

FILED FEBRUARY 29, 2012

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 06-O-11488
	)	
ALBERT MYRICK GRAHAM, JR.,	)	OPINION
	)	
A Member of the State Bar, No. 44490.	)	
_____	)	

**I. SUMMARY**

In 2005, a United States Tax Court judge found that Albert Myrick Graham, Jr., fraudulently underpaid his taxes in 1995, 1998 and 1999, by approximately \$157,000. The tax court found that Graham had engaged in an elaborate scheme of hiding his income and assets to avoid paying taxes to the Internal Revenue Service (IRS) and a private debt to a mortgage creditor. The tax court imposed a civil tax fraud penalty, and the Ninth Circuit Court of Appeals affirmed that decision.

In 2010, the Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) alleging a single count of moral turpitude, dishonesty or corruption, based on the tax court's findings. Graham, who was admitted to the Bar in 1969, has a prior record of discipline (private reproof) from 2002. The hearing judge found Graham culpable of moral turpitude and recommended a two-year actual suspension, continuing until he establishes his rehabilitation, fitness to practice, and learning and ability in the law, as required in a standard 1.4(c)(ii) proceeding.<sup>1</sup>

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<sup>1</sup> Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Graham seeks review, asserting his actions “did not rise to the level of moral turpitude,” particularly since criminal tax fraud charges were never filed against him. Alternatively, he contends that even if he is found culpable, no discipline should be imposed since he acted in good faith and presented significant mitigation. The State Bar requests that we affirm the hearing judge’s decision.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find Graham culpable of committing acts of moral turpitude. Overall, the aggravation outweighs the mitigation even though we find fewer aggravating factors than the hearing judge found. Given Graham’s extensive fraud, lack of candor at trial and present lack of insight, we agree with and adopt the recommended discipline.

## **II. GRAHAM’S CHALLENGE TO THE TAX COURT’S FINDING**

Graham asserts that the tax court’s *finding* of civil tax fraud is irrelevant and urges us not to consider it because it: (1) did not include a determination of moral turpitude; and (2) was based on a lesser standard of proof than required in discipline cases. Generally, civil findings are entitled to a strong presumption of validity if supported by substantial evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947 [noting civil findings must nonetheless be assessed independently under clear and convincing standard in discipline proceedings].) The hearing judge properly admitted the *actual testimony* from the tax court trial in addition to the judicial finding of tax fraud. (Bus. & Prof. Code, § 6049.2 [testimony from contested civil action admissible in discipline proceeding where respondent was party and had opportunity for cross-examination].) Because the tax court testimony is the most direct evidence of Graham’s actions, we give this testimony greater weight than the tax court’s finding and analysis.

### III. FINDINGS OF FACT

The NDC charges that Graham committed several acts of moral turpitude in an attempt to fraudulently underpay his taxes in 1995, 1998 and 1999. The primary factual allegations are that he: (1) created a bogus lien and deeds of trust; (2) concealed his interest in a partnership; and (3) concealed and diverted income. The record clearly and convincingly<sup>2</sup> supports the hearing judge's findings of fact, which we summarize below.<sup>3</sup>

#### A. GRAHAM CREATED A BOGUS LIEN AND DEEDS OF TRUST

Prior to 1995, Graham owned a 33% interest in an apartment building. Redlands Federal held a \$3.4 million dollar note on the property. In 1995, Graham and his co-owners defaulted on the note and Redlands Federal instituted judicial foreclosure proceedings.

Graham admitted he created "bogus" legal documents to prevent Redlands Federal from attaching his personal assets for a deficiency judgment. First, he created a fraudulent lien on his 1956 Mercedes Benz by giving cash to a friend, Lee Cogan, who wrote a check to Graham for the same amount, but characterized it as a loan. Graham then conveyed a lien on the Mercedes to Cogan.

Next, Graham executed two false deeds of trust. The first was against his home for approximately \$164,000 in favor of Charlene Edgar, his office manager, even though he owed her no money. The second was against a commercial property Graham owned for \$50,000 in favor of James O'Leary, an accountant friend to whom he also owed no money.

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<sup>2</sup> Clear and convincing evidence "requires a finding of high probability, based on evidence so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]" (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552, internal quotations omitted.)

<sup>3</sup> On review, the hearing judge's findings of fact are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) Graham must specify those factual findings he disputes and provide references to the record. If he does not raise a factual error, it is waived. (Rules Proc. of State Bar, rule 5.152(C).) We have reviewed all factual findings Graham disputed in his briefs.

## **B. GRAHAM CONCEALED HIS PARTNERSHIP INTEREST**

In 1995, Graham and his co-counsel successfully obtained a civil judgment on behalf of Nick and Patricia Anis in a wrongful termination case. Graham's co-counsel created the Anis Recovery Funds Partnership to administer the judgment proceeds, including Graham's 22.375% share of the contingency fee. Graham explained at his tax trial that he wanted to prevent Redlands Federal from attaching his partnership interest since it "would just be additional . . . pickings for Redlands Federal . . . in satisfying any deficiency judgment." So he directed that his share be placed in the names of two of his children, Drew and Allison. Despite this transfer of shares, Graham maintained control over the partnership activities by attending partnership meetings, contributing money for cash calls and receiving the cash distributions the partnership made to the children. The following summary details how Graham ultimately received that money.

In 1995, Drew and Allison received approximately \$47,000 as a partnership share from a cash settlement, which was paid over to Graham. In 1996, the partnership distributed approximately \$5,000 to the children, but the money was used to pay outstanding fees Graham owed to his co-counsel. And in 1999, the partnership distributed two checks totaling \$77,000 to the children. The checks were endorsed over to O'Leary, who re-distributed \$55,000 to Graham, marking it as a loan from the children. The hearing judge rejected Graham's claim that any funds were a loan, and no evidence established that Graham paid the money back to his children or that they claimed it as income. In fact, Graham's accountant testified at the tax trial that he included the children's partnership distributions on *Graham's* tax returns because he "didn't know how Drew and Allison could be a partner in that [Anis] fund." Overall, the hearing judge found that the way Graham handled the partnership distributions "makes clear that this ostensible change of ownership was a sham."

### **C. GRAHAM HID INCOME BY DIVERTING IT TO OTHERS**

According to the hearing judge, Graham “took extensive steps to hide his income from the taxing authorities.” Edgar and O’Leary, who participated in creating the bogus deeds of trust, assisted Graham with his scheme to hide income.

Edgar’s involvement occurred during 1997 and 1998. Graham made deposits of client checks directly into Edgar’s personal checking account. Edgar then returned the money to Graham or paid his personal bills. Graham also directed her to cash various checks at the bank and give him the cash. He knew that Edgar kept a “secret list” of client payments that had been handled this way. She used the list to keep track of how much each client had paid, since these cashed checks were not recorded in the business ledger. Edgar’s tax court testimony was corroborated by deposit receipts to her account, copies of client checks and Graham’s admission that he had her help him create the sham \$164,000 deed of trust on his home.<sup>4</sup>

O’Leary’s involvement occurred during 1998. Graham directed that \$135,421 in earned attorney fees go directly to O’Leary between March and May of 1998. Graham testified that he gave the money to O’Leary to invest for his retirement. The hearing judge found this testimony lacked credibility and candor because O’Leary, who was not an investment advisor, deposited the money in his own account and never made any investments. Further, almost immediately after O’Leary received the first \$100,000, Graham told him he needed it back. Graham also directed O’Leary to pay \$42,500 to Edgar (who then issued checks on her personal account to Graham) and smaller sums to his accountant, his son and his interior decorator. By September

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<sup>4</sup> Graham’s misconduct came to light after he accused Edgar of embezzling funds from his office. Upon Edgar’s arrest in 1999, she reported Graham’s fraudulent actions to her attorney. An Orange County deputy district attorney testified at the tax court trial that no charges were filed against Edgar due to insufficient evidence, including Graham’s “less than honest” answers provided during the investigation. The IRS investigated Edgar’s allegations against Graham, which led to the tax court proceedings. Graham testified that he filed a civil lawsuit against Edgar and received a judgment of over \$500,000.

1998, O’Leary had distributed \$119,561 of the \$135,421, according to Graham’s direction. Graham did not record the \$135,421 income in his business account nor did he report it to his accountant for his initial 1998 tax return. Weeks later, however, Graham asked his accountant to file an amended tax return reflecting the \$135,421 in income.<sup>5</sup>

#### IV. CULPABILITY

The hearing judge found Graham culpable of committing acts of moral turpitude and dishonesty. We agree.

In broad terms, any act contrary to honesty and good morals involves moral turpitude. (*Kitsis v. State Bar* (1979) 23 Cal.3d 857, 865.) Evil intent is not necessary to prove moral turpitude, although some level of guilty knowledge or gross negligence is required. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr, 234, 241.) Here, Graham’s deceitful actions, including creating a sham lien and fraudulent deeds of trust to avoid paying Redlands Federal, constitute moral turpitude under established case law. (*Townsend v. State Bar* (1948) 32 Cal.2d 592, 595 [attorney advising conveyance of property to prevent creditor from recovering on judgment involves moral turpitude].) Similarly, Graham’s other actions to conceal his partnership interest in Anis from Redlands Federal and his law practice income from the IRS amount to moral turpitude. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 679 [acts by attorney who conceals or deceives are dishonest and involve moral turpitude]; *In re Hallinan* (1957) 48 Cal.2d 52, 54-56 [attorney who diverts income to avoid full accounting to IRS acts with moral turpitude].)

Graham advances two primary arguments against his culpability. First, he claims he encumbered his assets in good faith and according to his bankruptcy counsel’s advice. We reject

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<sup>5</sup> Graham requested the amended return after he filed a malpractice action against his accountant for not discovering Edgar’s alleged embezzlement. Once the amended return was filed, Graham served the lawsuit.

this claim since there is no evidence that Graham's attorney advised him to *fabricate* a lien and deeds of trust or to hide income. Graham could not have honestly or reasonably believed that creating such fraudulent legal documents was justified by his attorney's general advice to encumber assets. (Compare *In the Matter of Respondent H, supra*, 2 Cal. State Bar Ct. Rptr. at p. 241 [honest but unreasonable belief may negate the mens rea for moral turpitude].)

Second, Graham claims that the civil tax fraud finding does not establish moral turpitude or justify discipline because he was never charged with *criminal* tax fraud. This claim also lacks merit since a criminal conviction is not a condition precedent to finding moral turpitude or to imposing attorney discipline. (Bus. & Prof. Code, § 6106 [act of moral turpitude, whether committed in course of relations as attorney and whether a felony or misdemeanor, is cause for disbarment or suspension].) Graham's fraudulent actions, as evidenced by the tax court testimony, sufficiently prove moral turpitude and merit discipline.

## **V. FACTORS IN AGGRAVATION AND MITIGATION**

The offering party bears the burden of proof for aggravating and mitigating circumstances. Graham must establish mitigation by clear and convincing evidence (std. 1.2(e)), while the State Bar has the same burden to prove aggravating circumstances (std. 1.2(b)).

### **A. AGGRAVATION**

The hearing judge found five factors in aggravation: (1) one prior discipline in 2001 (private reproof); (2) multiple acts of misconduct; (3) lack of candor at trial; (4) lack of insight and remorse; and (5) significant harm to the public for failure to timely pay taxes. We agree with the first four factors but disagree with the last one – there is no clear and convincing evidence that Graham caused significant harm to a client, the public or the administration of justice. (Std. 1.2(b)(iv).) He ultimately paid his overdue taxes, penalties and fees and the State Bar did not prove that his case was more egregious than other routine tax deficiency matters.

### **1. Prior Discipline – Private Reproval (std. 1.2(b)(i))**

In 2002, Graham was disciplined for improperly entering into a business transaction with a client. In 2001, one of Graham's family law clients owed him over \$22,000 in attorney fees. Graham created a two-fold ethical problem when his client executed an agreement to place a \$40,443 lien on the client's home to secure payment for the outstanding fees. First, the lien amount exceeded the unpaid fees. And second, Graham did not follow the safeguards for entering into a business transaction with a client in willful violation of rule 3-300, which include written disclosures and consent. Graham stipulated to culpability and received a private reproval due to three strong mitigating factors (cooperation and good character, no prior discipline, and absence of harm) and no factors in aggravation. We assign moderate weight to Graham's prior discipline.

### **2. Multiple Acts (std. 1.2(b)(ii))**

Graham committed multiple acts of misconduct over several years by repeatedly attempting to deceive the IRS and a creditor. This is a significant aggravating factor.

### **3. Lack of Candor (std. 1.2(b)(vi))**

The hearing judge found that Graham displayed a "complete lack of candor" at times throughout his testimony. The record supports this finding. Notably, Graham testified that he legitimately created the deeds of trust on his properties in 1995, even though he admitted at his tax court trial that they were "bogus." In addition, Graham falsely testified that he diverted \$135,421 of his income to O'Leary to "invest" in his retirement, which was untrue since O'Leary simply followed Graham's instruction to either pay the money back to him or to others for his benefit. Such dishonesty before the State Bar Court greatly aggravates this case. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282 [lack of candor is "strong aggravating circumstance"].)



#### **4. Lack of Insight and Remorse (std. 1.2(b)(v))**

The hearing judge correctly found that Graham “fails to demonstrate any realistic recognition of or remorse for his wrongdoing and instead continues to assert that his conduct was justified and/or that others were responsible for it.” While the law does not require Graham to be falsely penitent, it “does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) We agree with the hearing judge that this aggravating factor is mitigated since Graham has not committed further tax violations for over 10 years.

#### **B. MITIGATION**

The hearing judge found two factors in mitigation: (1) good character (std. 1.2(e)(vi); and (2) pro bono service. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service is mitigating factor entitled to considerable weight].) We agree.

Graham presented impressive character evidence, including testimony and declarations from several judges, who raved about his long-standing and stellar reputation as a competent and ethical attorney. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from members of bench and bar entitled to serious consideration because judges and attorneys have “strong interest in maintaining the honest administration of justice”].) Nonetheless, the hearing judge correctly assigned limited weight to this evidence since most witnesses were not fully aware of Graham’s fraudulent misconduct.

Graham also presented evidence of his extensive community service. First, he has served the superior court as a pro tem judge. Second, after Hurricane Katrina, he traveled to the affected region to offer his help. Graham raised over \$300,000 to assist the victims. The hearing judge correctly assigned considerable weight to this evidence.

On balance, however, the aggravating factors outweigh those in mitigation.

## VI. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to preserve public confidence in the profession and to maintain high professional standards for attorneys. (Std. 1.3.) All relevant factors are balanced on a case-by-case basis to ensure discipline consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

We begin with the standards.<sup>6</sup> Standard 2.3 is most pertinent here and calls for actual suspension or disbarment when a member commits “an act of moral turpitude, fraud, . . . intentional dishonesty . . . or . . . concealment.” The degree of discipline depends upon “the extent to which the victim of the misconduct is harmed or misled and . . . upon the magnitude of the act of misconduct and the degree to which it relates to the member’s acts within the practice of law.” (*Ibid.*)

As standard 2.3 directs, we focus on the seriousness of Graham’s misconduct and its connection to the practice of law. Graham fraudulently concealed his assets and income for more than four years to deceive a creditor and the IRS. He engaged in a complex scheme of fraud for personal financial gain. He also used his legal skills to draft false documents and hide his law practice income. It is a serious matter when attorneys violate tax laws because they must set an example for others in observing the law. (*In re Rohan* (1978) 21 Cal.3d 195, 203.) Graham compounded his misconduct by testifying falsely at the hearing below and failing to acknowledge that his actions were wrong. Accordingly, Graham’s misconduct warrants significant discipline under standard 2.3. Given the standard’s broad range of discipline (from

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<sup>6</sup> Since Graham received a private reproof in 2001, we consider standard 1.7(a), which provides that if a “member has a record of one prior imposition of discipline . . . the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.”

actual suspension to disbarment), we look to comparable case law for further guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The State Bar urges a two-year actual suspension, citing *In re Hallinan*, *supra*, 48 Cal.2d 52, as most instructive.<sup>7</sup> We agree. In *Hallinan*, the attorney received a three-year actual suspension for underreporting income and claiming business expenses as personal expenses in a scheme that lasted four years. But the *Hallinan* attorney had a prior discipline for acts of deceit on another attorney and was criminally convicted of tax fraud. We do not find Graham's case to be as egregious as *Hallinan*. Graham was never criminally charged, has one prior discipline that did not involve dishonesty and presented substantial mitigation.

But we wish to be clear – Graham's many fraudulent acts, coupled with his lack of candor at trial, constitute serious misconduct deserving of discipline. Yet Graham's misconduct occurred over a decade ago, and he has otherwise practiced law discipline-free for 40 years. Relying on the applicable standard and comparable case law, we believe a two-year actual suspension followed by a reinstatement hearing will serve the goals of attorney discipline. Importantly, the actual suspension period will give Graham a lengthy time to reflect upon and gain insight into his misconduct before he attempts to prove his rehabilitation at the reinstatement hearing.

## **VII. FORMAL RECOMMENDATION**

For the foregoing reasons, we recommend that Albert Myrick Graham, Jr., be suspended from the practice of law for three years, that execution of that suspension be stayed, and that Graham be placed on probation for three years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

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<sup>7</sup> The State Bar requested a three-year actual suspension at trial.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)
7. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the three-year period of stayed suspension will be satisfied and that suspension will be terminated.

### **VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We recommend that Albert Myrick Graham, Jr., be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

## **IX. RULE 9.20**

We recommend that Albert Myrick Graham, Jr., be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

## **X. COSTS**

We recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.