

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

FILED

DEC 11 2008 *Jic*

STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES

In the Matter of )  
MARSHALL BITKOWER )  
Member No. 47478 )  
A Member of the State Bar. )  
Case Nos.: 06-O-11971, 06-O-14398, 06-O-14653, 07-O-11455  
DECISION INCLUDING DISBARMENT  
RECOMMENDATION AND  
INVOLUNTARY INACTIVE  
ENROLLMENT ORDER

PUBLIC MATTER

I. INTRODUCTION

Respondent **Marshall Bitkower** (respondent) is charged here with wilfully violating his professional duties in four separate matters. In the first matter (Case No. 06-O-11971), he is charged with violating: (Count 1) rule 3-100(A) of the State Bar Rules of Professional Conduct<sup>1</sup> [failure to act with competence]; (Count 2) rule 3-700(A)(2) [improper withdrawal from employment]; and (Count 3) Business and Professions Code<sup>2</sup> section 6068(m) [failure to inform client of significant development]. With respect to the second matter (Case No. 06-O-14398), respondent is charged with violating: (Count 4) rule 4-100(B)(4) [failure to pay client funds promptly]; (Count 5) rule 4-100(A) [failure to maintain client funds in trust account]; and (Count 6) section 6106 [moral turpitude- misappropriation]. In the third matter (Case No. 06-O-14653), he is charged with violating: (Count 7) rule 3-100(A)[failure to act with competence]; (Count 8) section 6068(m) [failure to inform client of significant development]; and (Count 9) rule 3-700(A)(2) [improper withdrawal from employment]. In the fourth matter (Case No. 07-O-

<sup>1</sup> Unless otherwise noted, all future references to rule(s) are to the Rules of Professional Conduct.

<sup>2</sup> Unless otherwise noted, all future references to section(s) are to the Business and Professions Code.

11455), he is charged with violating: (Count 10) rule 3-100(A)[failure to act with competence]; (Count 11) section 6068(m) [failure to respond to client inquiries]; and (Count 12) section 6068(i) [failure to cooperate in State Bar investigation].

The State Bar's culpability case in chief consisted solely of its presentation of a stipulation of undisputed facts reached with the respondent, including a stipulation by respondent to culpability for all twelve counts. The findings of facts and conclusions of law regarding culpability, below, are generally merely a recitation of that stipulation.

The purpose of the trial was primarily for the parties to present evidence of aggravation and mitigation. The findings below regarding that portion of the trial are from the evidence produced at trial, rather than from any stipulation of the parties.

## **II. PERTINENT PROCEDURAL HISTORY**

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on August 14, 2007. Respondent did not file a typical response to the NDC. Instead, on January 28, 2008, the parties filed an extensive Stipulation as to Facts and Culpability and Admission of Documents.

Trial was commenced and completed on May 19-20, 2008, followed by a period of post-trial briefing. The State Bar was represented at trial by Supervising Trial Counsel Geri Von Freymann. Respondent acted as counsel for himself.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Jurisdiction and Background**

Respondent was admitted to the practice of law in the State of California on January 7, 1971. In the late 1970's he became addicted to both alcohol and cocaine. As a result of his

substance abuse, he mishandled client funds and faced criminal charges. Formal proceedings were initiated against him by the State Bar in April 1981.

On August 17, 1982, an executed 68-page stipulation by respondent as to facts in lieu of perpetuation was filed with the State Bar Court. In this stipulation, respondent agreed to misconduct involving numerous clients and dating back to 1977. He also agreed to having violated numerous professional obligations, including the duties to act with competence and to respond to client inquiries. In many of the cases, he agreed that clients, attempting to reach him, had discovered that his phone was disconnected and that he had left no forwarding phone number or office address. Shortly after this stipulation was filed, respondent's resignation from the State Bar with charges pending was accepted by the Supreme Court in September 1982.

In 1983, while respondent was not a member of the State Bar, he pled nolo contendere to criminal charges of grand theft involving his mishandling of client settlement funds.

In 1987, respondent filed a request for reinstatement to the State Bar. His petition was initially rejected with a recommendation by the Hearing Department of the State Bar Court that respondent be required to pass the general bar examination. Thereafter, after respondent had been unable to pass that examination, he succeeded in having the bar examination passage requirement replaced with a requirement that he present other proof of his requisite knowledge of the general law. On November 21, 1991, respondent was reinstated to the practice of law.

Less than three years later, on July 18, 1994, disciplinary charges were filed against respondent as a result of his handling of a personal injury settlement in March 1993. On October 19, 1995, a decision was rendered by this court, finding respondent culpable of violations of rule 4-100(A) [failure to maintain client settlement funds in a client trust account] and rule 4-100(B)(3) [failure to maintain complete records of all funds held for the benefit of clients]. The

court recommended discipline including a one-year stayed suspension, two years of probation, and 30 days of actual suspension. In reaching that recommendation, the court noted that respondent technically had no prior discipline and that he had been sober since December 14, 1981. The court declined to follow the minimum discipline language of Standard 2.2(a) of the Standards for Attorney Sanctions for Professional Misconduct. The court's recommendation was adopted by the Supreme Court in an order dated April 18, 1996.

**Present Charges:**

**Case No. 06-O-11971**

In January 2004, respondent was employed by Colin Reynolds ("Reynolds") and Arna Vargas ("Vargas") to handle a personal injury matter for them on a contingency fee basis.

On February 5, 2004, respondent sent a representation letter to Mercury Insurance Company ("Mercury") on behalf of Reynolds and Vargas.

On September 23, 2004, respondent settled the Vargas claim. On October 4, 2004, he distributed the settlement funds to Vargas, paid himself, and paid the medical provider.

On October 28, 2004, respondent sent a demand letter on Reynolds' behalf to Mercury.

On April 12, 2005, respondent filed a complaint in Los Angeles Superior Court, captioned *Reynolds v. Michaelson*, case no. EC040680.

On June 17, 2005, attorney Thomas W. Shaver ("Shaver") filed an answer and case management statement for Michaelson. Shaver then served discovery on respondent. Respondent failed to timely respond.

On August 16, 2005, Shaver wrote to respondent, requesting objection-free, verified responses within three days.

On August 19, 2005, Shaver sent a letter to respondent, confirming the rescheduling of Reynolds' deposition to September 9, 2005.

On August 31, 2005, at the scheduled case management conference, which respondent did not attend, the matter was transferred to the ADR program for a mediation ordered to be completed within 120 days.

On September 8, 2005, Shaver's office sent notice of the following dates set by the court at the case management conference: status conference on July 26, 2005; trial commencing July 31, 2005; and mediation within 120 days.

On September 8, 2005, Shaver sent a fax to respondent, confirming Reynolds' deposition on October 3, 2005.

On September 26, 2005, a mediator was appointed, and notice of appointment was served on respondent and Shaver.

On October 4, 2005, Shaver sent a letter to respondent, complaining about 'incomplete and evasive' discovery responses, cancelling Reynolds' deposition, and threatening a motion to compel if further responses were not received before October 10, 2005.

On October 21, 2005, Shaver filed a motion to compel and for sanctions. The motion was initially set for hearing on December 2, 2005. It was then reset by the court to January 13, 2006. Notice was served on respondent.

On January 13, 2006, the court granted Shaver's motions, finding that the discovery responses were inadequate and unverified. The court issued an order requiring further answers and awarding sanctions in the sum of \$600. Respondent was served with notice of the order.

Respondent subsequently failed to comply with this order. Shaver then filed a motion for terminating sanctions and dismissal of the complaint, which was then set for hearing on March 6,

2006. No opposition to this motion was filed by respondent. Nor did he appear for the hearing of the motion. The court granted Shaver's motion and dismissed the Reynolds' lawsuit. Notice of ruling was served on respondent.

Respondent did not take any action on Reynolds' behalf after receiving notice of the dismissal. Respondent also did not notify Reynolds' of the court's action.

**Count 1 – Rule 3-110(A) [Failure to Perform with Competence]**

Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

By failing to respond to Shaver's discovery motions, failing to comply with the deadlines set by the court in its notice of rulings, failing to oppose the motion for terminating sanctions, and failing to take any action after the issuance of terminating sanctions, respondent intentionally, recklessly, or repeatedly failed to competently perform the services for which he was employed, in violation of rule 3-110(A).

**Count 2 – Rule 3-700(A)(2) [Improper Withdrawal From Employment]**

Rule 3-700(A)(2) provides, "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." An attorney may effectively withdraw from a case without any intent to do so, when that attorney virtually abandons the client and is grossly negligent in communicating with the client. (See, e.g., *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 951; and cases cited therein.)

Here, by failing to file a substitution of attorney or a motion to withdraw, respondent failed to take reasonable steps on withdrawal from employment to avoid reasonably foreseeable prejudice to Reynolds, in violation of rule 3-700(A)(2).

**Count 3 –Section 6068(m) [Failure to Inform Client of Significant Development]**

Section 6068(m) of the Business and Professions Code obligates an attorney to “respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

By failing to advise Reynolds of the dismissal of the lawsuit, respondent failed to keep his client reasonably informed of a significant development, in wilful violation of section 6068(m).

**Case No. 06-O-14398**

On April 1, 2004, Arthur and Mar-Jeanne Tandler (“the Tendlers”) employed respondent on a contingency fee basis to handle a mold claim arising from their leased property.

On April 20, 2004, respondent and the Tendlers executed medical liens in favor of Dr. Ralph Potkin (“Potkin”).

On August 24, 2004, respondent filed a lawsuit, entitled *Tandler v. Chapman*, case no. 04CC08893, in the Orange County Superior Court.

Between August 24, 2004, and June 21, 2005, respondent litigated the *Tandler* matter. On July 7, 2005, the Tendlers agreed to a \$24,000 settlement. Several insurance company checks were issued to effect this settlement. On July 12, 2005, Clarendon National Insurance issued a check in the sum of \$10,000 to respondent and the Tendlers. The check was deposited in respondent’s client trust account (“CTA”). On July 22, 2005, respondent deposited two

OneBeacon Insurance checks, each for \$5000, into his CTA. On July 22, 2005, respondent deposited the final \$4000 settlement check into his CTA.

On August 1, 2005, respondent distributed settlement funds to the Tendlers. In doing so, he withheld the sum of \$2690 to pay the Potkin medical lien. Respondent then failed to pay the Potkin lien, despite the Tendlers' requests that he do so. To date, the Potkin lien has still not been paid.

Between July 22, 2005, and February 28, 2007, the balance in respondent's CTA fell below the sum of \$2690.

**Count 4 – Rule 4-100(B)(4) [Failure to Pay Client Funds Promptly]**

Rule 4-100(B)(4) of the Rules of Professional Conduct requires attorneys to “[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.” This obligation includes the duty to pay valid medical liens where the attorney is holding client funds for that purpose. (See, e.g., *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 286; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10.)

By failing to promptly pay the Potkin lien, respondent failed to promptly pay out, as requested, funds held by him to which the clients were entitled, in wilful violation of rule 4-100(B)(4).

**Count 5 - Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]**

Rule 4-100(A) of the Rules of Professional Conduct requires that all funds received or held for the benefit of clients by an attorney or law firm, including advances for costs and expenses, shall be deposited and maintained in a designated client trust account. This obligation

includes funds held by the attorney for the purpose of paying medical liens. (*In the Matter of Dyson, supra*, 1 Cal. State Bar Ct. Rptr. at p. 286.)

By failing to maintain in his client trust account the balance of the funds received by him for the Tendlers, respondent wilfully failed to comply with rule 4-100(A).<sup>3</sup>

**Count 6 – Section 6106 [Moral Turpitude – Misappropriation]**

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or wilfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

By failing to maintain entrusted funds in his client trust account, respondent misappropriated the Tendlers' funds, in violation of section 6106.

**Case No. 06-O-14653**

On March 4, 2004, Martin Ross ("Ross") employed respondent on a contingency fee basis to represent him in a personal injury matter.

On October 5, 2005, respondent sent Ross a letter, advising Ross that respondent had received a settlement offer of \$8000. Respondent advised Ross not to accept that offer.

---

<sup>3</sup> As noted, each of the above findings of culpability reflect the stipulation reached between the State Bar and respondent. However, the conduct underlying this violation is essentially the same as that underlying the finding, below, that respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in wilful violation of section 6106. Accordingly, the court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

From October 2005, through March 2006, respondent failed to perform any services on the Ross matter.

On March 2, 2006, the statute of limitations in the Ross matter elapsed before the filing of a lawsuit. Respondent failed to advise Ross of this significant development.

On August 21, 2006, Ross employed attorney Bob Cohen. Ross learned from Cohen that the statute of limitations had expired.

**Count 7 – Rule 3-110(A) [Failure to Perform with Competence]**

By failing to timely file a lawsuit on Ross' behalf and by repeatedly failing to perform any legal services from October 2005 through August 2006, respondent failed to perform the services for which he was employed with competence, in wilful violation of rule 3-110(A).

**Count 8 – Section 6068(m) [Failure to Inform Client of Significant Development]**

By failing to inform Ross of the expiration of the statute of limitations in his personal injury matter, respondent wilfully violated section 6068(m).

**Count 9 – Rule 3-700(A)(2) [Improper Withdrawal From Employment]**

By failing to inform Ross of his intent to withdraw from employment, respondent wilfully violated rule 3-700(A)(2).

**Case No. 07-O-11455**

In June 2006, Ronald Halen ("Halen") employed respondent on a contingency fee basis to handle a personal injury claim arising from an automobile accident.

In March 2007, frustrated by the lack of activity on his case and the approaching expiration of the statute of limitations on his matter, Halen called respondent's office to advise him that a new attorney was going to be hired. Halen had previously made numerous attempts to reach respondent by telephone to discuss his case.

In May 2007, Halen employed subsequent counsel, Richard Schwartz (“Schwartz”). After taking over the case, Schwartz opined that no services were performed by respondent on Halen’s behalf.

On May 7, 2007, and May 23, 2007, a State Bar investigator wrote to respondent, advising him of Halen’s allegations and requesting a written response to the allegations. The letters were sent to respondent’s official membership address with the appropriate postage. They were not returned as undeliverable.

On June 5, 2007, respondent left a voice mail message for the investigator, requesting a two-week extension in which to respond. The extension was granted through June 22, 2007. No response was thereafter received.

**Count 10 – Rule 3-110(A) [Failure to Perform with Competence]**

By failing to provide any services for Halen, for whom respondent was employed from June 2006 through March 2007, respondent wilfully violated rule 3-110(A).

**Count 11 – Section 6068(m) [Failure to Respond to Client Inquiries]**

By failing to respond to reasonable status inquiries by Halen about his personal injury claim, respondent wilfully violated section 6068(m).

**Count 12 – Section 6068(i) [Failure to Cooperate in State Bar Investigation]**

Section 6068(i) of the Business and Professions Code, subject to constitutional and statutory privileges, requires that attorneys cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against that attorney.

By failing to cooperate and participate in a State Bar disciplinary investigation, respondent wilfully violated section 6068(i).

### **Aggravating Circumstances**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)<sup>4</sup>

#### **Prior Discipline**

As noted above, respondent has been formally disciplined on one prior occasion. Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) In addition, as previously noted, he executed and filed a stipulation with this court, acknowledging misconduct in numerous client matters, immediately prior to being allowed to resign from the State Bar with charges pending in 1982.

#### **Multiple Acts**

Pursuant to stipulation, respondent has been found culpable of twelve counts of misconduct in the present proceeding. Although some of these counts are largely duplicative of others, the existence of multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

#### **Significant Harm**

Respondent's misconduct significantly harmed his clients. He allowed one action to be dismissed for a client and failed to file another, resulting it in being barred by the statute of limitations. He also continues to hold the Tendler funds he previously retained to pay the Potkin medical lien and then misappropriated. Such significant harm constitutes an aggravating circumstance. (Std. 1.2(b)(iv).)

---

<sup>4</sup> All further references to standard(s) are to this source.

### **Mitigating Circumstances**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).)

#### **Cooperation**

Respondent entered into an extensive stipulation of facts and freely admitted certain of the trust account violations in this case, for which conduct respondent is entitled to some mitigation. (Std. 1.2(e)(v); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.)

#### **Emotional and Physical Disabilities**

Respondent testified that during the time of the above misconduct he was dealing with a number of emotional and physical problems.

- He lost his relationships with his son and step-daughter in the past due to a very bitter divorce and continues to be depressed over the situation. The divorce was final in 1998-1999.
- He complains of having been plagued by bronchitis for all of his life and by bronchiectasis since the fall of 2002, which he attributes to exposure to toxic mold. In September 2005, he had an upper respiratory condition, resulting in him being unable to appear in court for a couple of weeks. He testified this was a non-reversible problem.
- One of his two dogs died during this same period. Respondent described his relationship with his pets as being especially close and, therefore, the death of one of them was particularly difficult for him.

- During the fall of 2003, respondent was diagnosed with coronary disease and underwent an angioplasty and coronary stenting. He has had no further medical procedures for this condition since that time, other than taking blood pressure medication on a regular basis.
- In September 2006, he was hospitalized for four days because of an infection affecting the side of his face. It was initially suggested that he might have a flesh-eating bacteria on his face, but that proved not to be the case. The infection problem was resolved, and there has been no recurrence.

Respondent's long-time treating psychiatrist, Dr. Mark Goulston, testified at the hearing and verified being told by respondent of the above medical problems while they were occurring. He opined that respondent has gone through a period of low grade depression.

The court declines to afford significant mitigating credit to this evidence for several reasons. First, the evidence is neither clear nor convincing that the conditions are causally linked to the misconduct. The bitter divorce and problems with respondent's children preceded the misconduct here by a number of years. In contrast, the infection in respondent's face took place in late 2006, after most of the misconduct here had taken place. With regard to the angioplasty, while there were no doubt days when respondent's concerns about his heart were distracting or made him unavailable to take care of business, these problems in 2003 do not explain his conduct in for the following years. The same is true regarding the death of his pet. Finally, none of these problems explain why respondent misappropriated funds from his client or why he continues to fail to re-pay those monies.

Second, if the above physical and emotional problems did cause respondent's many failures to comply with his professional duties over the last five years, the evidence is not clear

and convincing that those problems have now been resolved. Instead, while Dr. Goulston indicated that respondent is now better than he had been at times in the past, the doctor nonetheless expressed concern that allowing respondent to practice now without restriction might put future clients at risk.

### **Good Character**

Respondent has been clean and sober since December 14, 1981. He has also been active in Alcoholic Anonymous and has been a successful sponsor of many other members.

Respondent called two additional witnesses to testify regarding his good character. These witnesses included Judge Greg Marcus of the Los Angeles Superior Court, who appeared as a result of a subpoena, and Darryl Carlson, a private investigator in the Los Angeles area.

Judge Marcus has known respondent since the two worked together in the Los Angeles District Attorney's office. Their current relationship was described as generally consisting of respondent occasionally stopping by the court to have lunch with the judge. Judge Marcus also recalled being told by respondent in the past of the physical and emotional problems described above. He described respondent as an honest individual and as a very good attorney under "normal" circumstances. The judge said there had been deterioration in respondent's condition during the period 2004-2006, but expressed no opinions as to what caused respondent's misconduct. The judge also indicated that he might have concerns about having respondent represent him if respondent's past health concerns were not alleviated.

Mr. Carlson knows respondent both from their joint participation for over twenty-five years in AA and due to their work together on several legal cases. He also confirmed observing respondent's concerns about his medical and family issues. He attributed the misconduct to just being mistakes and the result of respondent's depression.

The court affords respondent some, but not significant, mitigation credit for the above evidence. (See, e.g., *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153 [testimony by three character witnesses was not entitled to significant weight in mitigation since it was not an extraordinary demonstration of good character attested to by a wide range of references]; *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61 [good character evidence from two judges entitled to some, but not substantial, mitigation credit].)

In addition, respondent presented evidence of his involvement as a mediator on behalf of the Los Angeles Superior Court. Although the evidence was fairly sparse with respect to the actual amount of work he did on behalf of the court, the court accords him some, but not extensive, mitigation credit for that work.

#### **Remorse**

At trial, respondent expressed his regret at his handling of the various client matters. He described his emotional and physical problems in the past as a contributing cause and described himself as being a more responsible person now.

In the context of assessing whether respondent's expressions of remorse mean that such misconduct will not reoccur in the future, this court declines to give respondent significant mitigation credit on this issue.

First, as previously noted, it is not possible to conclude that respondent has seen the error of his ways when he continues, without explanation, to hold the funds he previously misappropriated from his client. In his post-trial brief, respondent dealt with this issue by merely stating, "I have testified that I have failed to maintain my trust account medical liens on behalf of the Tendlers. I will make arrangements to pay these liens." At the time of that brief, respondent had been holding those funds for more than three years. The State Bar's efforts to discipline him

for failing to repay the money had been ongoing for more than a year. If respondent has truly seen the error of his ways, such payment arrangements should have been made and carried out long ago.

Further, this court's ability to conclude that respondent's professed remorse means that no future misconduct will occur is largely defeated by respondent's simultaneous efforts during trial to blame others for the situations, notwithstanding his executed stipulation of facts and culpability. In the Reynolds matter, respondent blamed his client, Reynolds, for the inadequate discovery responses and testified that he had arranged with Reynolds to withdraw from the case. In the Tendler/Potkin matter, he blames the Tendlers for his failure since 2005 to pay Dr. Potkin, suggesting that the Tendlers told him to wait to see what payments would be made by their private insurer.<sup>5</sup> In the Ross matter, he blames his secretary for his failure to file an action on behalf of Ross saying that she put the wrong statute of limitations on the file. That failure lasted for two years before the statute expired. Finally, in the Halen matter, he suggested that no action was taken by him on behalf of Halen because Halen's damages were suspicious to him and possibly contrived.

In each of these client matters, respondent portrayed himself as the helpless victim of bad situations created by others. In all of the cases, his words and demeanor at trial showed that he clearly believes that such was the case. In none of the cases is his view a fair assessment.

Acknowledging legal responsibility for one's misconduct is not the same as accepting actual responsibility for it. Respondent needs to do both. To date, he has not. So long as he continues to view his conduct as being beyond his control and to perceive himself as a helpless

---

<sup>5</sup> This explanation, of course, provides no light on why the funds disappeared from respondent's client trust account. Nor did respondent provide any evidence that the funds had been restored to that account.

victim in situations for which he has professional responsibility, he provides this court with no assurance that the public will not endure suffer additional harm if he is allowed to continue to practice.<sup>6</sup>

#### IV. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *In the Matter of Van Sickle, supra*; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar*

---

<sup>6</sup> In a like manner, respondent, during this proceeding, attributed the misconduct resulting in his first formal discipline in 1996, to being “set up” by his disgruntled former partner. (See Respondent’s Brief re Culpability and Discipline, p. 2.)

(1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

In the present proceeding, there are a number of sanctions applicable to respondent's misconduct. Application of the standards indicates that significant discipline, and probably disbarment, should be effected. Included among these applicable standards are the following:

- Standard 2.2(a), which provides: "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."
- Standard 2.3, which provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending 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."
- Standard 1.7, which provides: (a) If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the

member has a record of one prior imposition of discipline as defined by standard 1.2(f), 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. (b) "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline as defined by 'Standard 1.2(f), the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.

As noted above, the discipline appropriate in a particular case depends on the circumstances of that situation. A fair assessment of the circumstances here, however, reveals that disbarment is necessary to protect the public.

Respondent has had problems complying with his professional obligations for many years and with many clients. He has frequently failed to act with competency; he has repeatedly abandoned clients and improperly withdrawn from representing them; and he has demonstrated an ongoing inability to properly safeguard client monies. His current problems are not limited to a single problem or an individual client, and they are not insignificant. Instead, his misconduct involves numerous clients and problems, and it has resulted in significant harm. There is no justification or excuse for his conduct; here is no compelling mitigation; and there is significant reason to believe that the problems will reoccur.

The disciplinary process is not intended to punish attorneys for their misconduct but to take steps to see that they do not repeat it. Respondent is not a stranger to either this disciplinary process or to the consequences of his failure to abide by his professional obligations.

Unfortunately, the past efforts of the disciplinary process have proved ineffective in causing respondent to abide by his professional duties. Harm to members of the public continues to result from his actions. That his misconduct has now extended to ignoring the State Bar when it seeks to address with him the complaints of those clients makes the prospect of him practicing appropriately in the future even less promising.

Ultimately, the disciplinary process needs to protect the public. As previously discussed, respondent has yet to accept actual responsibility for controlling his conduct. Until he does, the probability that he will continue to harm members of the public remains unacceptably high. Whether he will ultimately be able to accept that responsibility remains uncertain. As concluded by the court in *In the Matter of Snyder, supra*, a case involving physical and emotional problems similar to those here, "the public is entitled to the protection of a formal reinstatement hearing after disbarment before respondent is entitled again to practice law." (*In the Matter of Snyder, supra*, 2 Cal. State Bar Ct. Rptr. at p. 600; see also *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439, especially fn. 3.) The same is true here.

#### V. RECOMMENDED DISCIPLINE

This court recommends that respondent **Marshall Bitkower** be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

It is further recommended that respondent make restitution to the following per individuals within 30 days following the effective date of the Supreme Court order in this matter

or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291): to Dr. Ralph Potkin in the amount of \$2690 plus 10% interest per annum from August 1, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Dr. Ralph Potkin and/or to Arthur and/or Mar-Jeanne Tendler, plus interest and costs, in accordance with Business and Professions Code section 6140.5)

**Rule 9.20**

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.<sup>7</sup>

**Costs**

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

**VI. ORDER OF INACTIVE ENROLLMENT**

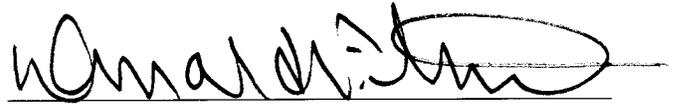
In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Marshall Bitkower** be involuntarily enrolled as an inactive member of the State Bar

---

<sup>7</sup> Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or as contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

of California effective three court days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c).)<sup>8</sup>

Dated: December 11, 2008



DONALD F. MILES  
Judge of the State Bar Court

---

<sup>8</sup> Only active members of the State Bar may lawfully practice law in California. (Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice of law, or to even hold himself or herself out as entitled to practice law. (Bus. & Prof. Code, § 6126, subd. (b).) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

**CERTIFICATE OF SERVICE**

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on December 11, 2008, I deposited a true copy of the following document(s):

**DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

MARSHALL L. BITKOWER  
ATTORNEY AT LAW  
20501 VENTURA BLVD STE 140  
WOODLAND HILLS, CA 91364

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

GERI VONFREYMANN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on December 11, 2008.

  
\_\_\_\_\_  
Tammy Cleaver  
Case Administrator  
State Bar Court