FILED JUNE 9, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **GARY R. ABRAMS,** **Member No. 160545,** A Member of the State Bar.	)	Case No. **06-O-12710-RAP** (08-O-10066) **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. Introduction

In this default disciplinary matter, respondent **Gary R. Abrams** is charged with seven counts of professional misconduct in two client matters, including (1) misappropriation ($78,843.88); (2) failing to maintain client funds; (3) commingling; (4) failing to update address; (5) improperly withdrawing from employment; and (6) failing to communicate with client.

The court finds, by clear and convincing evidence, that respondent is culpable of the alleged counts of misconduct. In view of respondent's serious misconduct and the evidence in aggravation, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

On November 24, 2008, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address. Respondent did not file a response.

Respondent's default was entered on February 25, 2009, and respondent was enrolled as an inactive member on February 28, 2009. The matter was submitted for decision on March 17, 2009, following the filing of State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on October 21, 1992, and has since been a member of the State Bar of California.

A. The Betancourt Matter

On or about May 12, 2002, Julia Betancourt employed respondent to represent her in a personal injury claim.

On or about May 7, 2003, respondent filed a lawsuit on behalf of Betancourt in the San Bernardino County Superior Court, titled *Julia Betancourt v. Horst Kozole, Helen Kozole and Maric Morris*, case No. BCV07060 (*Betancourt v. Kozole*).

On or about January 22, 2004, respondent settled *Betancourt v. Kozole* for $400,000.

Between on or before January 1, 2003, and on or after October 21, 2006, respondent maintained a client trust account at Wells Fargo Bank titled "Law Offices of G. Rex Abrams, Attorney Client Trust" (CTA).

On or about March 26, 2004, respondent deposited the settlement draft from the defendants' insurance carrier, Gore Mutual Insurance Company, for $400,000 into respondent's CTA.

Respondent was entitled to a contingency fee of $100,000 from his settlement of *Betancourt v. KozoIe*.

Between on or about April 19, 2004, and on or about July 14, 2005, respondent paid the following sums to or on behalf of Betancourt:

Date Posted	Check No.	Payee	Memo	Amount	Balance
4/19/04	1250	Julia Betancourt	"Settlement Advance"	$145,000	$145,000
1/31/05	1301	Julia Betancourt	"Full & Final Settlement"	$50,000	$195,000[1]
3/15/05	1312	Bernard Koire, M.D.	"Betancourt – Full & Final Settlement of Disputed Claim"	$12,375	$207,375
5/20/05	1322	Issac Schmidt, M.D.	"Julia Betancourt"	$8,741.25	$216,116.25
6/30/05	1332	Neurowave Monitoring, Inc.	"Bentancourt"	$1,164.61	$217,280.86
7/7/05	1333	Southwest Professional Medical Arts	"Julia Betancourt Acct# S138339"	$465.54	$217,746.40
7/14/05	1332	The Rawings Company	"Julia Betancourt/ Blue Shield of California"	$3,787.70	$221,534.10

After subtracting his contingency fee of $100,000 and the sums paid to or on behalf of Betancourt of $221,534.10, respondent was required to maintain the sum of $78,465.90 ($400,000 - $100,000 - $221,534.10) in respondent's CTA.

Between on or about October 31, 2005, and on or about August 28, 2006, and without paying any further amounts to or on behalf of Betancourt, the balance in respondent's CTA fell to the sum of -$200.34.

[1] The NDC incorrectly noted that the balance of $145,000 plus $50,000 to be $205,000. The correct balance should have been $195,000. Accordingly, the amounts in the balance column reflect the corrected difference of $10,000.

On or about May 28, 2003, respondent caused a wire transfer of personal funds to be deposited into respondent's CTA of $13,000 from the Bank of New York on behalf of Countrywide Home Loans, Inc.

On or about June 5, 2003, respondent issued CTA check Nos. 1145 and 1146, each for $3,000, to "Dan's Mobile Home Repair" for personal expenses.

On or about July 23, 2003, respondent caused a wire transfer of personal funds to be deposited into respondent's CTA of $7,970 from the Bank of New York on behalf of Countrywide Home Loans, Inc.

On or about September 2, 2003, respondent caused another wire transfer of personal funds to be deposited into respondent's CTA of $9,500 from the Bank of New York on behalf of Countrywide Home Loans, Inc.

On or about September 12, 2003, respondent issued CTA check number 1180 to "Southwest Concrete" for a personal expense.

On or about September 22, 2003, respondent caused a wire transfer of personal funds to be deposited into respondent's CTA of $11,404.16 from the Bank of New York on behalf of Countrywide Home Loans, Inc.

On or about December 3, 2003, respondent caused personal funds to be deposited into respondent's CTA of $32,342.29 from "Realty World First Class."

Respondent did not promptly remove the $100,000 contingency fee, which he had earned when his interest in those funds became fixed, in part, by issuing 11 checks drawn upon respondent's CTA payable to himself for the sum of $106,843 from his CTA between on or about March 26, 2004, and on or about May 27, 2004.

During the period between in or about March 26, 2004, and on or about August 28, 2006, respondent repeatedly issued checks drawn upon respondent's CTA to pay his personal expenses, including, but not limited to the following:

Date	Check No.	Payee	Memo	Amount
6/1/04	1262	CCC (California Community College)	Acct. Emanuel James	$ 564.00
3/10/04	1311	Angelus Waterproofing		$2,200.00
3/21/05	1313	Ralphs		$ 98.18
9/26/05	1356	Craig's Tree Service		$ 500.00
9/30/05	1358	Alan Metcalf	"Abrams v. Burke"	$2,012.00
10/12/05	1363	Sav-On-Drugs		$ 144.31
10/27/05	1367	Elizabeth Burke	"Advance Spousal Support Burke v. Abrams"	$ 800.00
11/1/05	1370	Sav-On		$ 107.99
11/7/05	1374	Sav-On		$ 184.19
11/8/05	1372	Joe's Auto Parts		$ 8.00
11/17/05	1377	Power Storage	"Unit 106"	$ 360.00
12/1/05	1380	Elizabeth Burke	"Spousal Support – 12/05"	$ 800.00
12/5/05	1382	Rite-Aid		$ 204.43
12/19/05	1391	Elizabeth Burke	"Spousal Support"	$ 800.00
12/27/05	1394	La Habra Heights County Water District	"Gary Abrams 1455 East Road, La Habra Hts."	$ 350.00
1/17/06	1399	Power Storage	"Office – Storage"	$ 196.50
2/1/06	1406	Charlotte Dennis	"Dennis/Abrams"	$3,420.00
2/22/06	1411	O.C. Limousines		$ 400.00

8/28/06	1007	Elizabeth Burke	"Final Spousal Support Payment"	$ 500.00
9/13/06	1003	The Gas Company		$ 77.15

Between on or about December 27, 2006, and the present, respondent's official membership address has been listed as 1455 East Road, La Habra, California 90631 (the "La Habra address").

On or about April 20, 2006, the State Bar opened an investigation pursuant to a complaint filed by Betancourt.

On or about June 28, 2006, a State Bar investigator wrote to respondent, requesting that respondent provide a written response to the allegations in the Betancourt matter. The letter was placed in a sealed envelope correctly addressed to the respondent at the La Habra address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business.

On or about July 5, 2006, the letter dated June 28, 2006, was returned by the U.S. Postal Service with the notation "Return to Sender [¶] Attempted - Not Known [¶] Unable to Forward." The State Bar received the returned letter.

Count 1: Failing to Maintain Client Funds in Trust Account (Rules Prof. Conduct, Rule 4-100(A))

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith.

Respondent had a fiduciary duty to hold in trust at least $78,465.90[2] of entrusted funds belonging to Betancourt in his CTA. Between October 2005 and August 2006, the balance in the CTA fell below $78,465.90 (the balance was -$200.34). Thus, respondent's failure to hold in trust the Betancourt's settlement funds in the CTA was clearly and convincingly in violation of rule 4-100(A).

Count 2: Misappropriation (Bus. & Prof. Code, § 6106)[3]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

The mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent. (See *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113.)

Here, respondent received $400,000 for the benefit of Betancourt. But after he had deposited the funds into his CTA and disbursed $221,534.10 to the client and $100,000 to himself, the balance fell below $78,465.90, beginning in October 2005. Therefore, because the balance in respondent's CTA fell below the amount of entrusted funds of $78,465.90 to -$200.34 from October 2005 through August 2006, respondent misappropriated the money and committed an act of moral turpitude in willful violation of section 6106.

[2] Although the NDC incorrectly alleged the sum to be $78,843.88, the State Bar correctly argued in its brief that the amount was $78,465.90.

[3] References to sections are to the provisions of the Business and Professions Code.

Count 3: Commingling (Rules Prof. Conduct, Rule 4-100(A))

Rule 4-100(A) "absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit. Because [respondent] used the account while it was ... denominated a trust account, even if he [did not intend] ... to use for trust purposes, rule [4-100(A)] was violated. The rule leaves no room for inquiry into the depositor's intent." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.) Therefore, by using the CTA as his personal and business account and issuing checks for his personal expenses from his CTA, respondent's personal use of the trust account and the commingling of his personal funds in the CTA were clear and convincing evidence of willful violations of rule 4-100(A).

Count 4: Failure to Update Membership Address (§ 6068, Subd. (j))

Section 6068, subdivision (j), states that a member must comply with the requirements of section 6002.1, which provides that respondent must maintain on the official membership records of the State Bar a current address and telephone number to be used for State Bar purposes.

By not updating his State Bar membership records address, respondent failed to maintain a current address and telephone number to be used for State Bar purposes, in willful violation of section 6068, subdivision (j).

B. The Manning Matter

On or about March 23, 2004, J.D. Manning was involved in a car accident. The other car was owned and/or operated by Rogers Poultry Company, whose insurer was The Hartford Insurance.

On or about March 24, 2004, Manning signed a "Notice of Doctor's Lien" prepared by Michael J. Kelemen, D.C. (Dr. Kelemen).

Between on or about March 24, 2004, and on or about April 2, 2004, Dr. Kelemen provided the Notice of Doctor's Lien to respondent. Respondent received the notice.

On or about April 2, 2004, respondent went to Manning's home where Manning employed respondent with respect to his claims from the car accident. Manning signed several documents prepared by respondent, including an "Authorization to Receive or Release Medical Information." Respondent did not provide Manning with copies of the documents.

On or about April 2, 2004, respondent signed and returned the Notice of Doctor's Lien to Dr. Kelemen. Dr. Kelemen received the notice.

Between in or about April of 2004 and in or about April of 2006, Manning called respondent's office and/or mobile telephone numbers three to four times a month. Respondent's office and/or mobile numbers were later disconnected. When respondent's office and/or mobile numbers were accepting calls, Manning would either leave messages, including his telephone number, on respondent's voice message systems requesting that respondent call Manning and provide a status report or speak with respondent who would attempt to disguise his voice and claim to be someone else. Manning would leave messages with respondent requesting that respondent call him and provide a status report. Respondent received the messages.

At no time after April 2, 2004, did respondent provide a status report to Manning, or otherwise communicate with Manning.

After in or about April of 2006 to the present, the office and mobile numbers that Manning had for respondent were disconnected.

On or about March 23, 2006, the two-year statute of limitations to file an action concerning the car accident expired. Respondent did not negotiate a settlement with The Hartford Insurance or file a lawsuit prior to the expiration of the statute of limitations.

Between on or about December 27, 2006, and the present, respondent's official membership address has been listed as 1455 East Road, La Habra, California 90631 (the "La Habra address").

On or about December 28, 2007, the State Bar opened an investigation pursuant to a complaint filed by Manning.

On or about January 18, 2008, a State Bar investigator wrote to respondent, requesting that respondent provide a written response regarding the allegations in the Manning matter. The letter was placed in a sealed envelope correctly addressed to the respondent at the La Habra address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business.

On or about January 24, 2008, the letter dated January 18, 2008, was returned by the U.S. Postal Service with the notation "Moved Left No Address [¶] Unable to Forward [¶] Return to Sender." The State Bar received the returned letter.

Count 5: Improper Withdrawal from Employment (Rules Prof. Conduct, Rule 3-700(A)(2))

Rule 3-700(A)(2) states: "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."

By failing to pursue the Manning matter before the expiration of the statute of limitations (either by settlement or filing an action) and by failing to communicate with Manning, respondent effectively withdrew from the case. And by withdrawing from the case without advising Manning of his withdrawal, respondent willfully failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client, in violation of rule 3-700(A)(2).

Count 6: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

Section 6068, subdivision (m), provides that it is the duty of 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 communicate with Manning in response to the messages that Manning left for him to contact Manning and provide a status report between in or about April of 2004 and in or about April of 2006, respondent willfully failed to respond promptly to reasonable status inquiries of a client in willful violation of section 6068, subdivision (m).

Count 7: Failure to Update Membership Address (§ 6068, Subd. (j))

By failing to comply with the requirements of section 6002.1, which requires a member of the State Bar to maintain on the official membership records of the State Bar, the member's current office address and telephone number or, if no office is maintained, the address to be used for State Bar purposes or purposes of the agency charged with attorney discipline, respondent willfully violated Business and Professions Code section 6068(j).

However, the misconduct underlying both counts 4 and 7 is the same. The court will not attach additional weight to the finding of the two violations in determining the appropriate discipline to recommend in this matter. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State* Bar (1990) 51 Cal.3d 1056, 1060.)

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,[4] stds. 1.2(e) and (b).)

[4] Future references to standard(s) or std. are to this source.

A. Mitigation

No mitigation was submitted into evidence. (Std. 1.2(e).)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing by abandoning the Manning matter, failing to communicate with his client, commingling personal funds with client funds in his CTA and misappropriating client funds. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed significantly his clients. (Std. 1.2(b)(iv).) Betancourt was deprived of a large portion of her settlement funds; and Manning lost his cause of action due to respondent's failure to pursue his personal injury matter.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He had not yet reimbursed Betancourt her settlement funds.

Respondent's failure to cooperate with the State Bar before the entry of his default, including filing an answer to the NDC, is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of

sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.2(a), 2.2(b), 2.3, 2.4(b), 2.6, and 2.10 apply in this matter.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

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.

Standard 2.2(a) provides that culpability of willful misappropriation of entrusted funds must result in disbarment, unless the amount is insignificantly small or if the most compelling mitigating circumstances clearly predominate. Then the discipline must not be less than a one-year actual suspension, irrespective of mitigating circumstances.

Standard 2.2(b) provides that the commission of a violation of rule 4-100, including commingling, must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

Standard 2.4(b) provides that culpability of a member's willful failure to perform services and willful failure to communicate with a client must result in reproval or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges disbarment, citing several cases, including *Kaplan v. State Bar* (1991) 52 Cal.3d 1067; *Grim v. State Bar* (1991) 53 Cal.3d 21; and *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, in support of its recommendation.

In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, the Supreme Court disbarred an attorney who intentionally misappropriated $29,000 from his law firm. In mitigation, the attorney had no prior record of discipline in 12 years of practice of law and suffered from emotional problems. The court did not find these factors sufficiently compelling to warrant less than disbarment.

In *Grim v. State Bar* (1991) 53 Cal.3d 21, the attorney misappropriated over $5,500 of client funds and did not return the funds to the client until after almost three years later and after the State Bar had initiated disciplinary proceedings and held an evidentiary hearing. The Supreme Court did not find compelling mitigating circumstances to predominate and rejected his defense of financial stress as mitigation because his financial difficulties which arose out of a business venture were neither unforeseeable nor beyond his control. Finally, the attorney intended to permanently deprive his client of her funds. The Supreme Court therefore did not find his cooperation with the State Bar and evidence of good character to constitute compelling mitigation in view of the aggravating factors.

In *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, the attorney was disbarred for misappropriating $40,000 from a client's personal injury settlement funds and misled the client over a year as to the status of the money. The attorney had no prior disciplinary record in 15 years of practice of law.

Here, like the attorneys in *Spaith*, *Grim* and *Kaplan*, respondent had misappropriated a large sum of client funds ($78,843) without any explanation. And, no compelling mitigation has been shown.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Here, respondent had flagrantly breached his fiduciary duties to his client by taking the client funds of almost $79,000.

The misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (See *Grim v. State Bar, supra*, 53 Cal.3d 21.)

Respondent's misappropriation weighs heavily in assessing the appropriate level of discipline. Like the attorney in *Grim*, the "misappropriation in this case . . . was not the result of carelessness or mistake; [respondent] acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that [respondent] intended to permanently deprive his client of [his] funds." (*Grim v. State Bar, supra*, 53 Cal.3d at p. 30.) "It is precisely when the attorney's need or desire for funds is greatest that the need for public protection afforded by the rule prohibiting misappropriation is greatest." (*Grim v. State Bar, supra*, 53 Cal.3d at p. 31.)

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.) The court is seriously concerned about the possibility of similar misconduct recurring. Respondent has offered no indication that this will not happen again. Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding.

Respondent "is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) Therefore, based on the severity of the offense, the serious aggravating circumstances and the lack of any mitigating factors, the court recommends disbarment.

VI. Recommendations

A. Discipline

Accordingly, the court recommends that respondent **Gary R. Abrams** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

B. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.[5]

[5]Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

C. Costs

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

VII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: June 9, 2009.

RICHARD A. PLATEL
Judge of the State Bar Court