respondent. Respondent remitted $1,547 with the return, leaving a tax balance due of $1,682. Late filing and payment penalties and interest totaling $1,118 were assessed against respondent. Respondent paid the tax, penalties and interest in full on December 30, 2002 .

81. **3rd Quarter 2002.** The filing deadline for respondent's third quarter 2002 federal employer withholding tax return was October 31, 2002. Respondent timely filed his return on that date. The return reflected $4,199 in employer withholding taxes, over and above the tax deposits respondent had made through the filing deadline, due from respondent. Respondent remitted $3,449 with the return and paid the $750 tax balance on November 4, 2002. A late payment penalty of $430 was assessed against respondent. Respondent paid this penalty on December 30, 2002. Respondent's check was,

however, returned for insufficient funds, resulting in the assessment of interest. Respondent paid the penalty and interest in full on February 10, 2003.

82. **4th Quarter 2002.** The filing deadline for respondent's fourth quarter 2002 employer withholding tax return was January 31, 2003. Respondent did not file his return until October 14, 2005, or almost three years late. The return reflected $4,303 in employer withholding taxes, over and above the tax deposits respondent had made through the filing deadline, due from respondent. Respondent remitted payment of $500 with the return, resulting in a $3,803 tax balance. Late filing and payment penalties and interest totaling $3,133 were assessed against respondent. Respondent thereafter made the following payments: (a) January 3, 2006 - $500; (b) May 30, 2006 - $425; and (c) January 31, 2007 - $3,802. The check by which respondent made the January 31, 2007, payment was, however, returned for insufficient funds. Currently, at least $5,526 in tax, penalties and interest remains due from respondent.

83. **1st Quarter 2003.** The filing deadline for respondent's first quarter employer withholding tax return was April 30, 2003. Respondent did not file his return until May 9, 2005, or more than two years late. The return reflected $7,361 in employer withholding taxes, over and above the tax deposit respondent had made through the filing deadline, due from respondent, which respondent remitted in full with the return. Late filing and payment penalties and interest totaling $1,516 were assessed against respondent. Respondent paid these penalties and interest in full on May 30, 2006.

84. **2nd Quarter 2003.** The filing deadline for respondent's second quarter 2003 employer withholding tax return was July 31, 2003. Respondent did not file his return until May 9, 2005, or almost two years late. The return reflected $1,162 in employer withholding taxes due from respondent, which respondent remitted in full with the return. Late filing and payment penalties and interest totaling $572 were assessed against respondent. Respondent paid these penalties and interest in full on December 18, 2006. Respondent's check was, however, returned for insufficient funds.

Respondent paid the late filing and payment penalties and interest in full on April 18, 2007.

85. **3rd Quarter 2003.** The filing deadline for respondent's third quarter 2003 employer withholding tax return was October 31, 2003. Respondent did not file his return until May 9, 2005, or more than a year-and-a-half late. The return reflected $2,286 in employer withholding taxes due from respondent, which respondent remitted with the return. Late filing and payment penalties and interest totaling $1,076 were assessed against respondent. Respondent paid these penalties and interest in full on April 18, 2007.

86. **4th Quarter 2003.** The filing deadline for respondent's fourth quarter 2003 employer withholding tax return was January 31, 2004. Respondent did not file his return until May 9, 2005, or more than a year late. The return reflected $5,168 in employer withholding taxes due from respondent, which respondent remitted in full with the return. Late filing and payment penalties and interest totaling $2,498 were assessed against respondent. On June 7, 2007, respondent was credited with a $540 payment against these penalties and interest. To date, however, at least $1,958 in penalties and interest remain due from respondent.

87. **1st Quarter 2004.** The filing deadline for respondent's first quarter 2004 employer withholding tax return was April 30, 2004. Respondent did not file his return until May 9, 2005, or more than a year late. The return reflected $4,305 in employer withholding taxes due from respondent, which respondent remitted with the return. Late filing and payment penalties and interest totaling at least $1,956 were assessed against respondent. To date, respondent has not paid these penalties and interest.

88. **2nd Quarter 2004.** The filing deadline for respondent's second quarter 2004 employer withholding tax return was July 31, 2004. Respondent did not file his return until May 9, 2005, or almost a year late. The return reflected $2,260 in employer withholding taxes due from respondent, which respondent remitted with the return.

Late filing and payment penalties and interest totaling $733 were assessed against respondent. On December 18, 2006, respondent paid $315 check against these penalties and interest. Respondent's check was, however, returned for insufficient funds. Respondent paid the penalties and interest in full on April 18, 2007.

89. **3rd Quarter 2004.** The filing deadline for respondent's third quarter 2004 employer withholding tax return was October 31, 2004. Respondent did not file his return until May 9, 2005, or more than six months late. The return reflected $3,046 in employer withholding taxes due from respondent, which respondent remitted with the return. Late filing and payment penalties and interest totaling $1,205 were assessed against respondent. Respondent paid these penalties and interest in full on April 18, 2007.

90. **4th Quarter 2004.** The filing deadline for respondent's fourth quarter 2004 employer withholding tax return was January 31, 2005. Respondent did not file his return until May 9, 2005, or more than three months late. The return reflected $2,098 in employer withholding taxes due from respondent, which respondent remitted with the return. Late filing and payment penalties and interest totaling $459 were assessed against respondent. Respondent paid these penalties and interest in full April 18, 2007 .

91. As of August 25, 2009, *i.e.*, the date of the IRS transcripts reflecting the status of respondent's employer withholding tax filings and payment, a balance of $9,440 in unpaid employer withholding taxes, penalties and interest remained due from respondent for the 4th quarter of 2002 ($5,526), 4th quarter of 2003 ($1,958) and 1st quarter of 2004 ($1,956). Respondent presented no evidence that he has paid any portion of these taxes, penalties and interest.

ANTWAN SCARVER MATTER

92. In January 2007 Antwan Scarver was charged with several probation violations and additional criminal charges in Ramsey County, Minnesota. Scarver was

initially represented by attorney Calandra Harris, who arranged for a plea agreement on Scarver's behalf.

93. After entering a plea of guilty, Scarver consulted with respondent about withdrawing his plea and seeking a more favorable plea bargain. On or about July 29, 2007, Scarver retained respondent to withdraw his guilty plea. Scarver signed a written fee agreement providing for a $10,000 non-refundable retainer. Scarver thereafter paid respondent $4,500 of the $10,000 retainer.

94. When Scarver retained respondent, he advised Scarver that he had a good chance of successfully withdrawing his plea and that respondent had just successfully handled a matter similar to Scarver's in Wisconsin.

95. On July 30, 2007, respondent signed and filed a substitution of counsel and certificate of representation with the district court. Respondent also filed a one-page motion to withdraw guilty plea on behalf of Scarver along with a brief request for discovery . Respondent submitted no written memoranda or case law in support thereof. A hearing was scheduled for August 3, 2007 Both respondent and Scarver appeared for the hearing and the matter was continued to August 15, 2007.

96. The parties appeared at the August 15, 2007, hearing . Respondent's motion to withdraw guilty plea was denied and Scarver's bail was revoked. On August 20, 2007, Scarver was sentenced pursuant to the terms of the original plea agreement. Scarver was incarcerated in September 2007 .

97. On August 17, 2007, respondent filed a one-page motion for reconsideration which was also denied. Respondent did not submit any written memoranda or case law in support of the motion for reconsideration .

98. Beginning in August 2007 Scarver requested that respondent refund at least a portion of his $4,500 retainer. Scarver's request was based on the fact that respondent did not obtain a withdrawal of his guilty plea and Scarver's belief that respondent did not perform sufficient work to retain the entire $4,500. After Scarver

became incarcerated, he asked a friend to assist him in contacting respondent regarding a refund. Respondent did not refund any portion of Scarver's retainer.

99. By May 2008 Scarver and respondent agreed to submit their fee dispute to the Hennepin County Bar Association Legal Fee Arbitration Board (hereinafter "Fee Arbitration Board")..

100. On October 17, 2008, the Fee Arbitration Board held a hearing on Scarver's claim that respondent charged an unreasonable fee. As part of this hearing, the Fee Arbitration Board reviewed the legal work performed by respondent. On October 24, 2008, the Fee Arbitration Board issued a written determination that respondent had charged an unreasonable fee and should refund the entire $4,500 to Scarver.. Respondent did not refund Scarver's retainer..

101. Over the next six months the Director, Scarver and other individuals on Scarver's behalf made multiple requests for respondent to comply with the binding fee arbitration determination.

102. Eventually, Scarver commenced a lawsuit against respondent to confirm the fee arbitration award. A hearing in the matter was scheduled for April 17, 2009. At that hearing, respondent issued a $4,500 check to Scarver, post-dated for April 24, 2009 . Based on respondent's payment, the court issued an order dismissing Scarver's lawsuit .

103. On April 17, 2009, Scarver's mother, Evette Scarver, picked-up respondent's check from the court. Ms. Scarver sent the check to Scarver. Scarver endorsed the check as payable to Ms. Scarver, and returned the check to her.

104. On April 24, 2009, Ms. Scarver deposited respondent's check into her bank account. Respondent's check was later returned for insufficient funds.

105. After learning of respondent's insufficient funds check, Ms. Scarver contacted respondent on several occasions over a period of at least three weeks. Respondent explained to Ms. Scarver that he had been issued an insufficient funds check by a third party and that had caused him to bounce several checks. Respondent

stated that as soon as the third party made good on his check, respondent would do the same for Scarver. During one of his conversations with Ms. Scarver, respondent stated that he was disappointed that Scarver had filed a complaint with the Director. Respondent did not, in fact, make good on his check to Scarver and Ms. Scarver eventually discontinued her contacts with respondent.

106. Scarver or someone on his behalf informed the court of the bounced check and another hearing was scheduled in the matter for June 16, 2009 .

107. As a result of the June 16, 2009, hearing, an order confirming arbitration award and denying respondent's motion to dismiss was entered.

108. To date, respondent has not repaid Scarver any portion of his $4,500 retainer.

STEVEN BOHLER MATTER

109. Steven Bohler carries a restricted driver's license due to previous alcohol-related driving infractions. Bohler carries what is known as a "B Card," which is issued by the Commissioner of Public Safety pursuant to Minn. Stat. § 171.09 to a driver upon meeting certain conditions for reinstating driving privileges after serial DWI or DUI violations. In order to be issued a B Card, Bohler signed a sworn statement to never again consume alcohol .

110. In 2006 Bohler was stopped by law enforcement walking in a bar parking lot. A breathalyzer was administered, which tested positive for alcohol. As a result, Bohler's B Card was cancelled immediately. Bohler hired respondent to seek judicial review of the cancellation of his B Card. Bohler described to respondent the facts that had led to cancellation of his B Card.

111. . Respondent told Bohler that he had a viable legal claim, that respondent would get Bohler's driver's license back for him and that Bohler had nothing to worry

about. On or about September 25, 2006, Bohler signed a written fee agreement and provided respondent with a $1,000 retainer and $250 in cash for a filing fee .

112. On December 1, 2006, respondent filed a petition for judicial review for reinstatement, an affidavit of service and an affidavit of counsel on behalf of Bohler with the Ramsey County Court Administrator. Respondent did not file any memorandum of law in support of his petition for review. Respondent did not provide Bohler with a copy of his December 1, 2006, submission

113. After he retained respondent, Bohler made several attempts to contact respondent by telephone regarding the status of his case. At one point, Bohler visited respondent's office, only to learn that respondent had moved. Respondent had not provided Bohler with his new address. When Bohler was able to reach respondent, respondent assured Bohler that everything was fine with his case.

114. On January 2, 2007, respondent's paralegal wrote to Bohler and informed him that a hearing was scheduled for February 5, 2007.

115. After he received the January 2, 2007, letter Bohler called respondent. Respondent advised Bohler that it was not necessary for him to attend the hearing. Respondent stated that he would attend on behalf of Bohler. Respondent again reassured Bohler not to worry about his case.

116. On January 17, 2007, respondent received the Commissioner of Public Safety's response to Bohler's petition for review . Respondent did not provide a copy of the Commissioner of Public Safety's January 17, 2007, response to Bohler.

117. On February 2, 2007, respondent's paralegal wrote to the district court clerk and cancelled the hearing in Bohler's matter. Respondent did not consult with Bohler prior to cancelling the hearing. Respondent did not provide Bohler with a copy of the February 2, 2007, letter.

118. Bohler called respondent to learn the outcome of the hearing he believed to have taken place on February 5, 2007. At that time, respondent informed Bohler, for

the first time, that if the hearing had not been cancelled, Bohler would likely have been made to pay a substantial amount for court costs. This conflicted with respondent's prior advice that Bohler had a good case, that his license would be reinstated and that Bohler need not worry..

119. Bohler requested that respondent refund his $1,000 retainer. Respondent refused to refund any portion of the fees. Respondent's retention of Bohler's entire $1,000 retainer constitutes an unreasonable fee in light of the fact that respondent dismissed Bohler's case without his permission and did not perform the legal services for which he was retained.

AGGRAVATING AND MITIGATING FACTORS

120. Respondent has a substantial history of prior discipline, including two public discipline determinations. Respondent has committed multiple acts of professional misconduct over an extended period of time. Respondent's disciplinary history constitutes an aggravating factor.

121. Respondent committed misconduct while subject to public probation. This is an aggravating factor.

122. Respondent refused to acknowledge the wrongful nature of his misconduct, exhibited no recognition or remorse for his misconduct, and failed to offer any evidence or assurance that similar misconduct will not reoccur.

123. Over the course of these disciplinary proceedings, respondent has engaged in the submission of false evidence, made false statements and engaged in other deceptive practices in order to conceal his misappropriation. Moreover, this referee believes respondent testified falsely during the referee hearing. Respondent provided false testimony regarding the purpose for which Mr. Rodrigue gave him the $27,000 in inheritance funds and his use of those funds; the December 19, 2007, letter in

the Rodrigue matter; the extent of his role in preparing the October 27 and November 12, 2008, Rodrigue affidavits; and his alleged repayment of $5,000 to Mr. Rodrigue. Respondent's dishonest conduct during the Director's investigation and this hearing is an aggravating factor.

124. Respondent has engaged in a pattern of bad faith obstruction of the last three public disciplinary proceedings against him. Respondent has solicited complainants to withdraw their complaints and/or discontinue cooperating with the Director through coercion and promises of repayment for legal fees as follows:

a. The referee who heard the public disciplinary matter that resulted in respondent's February 8, 2006, suspension, found that shortly before the hearing in that matter, respondent and the complainant "resolved" their fee dispute. The complainant thereafter recalled facts that tended to exonerate respondent regarding one of his alleged acts of misconduct. The referee concluded that the complainant's recollection was "too conveniently tied to the settlement of the fee dispute," and that respondent did, in fact, commit the misconduct at issue.

b. In this proceeding, respondent pressured Mr. Rodrigue into signing two affidavits containing multiple false statements and requesting that his complaint to the Director be withdrawn. Again, respondent's requests in this regard were accompanied by a promise to pay Mr. Rodrigue the funds respondent owed him.

Respondent's actions as described above constitute a pattern of willful interference in the disciplinary proceedings by respondent. Respondent's actions in this regard constitute an aggravating factor.

125. Respondent has not made any restitution to the victims of his misconduct. As stated above, respondent's claim that he repaid Mr. Rodrigue $5,000 in cash in October 2008 is not credible. The referee concludes the harm suffered by Mr. Rodrigue

remains outstanding and respondent has not repaid the entire amount that he misappropriated. Respondent currently owes Mr. Rodrigue $5,000. Respondent's failure to comply with the binding fee arbitration award and repay $4,500 to Scarver is a second instance where the client harm from respondent's misconduct remains outstanding. Respondent's indifference to making restitution is an aggravating factor.

126. Respondent had a dishonest or selfish motive in committing his misconduct. Respondent misappropriated $19,759 to join, or pay a country club bill. Respondent also took legal fees from clients and failed to perform or adequately perform the services for which he was retained. Respondent took money from clients and failed to return unearned fees.

127. No evidence of mitigating factors was presented.

CONCLUSIONS OF LAW

1. Respondent's conduct in misappropriating Rodrigue's inheritance funds, making false statements to Rodrigue to conceal his misappropriation, and allowing a non-lawyer signatory on his trust account violated Rules 1.15(c)(4) and (j), and 8.4(c) and (d), MRPC, and the Court's January 23, 2008, order.

2. Respondent's conduct in making false statements to the Director and coercing Rodrigue to sign a false affidavit, violated Rules 4.1, 8.1(b), and 8.4(c) and (d), MRPC, and the Court's January 23, 2008, order.

3. Respondent's conduct in failing to cooperate with the Director's investigation as a further means of concealing his misappropriation, violated Rules 8.1(b) and 8.4(d), MRPC, Rule 25, RLPR, and the Court's January 23, 2008, order.

4. Respondent's conduct in failing to timely file and pay his employer withholding taxes violated Rules 8.4(c) and (d), MRPC, and the Court's January 23, 2008, order.

5. Respondent's conduct in the Scarver matter violated Rules 1.5(a) and 8.4(d) and (i), MRPC, and the Court's January 23, 2008, order.

6. Respondent's conduct in the Bohler matter violated Rules 1.2, 1.3, 1.4, 1.5(a), and 8.4(d), MRPC, and the Court's January 23, 2008, order.

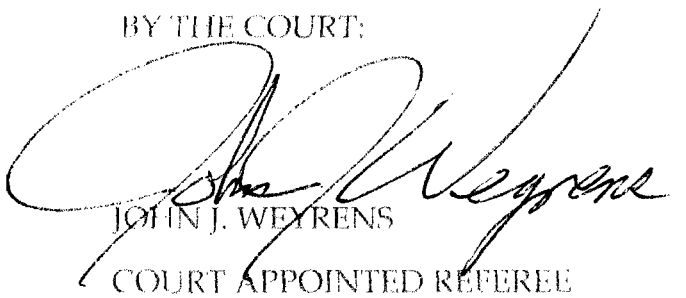
7. There are substantial aggravating factors as state above.

RECOMMENDATIONS FOR DISCIPLINE

I hereby recommend that the respondent, Albert A. Garcia, Jr., be disbarred from the practice of law pursuant to Rule 15, RLPR effective immediately. That he comply with the requirements of Rule 15, RLPR, and that he pay $900 in costs pursuant to Rule 24(a), RLPR and $321.86 in Disbursements pursuant to Rule 24(b), RLPR

Dated November 10, 2009

BY THE COURT:



JOHN J. WEYRENS

COURT APPOINTED REFEREE