

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos. 06-O-12783-RAP (07-O-12254)
)	
ROGER JAMES AGAJANIAN,)	
)	DECISION AND ORDER OF
Member No. 55393,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
A Member of the State Bar.)	
_____)	

I. Introduction

In this default disciplinary matter, respondent **Roger James Agajanian** is charged with 18 counts of professional misconduct in three client matters and extensive trust accounting violations, including (1) charging an illegal fee (\$28,000); (2) failing to maintain client funds; (3) commingling; (4) failing to obey a court order; (5), misappropriation of \$28,600; (6) failing to communicate with client; (7) failing to perform services competently; (8) improper withdrawal from employment; (9) seeking an agreement to withdraw a State Bar complaint; and (10) committing multiple acts of moral turpitude and dishonesty.

The court finds, by clear and convincing evidence, that respondent is culpable of the charged misconduct. In 1994, respondent resigned with charges pending. He was later reinstated as a member of the State Bar of California in 2001. Given respondent's history of recidivism – at least three disciplinary records in the past 23 years, the recommended degree of

discipline in this matter leaves no room for debate. Respondent should be disbarred from the practice of law and be ordered to make restitution to two clients.

II. Pertinent Procedural History

On March 3, 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 filed a response, which contained a plea of nolo contendere to all facts and violations alleged in the NDC. On March 17, 2008, respondent filed a resignation with charges pending. This matter was abated on April 4, 2008, pending the Supreme Court's action on his resignation with charges pending. However, on October 20, 2009, the Supreme Court declined to accept his resignation (State Bar Court case No. 08-Q-11051; Sup. Ct. case No. S177196).

On November 4, 2009, the abatement of this matter was terminated. Because respondent failed to appear at the March 9, 2010 trial, his default was entered, and respondent was enrolled as an inactive member on March 12, 2010. (Rules Proc. of State Bar, rule 201.) The matter was also submitted for decision on March 9, 2010.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default for his failure to appear at trial. (Rules Proc. of State Bar, rule 201.) His plea of nolo contendere is considered the same as an admission of the truth of the facts alleged in the NDC and of culpability for the purposes of the disciplinary proceeding. (Rules Proc. of State Bar, rule 103; Bus. & Prof. Code, § 6085.5.)

Respondent was admitted to the practice of law in California on June 29, 1973, resigned on April 29, 1994, and was reinstated as a member of the State Bar on October 10, 2001. He has since been a member of the State Bar of California.

At all times mentioned herein, respondent maintained a client trust account at Wells Fargo Bank ("CTA").

A. Case No. 06-O-12783 (Schnieders Matter – Counts 1-11)

In April 2004, respondent was employed by Donna Stern Ritch ("Mrs. Ritch") and her husband Ricky Ritch ("Mr. Ritch") to handle conservatorship matters with respect to Mrs. Ritch's elderly father, Marshall L. Stern ("Mr. Stern").

On April 22, 2004, respondent prepared a Statutory Form Durable Power of Attorney for Health Care and Other Purposes, which Mr. Stern allegedly signed on that date. In this document, Mr. Stern designated Mr. Ritch to act as his attorney-in-fact, his agent for health care purposes.

On April 27, 2004, respondent prepared a General Power of Attorney, which was allegedly executed by Mr. Stern granting Mr. Ritch the right and access to all of Mr. Stern's assets.

On April 20, 2005, respondent filed a Petition for Appointment of Probate Conservator of the Person and Estate of Marshall L. Stern in the Superior Court of California, County of Los Angeles, case number BP091574 on behalf of Mr. and Mrs. Ritch to have Mr. Ritch appointed as conservator of Mr. Stern (the "Conservatorship Proceeding").

On June 23, 2005, respondent received check number 3632 in the amount of \$3,000, drawn on Mr. Stern's Bank of America checking account, allegedly signed by Mr. Stern, from Mr. Ritch in payment of respondent's legal fees. On that date, respondent deposited the check into respondent's CTA. At no time was there a court order authorizing the payment of these attorney fees.

On July 7, 2005, in the Conservatorship Proceeding, the court appointed Jim Schnieders, R.N. ("Mr. Schnieders") as Temporary Conservator of Mr. Stern based upon findings that Mr.

Stern was unable to care for his person or finances. The court also revoked the General Power of Attorney in favor of Mr. Ritch. Respondent was aware of these matters in the Conservatorship Proceeding, as respondent appeared in court at this hearing and was present when Mr. Schnieders was appointed Temporary Conservator and when Mr. Ritch's General Power of Attorney was revoked.

On August 2, 2005, Mr. Ritch caused \$25,000 to be wire-transferred from Mr. Stern's IRA Account with Retirement Advisors of America to respondent's CTA for respondent's legal fees in the Conservatorship Proceeding. At no time was there a court order authorizing the payment of these attorney fees.

In the Conservatorship Proceeding, on October 31, 2005, the Court ordered respondent to return the \$25,000 he had received from Mr. Stern's assets to the Temporary Conservator, Mr. Schnieders. Respondent was aware of this Order as respondent appeared at the hearing where this order was made by the Court.

On November 7, 2005, respondent filed a Notice of Appeal with the California Second Appellate District, appealing the Court's Order that he return the \$25,000 to Mr. Schnieders.

Respondent took no further action on his appeal.

On January 17, 2006, the California Second Appellate District dismissed respondent's appeal as respondent was in default. Respondent was properly served with and received a Notice of the Dismissal.

To date, respondent has not returned the \$25,000 that he received from Mr. Stern's assets to Mr. Schnieders.

Respondent had a fiduciary duty to Mr. Schnieders with respect to the \$25,000 he received in attorney's fees due to the Court's Order to return the funds to Mr. Schnieders.

Subsequent to the Court's Order in the Conservatorship Proceeding that respondent return the \$25,000 that he received from Mr. Stern's retirement account to Mr. Schnieders, respondent failed to maintain this amount in respondent's CTA.

On December 19, 2005, the balance in respondent's CTA fell to -\$205.35.

Respondent dishonestly misappropriated \$25,000 of the funds respondent was ordered to repay to Mr. Schnieders.

During the period of July 2005 through August 2006, respondent left personal funds in respondent's CTA for the payment of office and/or personal expenses as needed.

During the same time period, respondent repeatedly made personal deposits into respondent's CTA for a total of \$17,810.75 as follows:

<i>Date</i>	<i>Amount of Deposit</i>
08/06/05	\$5,000.00
08/06/05	51.75
08/06/05	1,838.00
08/25/05	2,000.00
08/29/05	2,250.00
09/30/05	1,500.00
10/06/05	3,500.00
10/19/05	321.00
11/14/05	1,000.00
04/21/06	350.00

During the same time period, respondent repeatedly issued checks and authorized debits drawn upon respondent's CTA to pay his office and/or personal expenses as follows:

<i>Check Number</i>	<i>Date Presented</i>	<i>Payee</i>	<i>Check Amount</i>
184	07/18/05	Allison Agajannian	\$1,000.00
180	07/29/05	Pacific Marine Surveyors	480.00
192	07/29/05	Alphagraphics	4.31
179	07/29/05	Sunset Aquatic Shipyards	1,178.00
198	08/04/05	DBS	1,268.49
199	08/04/05	Home Consignment Center	576.46
207	08/05/05	The Law Bookstore	226.22
197	08/05/05	Vinny Bergeman	1,000.00

206	08/05/05	HCC Office Furniture	289.89
205	08/06/05	Bayside Yacht Trust Acct	298.70
203	08/06/05	Shurgard Office Storage	326.21
213	08/12/05	Home Consignment Center	753.17
191	08/14/05	Lenscrafters	657.96
217	08/15/05	Zurich North American	500.00
215	08/15/05	Margaret Berger	1,000.00
219	08/25/05	Sprint PCS	59.93
224	08/31/05	Margaret Berger	1,000.00
1002	08/31/05	DBS	1,089.00
1003	08/31/05	DBS	84.37
1004	08/31/05	Rickelman Investments	1,000.00
Debit	09/02/05	Coast Natl Ins Ins Paymt	99.17
1005	09/08/05	Royal Flush	45.00
1007	09/08/05	Firestar Designs	1,250.00
0211	09/09/05	Credit Collection Services	390.60
0210	09/09/05	Credit Collection Services	124.00
Debit	09/12/05	Western Union	7.50
Debit	09/12/05	Americredit Payment	449.19
Debit	09/13/05	Card Services 1 Payment	230.00
210	09/20/05	The Law Program	500.00
1100	09/25/05	BPPVE	4,500.00
Debit	09/26/05	Sprint PCS Telcom	359.78
103	09/29/05	Goodyear	151.00
Debit	10/03/05	Coast Natl Ins Ins Paymt	99.01
1008	10/07/05	Department of Real Estate	165.00
1104	10/14/05	Margaret Berger	1,000.00
Debit	10/20/05	Western Union	7.50
Debit	10/20/05	Americredit Payment	875.92
1105	10/31/05	Firestar Design	1,050.00
Debit	11/02/05	Coast Natl Ins Ins Paymt	99.01
1107	11/03/05	Royal Flush	90.00
Debit	11/09/05	Sprint PCS Telcom	198.21
1109	11/11/05	Law Program	500.00
Debit	11/14/05	Jetblue	256.90
Debit	11/14/05	Jetblue	256.90
Debit	11/14/05	Acapulco Restaurant	36.45
Debit	11/14/05	Shell Oil	32.72
Debit	11/14/05	Charro Chicken	20.31
Debit	11/15/05	Franciscan Crab Rest	100.32
Debit	11/16/05	Hilton Hotels	313.11
1118	11/16/05	Margaret Berger	1,000.00
Debit	11/17/05	Southwest Air	239.90
Debit	11/17/05	Southwest Air	239.90
Debit	11/18/05	FedexKinko's	11.29
Debit	11/21/05	Card Services 1 Payment	30.00
Debit	11/25/05	Ralphs	167.37
Debit	11/25/05	earthlink.Net	58.42

Debit	11/25/05	Arco	47.04
Debit	11/25/05	Chevron	45.06
Debit	11/25/05	Denny's	42.94
Debit	11/25/05	Office Depot	17.02
Debit	11/28/05	Flying J	42.63
Debit	11/28/05	Gas N Go	31.33
Debit	11/28/05	Stop N Save	29.83
Debit	11/28/05	R & K Gas and Goodies	20.13
Debit	11/28/05	ExxonMobil 26	20.00
Debit	11/29/05	Flying J	37.96
Debit	11/29/05	Chevron	29.00
Debit	11/29/05	Flying J	25.62
Debit	11/30/05	ExxonMobil 75	30.00
1119	11/30/05	DBS	1,341.72
1121	12/01/05	Margaret Berger	1,000.00
Debit	12/02/05	World of Winnt World	219.00
Debit	12/02/05	Spring PCS Telcom	197.58
Debit	12/02/05	Coast Natl Ins Ins Paymt	99.01
Debit	12/02/05	Arco	47.17
Debit	12/05/05	Shell Oil	30.01
Debit	12/05/05	earthlink.Net	27.90
Debit	12/05/05	Circuit City	24.71
Debit	12/05/05	Oasis Stores Inc	6.87
Debit	12/06/05	Southwest Air	249.90
Debit	12/06/05	Lowe's	109.11
Debit	12/06/05	Motel 6	46.52
Debit	12/09/05	Circle K	45.73
1124	12/12/05	Cash/Airline Tickets	260.00
Debit	12/12/05	Vons	55.49
Debit	12/12/05	Shell	45.71
Debit	12/12/05	The Home Desou	35.54
Debit	12/12/05	Shore House	34.31
Debit	12/12/05	Hofs Hut	29.96
Debit	12/12/05	Office Depot	22.51
Debit	12/13/05	Extended Stay Amer #87	98.99
Debit	12/13/05	New York Cargo	13.90
91216	12/16/05	Goodyear	725.75
Debit	12/16/05	Western Union	7.50
Debit	12/16/05	Americredit Payment	449.19
Debit	12/16/05	Steve & Barry's #70	163.36
Debit	12/16/05	Webroot Software	39.95
Debit	12/16/05	Shell Oil	36.16
Debit	12/19/05	Ralphs	202.00
Debit	12/19/05	Webroot Software	39.95
Debit	12/19/05	Arco	30.45
Debit	12/19/05	S C Gas & Service	30.02
Debit	12/19/05	Coco's	23.64
Debit	12/27/05	Sprint PCS Telcom	33.31

Debit	12/27/05	Chevron	30.12
Debit	01/03/06	Coast Natl Ins Ins Paymt	99.01
Debit	01/05/06	earthlink.Net	27.90
Debit	01/20/06	Card Services 1 Payment	431.91
Debit	02/02/06	Coast Natl Ins Ins Paymt	99.01
Debit	02/06/06	earthlink.Net	27.90
Debit	03/02/06	Coast Natl Ins Ins Paymt	99.01
Debit	03/16/06	earthlink.Net	27.90
Debit	04/03/06	Coast Natl Ins Ins Paymt	99.01
Debit	04/12/06	earthlink.Net	27.90
Debit	05/04/06	earthlink.Net	27.90
Debit	06/05/06	earthlink.Net	27.90
Debit	07/05/06	earthlink.Net	27.90
Debit	07/31/06	Arco	40.69
Debit	08/02/06	Union 76	30.23
Debit	08/04/06	Chevron	50.29
Debit	08/04/06	earthlink.Net	27.90
Debit	08/07/06	Circuit City	169.27
Debit	08/07/06	El Torito	29.46
Debit	08/07/06	Chevron	29.27
Debit	08/07/06	Shell Oil	20.02
Debit	08/07/06	Chevron	14.00
Debit	08/08/06	Chevron	40.07
Debit	08/08/06	Gulliver's	33.52
Debit	08/10/06	S C Gas & Service	50.21
Debit	08/11/06	Union 76	60.09
Debit	08/11/06	Gulliver's	41.60
Debit	08/14/06	Bistango Restaurant	55.40
Debit	08/14/06	Arco	35.58
Debit	08/14/06	Trader Joe's	25.84
Debit	08/15/06	El Torito	70.74

On May 15, 2006, the State Bar opened an investigation, pursuant to a complaint filed by Jim Schnieders, R.N. (the "Schnieders matter").

On June 27, 2006, a State Bar investigator wrote to respondent regarding the Schnieders matter. The investigator's letter requested that respondent respond in writing to specific allegations of misconduct being investigated by the State Bar.

On July 26, 2006, respondent responded in writing to the investigator's letter. With respect to allegations concerning the attorney's fees respondent received without court orders and

respondent's deposit of those attorney fees into respondent's CTA, respondent stated, "There was no other person's money in that account."

On the contrary, on August 31, 2005, respondent deposited a check from State Farm General Insurance Company in the amount of \$6,000 into respondent's CTA, which was made payable to Teri Taylor and her attorney, respondent.

On August 31, 2005, respondent deposited a check from Carol L. LaJuenesse in the amount of \$950 into respondent's CTA. In the memo section of the check was written "witness-court."

On September 14, 2005, respondent deposited a check from Carol L. LaJuenesse in the amount of \$2,500 into respondent's CTA. In the memo section of the check was written "trial."

On October 16, 2005, respondent deposited a check from Carol L. LaJuenesse in the amount of \$2,500 into respondent's CTA. In the memo section of the check was written "WHOA case."

On November 3, 2005, respondent deposited a check from Springer Investments, LLC in the amount of \$2,500 into respondent's CTA. In the memo section of the check was written "Paquette."

Respondent knew of these deposits, as respondent made the deposits into respondent's CTA. At the time respondent made these deposits, he still had at least some portion of the attorney's fees he received from Mr. Ritch in respondent's CTA.

In January 2007, Mr. Stern passed away.

On February 5, 2007, Mr. Schnieders filed a Petition for Probate in Los Angeles Superior Court, case number BP102788 (the "Probate matter").

As part of the Probate matter, Mr. Schnieders' counsel proposed a settlement to respondent on behalf of Mrs. Ritch to settle the estate between Mrs. Ritch and the other heirs.

On January 17, 2008, respondent forwarded correspondence to Mr. Schnieders' attorneys attempting to resolve the matter. In the correspondence, respondent agreed to some areas of the settlement but stated that Mrs. Ritch also had several conditions, one of which was, "That Mr. Schnieders inform the California State Bar that this matter has been resolved in a civil action and withdraw the complaint." This condition was proposed by respondent, not Mrs. Ritch.

On January 11, 2007, respondent served Mr. Schnieders' counsel and all other parties (seven other attorneys representing parties in the Conservatorship Proceeding and eight non-attorney parties) in the Conservatorship Proceeding with respondent's Notice of Hearing on Petition and Petition for Attorney's Fees for Roger Agajanian, Counsel for Donna Stern Ritch and Ricky Ritch (the "Petition"). In the Notice of Hearing, respondent stated that the Hearing would be held on February 14, 2007, in the Superior Court. At the time he served the Petition, respondent was aware that at no time did he file this document with the Court or reserve the hearing date with the Court. Furthermore, at no time after he served the Petition did respondent file the documents with the Court or reserve the hearing date with the Court. Nor did respondent ever notify Mr. Schnieders' counsel or the other parties that he never filed the Petition or reserved the hearing date.

Relying on the authenticity of respondent's Petition, on February 13, 2007, counsel for Mr. Schnieders filed his Objections to Petition for Attorney Fees with the Court and served it on respondent and all involved parties.

On November 1, 2005, respondent received a check from Mr. and Mrs. Ritch in the amount of \$10,000, with the notation in the memo section of the check reading "Marshall Stern fees," drawn on Mr. and Mrs. Ritch's personal bank account. On that date, respondent deposited this check into respondent's CTA.

On March 13, 2007, respondent served a conformed copy dated March 12, 2007, of respondent's Petition for Attorney's Fees for Roger Agajanian (the "filed Petition") on Mr. Schnieders' counsel and all other parties in the Conservatorship Proceeding.

Attached to the filed Petition was a Declaration of respondent, signed under penalty of perjury on March 7, 2007, wherein respondent stated that he had incurred attorney's fees of \$23,950 in the Conservatorship Proceeding for the period of April 20, 2005 through November 25, 2006.

Neither in the filed Petition nor the Declaration of respondent did respondent make reference to any of the attorney's fees that he had already received in the Conservatorship Proceeding; specifically the \$3,000 he received on June 23, 2005, the \$25,000 he received on August 2, 2005, and the \$10,000 he received on November 1, 2005.

Count 1: Illegal Fee (Rules Prof. Conduct, Rule 4-200(A))¹

Rule 4-200(A) prohibits an attorney from entering into an illegal or unconscionable fee agreement or charging or collecting an illegal or unconscionable fee.

By accepting the payment of \$3,000 on June 23, 2005, and the payment of \$25,000 on August 2, 2005, without an order from the Court in the Conservatorship Proceeding authorizing these payments, respondent collected illegal fees in violation of rule 4-200(A).

Count 2: Failure to Obey a Court Order (Bus. & Prof. Code, § 6103)²

The court finds that there is clear and convincing evidence that respondent willfully failed to obey a court order, requiring him to do an act connected with or in the course of his profession which he ought in good faith to do, in willful violation of section 6103, by failing to return the \$25,000 he received from Mr. Stern's assets to Mr. Schnieders, as he was ordered to do

¹ References to rules are to the current Rules of Professional Conduct, unless otherwise noted.

² References to sections are to the provisions of the Business and Professions Code.

so by the Superior Court in the Conservatorship Proceeding, and allowing his appeal of that Court Order to be dismissed rendering the Court's Order final.

Count 3: Failing to Maintain Client Funds in Trust Account (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.

By failing to maintain the \$25,000 in respondent's CTA that respondent had been ordered by the Court to return to Mr. Schnieders, respondent failed to maintain funds in trust for the benefit of another party in the Conservatorship Proceeding to whom respondent had a fiduciary duty.

Count 4: Dishonesty (Bus. & Prof. Code, § 6106)

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

By accepting the payment of \$25,000 from Mr. Ritch of Mr. Stern's assets when he knew that Mr. Ritch had no authority to disburse Mr. Stern's assets subsequent to Mr. Ritch's General Power of Attorney being revoked by the Court in the Conservatorship Proceeding and not immediately returning the funds, respondent committed an act of moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

Count 5: Misappropriation (Bus. & Prof. Code, § 6106)

By misappropriating \$25,000 of the funds to be repaid to Mr. Schnieders, respondent committed an act involving moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

Count 6: Commingling (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 and authorizing electronic debits as needed for personal and/or office expenses, 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 violation of rule 4-100(A).

Count 7: Moral Turpitude (Bus. & Prof. Code, § 6106)

By repeatedly utilizing respondent's CTA as a personal and/or business account, respondent committed acts involving moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

Count 8: Misrepresentation (Bus. & Prof. Code, § 6106)

By misrepresenting to the State Bar in his letter of July 26, 2006, that no other person's money was in respondent's CTA, respondent committed an act of moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

Count 9: Seeking an Agreement to Withdraw a State Bar Complaint (Bus. & Prof. Code, § 6090.5, Subd. (a)(2))

Respondent, while acting as a party or as an attorney for a party, willfully violated section 6090.5, subdivision (a)(2), by agreeing or seeking agreement that a plaintiff would withdraw a disciplinary complaint or would not cooperate with the investigation or prosecution conducted by the disciplinary agency. By conditioning the settlement agreement so as to require

that Mr. Schnieders withdraw the complaint he had made to the State Bar regarding respondent, respondent willfully sought agreement that Mr. Schnieders would withdraw his State Bar complaint.

Count 10: Misrepresentation (Bus. & Prof. Code, § 6106)

By serving the Notice of Hearing on Petition and Petition for Attorney's Fees when he did not file it with the Court or reserve the hearing date as specified in the Notice with the Court, thereby misrepresenting to all parties that this document had been or would be filed and there was a court date for the hearing, respondent committed acts of moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

Count 11: Misrepresentation (Bus. & Prof. Code, § 6106)

By misrepresenting to the Court and all involved parties in the Conservatorship Proceeding that he was owed \$23,950 in attorney's fees and that he had not received any attorney fees to date, respondent committed acts of moral turpitude, dishonesty and/or corruption in willful violation of section 6106.

B. Case No. 06-O-12783 (Taylor Matter – Counts 12-13)

Prior to August 2005, Teri Taylor ("Ms. Taylor") employed respondent to represent her in a personal injury action regarding injuries she suffered on February 19, 2002. Respondent agreed to represent her on a contingency basis.

On August 31, 2005, respondent received a check from State Farm General Insurance Company in the amount of \$6,000, payable to Teri L. Taylor & Roger Agajanian, her attorney. On that same date, respondent deposited the check into respondent's CTA.

After respondent took his fees of \$2,400, respondent was required to maintain the amount of \$3,600 in respondent's CTA on behalf of Ms. Taylor.

On December 19, 2005, prior to payment being made to Ms. Taylor or to any of Ms. Taylor's medical providers or to anyone else on Ms. Taylor's behalf, the balance in respondent's CTA fell to -\$205.35.

Respondent dishonestly misappropriated at least \$3,600 of the funds received on behalf of Ms. Taylor.

Count 12: Failing to Maintain Client Funds in Trust Account (Rule 4-100(A))

By not maintaining at least \$3,600 on behalf of Ms. Taylor in respondent's CTA until payment was made to Ms. Taylor and anyone else on behalf of Ms. Taylor, respondent failed to maintain funds in a client trust account in willful violation of rule 4-100(A).

Count 13: Misappropriation (Bus. & Prof. Code, § 6106)

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 \$3,600 for the benefit of Ms. Taylor. But after he had deposited the funds into his CTA, the balance fell to -\$205.35. Therefore, because the balance in respondent's CTA fell below the amount of entrusted funds of \$3,600 to -\$205.35 on December 19, 2005, respondent misappropriated the money and committed an act of moral turpitude in willful violation of section 6106.

C. Case No. 07-O-12254 (Merrill Matter – Counts 14-18)

In 2003, Hildegard Merrill ("Ms. Merrill") employed respondent to represent her in a construction defect dispute with her homeowner's association, Laguna Sur Community

Association ("Laguna"). As respondent had represented Ms. Merrill previously, there was no retainer agreement with respect to this matter.

On May 29, 2003, respondent filed a complaint on behalf of Ms. Merrill with the Orange County Superior Court entitled *Hildegard Merrill v. Laguna Sur Villas Community Association, et al.*, case number 03CC00206 (the "construction defect matter").

The construction defect matter went to trial beginning on March 14, 2005, and continued on non-consecutive days through on February 17, 2006. Respondent represented Ms. Merrill throughout trial of this matter.

On April 14, 2006, an Amended Judgment was filed in the construction defect matter against Ms. Merrill.

Ms. Merrill informed respondent that she wanted to appeal, and on June 13, 2006, respondent filed a Notice of Appeal to the Court of Appeal, Fourth District, Division Three, with the Orange County Superior Court.

On June 14, 2006, the Orange County Superior Court served a Notice of Filing Appeal on respondent, the District Court of Appeal and Defendants' Counsel. Respondent received this Notice.

On June 15, 2006, the District Court of Appeal served respondent and Defendants' Counsel with an Order directing Ms. Merrill to file a completed Civil Case Information Statement within 10 days of the date of the notice in the Appeal filed on her behalf by respondent, case number G037199 (the "appeal"). Respondent received this Order.

On June 22, 2006, respondent filed a Designation of Reporter's Transcript and Clerks Transcript on Appeal with the Orange County Superior Court from the construction defect trial on behalf of Ms. Merrill.

On June 26, 2006, respondent filed a completed Civil Case Information Sheet with the District Court of Appeal on behalf of Ms. Merrill in the appeal.

On June 27, 2006, the Orange County Superior Court served respondent and the District Court of Appeal with a Notice of Default of Appellant for Appellant's failure to timely deposit funds and/or original transcripts.

Prior to July 11, 2006, respondent informed Ms. Merrill that she needed to deposit \$3,575 with the Clerk of the Superior Court for the preparation of the Reporter's Transcript. On July 11, 2006, Ms. Merrill wrote a check for \$3,575 and deposited it with the Clerk of the Superior Court on that date.

On July 13, 2006, the Orange County Superior Court served Notice on the Court Reporter that the deposit had been made and which portions of the transcript were to be prepared. Thereafter, the Court Reporter prepared the requested portions of the transcript and forwarded them to respondent.

On August 8, 2006, the Orange County Superior Court served respondent and the District Court of Appeal with Notice that Appellant had failed to comply with California Rule of Court, rule 8. Respondent received the Notice. Respondent did not inform Ms. Merrill of the Notice or take any further action regarding the Notice or the appeal.

On August 24, 2006, the Orange County Superior Court served respondent and the District Court of Appeal with a Declaration of Appellant's Failure to Comply with California Rule of Court, rule 8. The Declaration stated that the reason for default was the failure to timely deposit costs for preparing the clerk's transcript and failing to timely deposit additional funds requested by the reporter. Respondent received the Declaration. Respondent did not inform Ms. Merrill of the Declaration or take any further action regarding the Declaration of Default or the appeal.

On August 28, 2006, the District Court of Appeal served respondent, Defendants' Counsel and the Orange County Superior Court with an Order dismissing Ms. Merrill's appeal for appellant's failure to timely deposit costs for preparation of the record on appeal. Respondent received the Order. Respondent did not inform Ms. Merrill of the Order of Dismissal or take any further action with respect to the appeal.

By failing to take any action with respect to the Court's Declaration of Default and allowing Ms. Merrill's appeal to be dismissed, respondent effectively withdrew from representation of Ms. Merrill.

At no time did respondent inform Ms. Merrill that he was withdrawing from employment in her matter. Nor did respondent take any other steps to avoid reasonably foreseeable prejudice to his client.

At no time did respondent inform Ms. Merrill that her appeal was going to be dismissed for failure to pay costs or that her appeal had finally been dismissed for failure to pay costs.

In February 2007, Ms. Merrill was speaking to an acquaintance of hers and respondent's about her interest in reading the trial transcripts from the construction defect matter. The acquaintance informed her that her appeal had been dismissed in 2006. This was the first time Ms. Merrill had any knowledge that her appeal had been dismissed.

Ms. Merrill attempted to reach respondent by telephone at the telephone number he had given her several times throughout February 2007, and each time she called she left a message for respondent to return her call. Respondent failed to return any of Ms. Merrill's telephone calls.

Subsequent to Ms. Merrill learning that her appeal had been dismissed, she retained another attorney, Jeanne Collachia ("Ms. Collachia"), to see what could be done about reinstating her appeal. Ms. Collachia attempted to reach respondent several times in February 2007 on

behalf of Ms. Merrill, by calling his membership records telephone number. Ms. Collachia was always transferred to respondent's voice mail. Ms. Collachia left a message for respondent that she was calling on behalf of Ms. Merrill and requesting that he return her call each time she called him. Respondent failed to return any of Ms. Collachia's telephone calls.

On March 5, 2007, Ms. Collachia filed Appellant's Motion to Recall Remittitur and Reinstate Appeal on behalf of Ms. Merrill in the appeal.

On March 22, 2007, the District Court of Appeal filed an Order Granting the Motion to Recall the Remittitur and Reinstated the Appeal. As part of this Order, the Court also ordered respondent to return the incomplete reporter's transcripts sent to him to the appellate section of the Superior Court Clerk's office within 10 days of the order and to file with the Court within 15 days of the order a statement of whether he had complied. The Court's Order was properly served upon respondent. Respondent received the Court's Order. Respondent took no action to address the Court's Order of March 22, 2007.

On May 8, 2007, the Orange County Superior Court served Notice of Inability to Provide a Reporter's Transcript on respondent, Ms. Collachia, Defendants' Counsel and the District Court of Appeal. The Notice stated that the reason the transcript could not be provided was that respondent had not provided the reporter's transcripts to the Clerk's Office pursuant to the District Court's Order of March 22, 2007. Respondent received the Notice. Respondent took no action with respect to the Notice of May 8, 2007.

On May 11, 2007, the District Court of Appeal issued an Order staying the briefing in the appeal. The Order was properly served upon respondent. Respondent received the Order.

On June 4, 2007, the District Court of Appeal issued an Order stating that the Court had been advised that respondent had not complied with the Court's Order of March 22, 2007. The Court again ordered respondent to return the incomplete reporter's transcripts sent to him by the

appellate section of the Superior Court's office within 10 days of the order and to file with the court within 15 days of the order a statement of whether he complied. The Order was properly served upon respondent. Respondent received the Order. Respondent took no action to comply with the Order.

According to the Docket entries for the District Court of Appeal, case number G037199, (the appeal on behalf of Ms. Merrill), on June 4, 2007, a person with the initials BRL from the court had a telephone conversation with respondent regarding the Court's Order of March 22, 2007, and that the transcripts should be submitted to the Superior Court as soon as possible. The notes also state that respondent stated he would comply.

To date, respondent has not complied with the Court Orders of March 22, 2007, and June 4, 2007.

Count 14: Failure to Perform Competently (Rule 3-110(A))

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

By failing to take any action regarding the Court's Notice of August 8, 2006, and the Court's Declaration of Default of August 24, 2006; and by allowing Ms. Merrill's appeal to be dismissed, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count 15: Improper Withdrawal from Employment (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 take the necessary steps to avoid Ms. Merrill's appeal being dismissed, failing to inform Ms. Merrill of his intent to withdraw from employment, and failing to take any other steps to avoid prejudice to his client, respondent willfully failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client.

Counts 16 and 17: Failure to Communicate (§ 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.

In count 16, by not informing Ms. Merrill that her appeal was in danger of being dismissed and that it was dismissed, respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

In count 17, by not returning Ms. Merrill's telephone calls and not returning Ms. Collachia's telephone calls on behalf of Ms. Merrill, respondent failed to respond to his client's reasonable status inquiries in willful violation of section 6068, subdivision (m).

Count 18: Failure to Obey a Court Order (Bus. & Prof. Code, § 6103)

By failing to return the reporter's transcripts to the Superior Court and comply with the District Court of Appeals Orders of March 22, 2007, and June 4, 2007, respondent willfully disobeyed and violated two orders of the court requiring him to do an act connected with or in the course of respondent's profession which he ought in good faith to do in willful violation of section 6103.

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,³ stds. 1.2(e) and (b).)

A. Mitigation

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

B. Aggravation

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

Respondent has previously been disciplined for misconduct in three instances, which is an extremely serious aggravating factor. (Std. 1.2(b)(i).)

1. On July 10, 1990, the Supreme Court suspended respondent from the practice of law for four years, stayed, and placed him on probation for four years with an actual suspension of two years and until he complied with standard 1.4 (c)(ii). This discipline arose from respondent's conviction of two counts of criminal contempt for knowingly and willfully making misleading and incomplete statements to the court. As a result of this conviction, respondent was sentenced to 90 days in federal prison. (BM 5560.)
2. On October 16, 1991, the Supreme Court suspended respondent from the practice of law for five years, stayed, and placed him on probation for five years with an actual suspension of three years and until he complied with standard 1.4 (c)(ii). Respondent was found culpable of multiple acts of professional misconduct in eight matters, including failure to promptly return a client file, failure to communicate, failure to perform services, committing an act of moral turpitude

³ Future references to standard(s) or std. are to this source.

and engaging in an unauthorized practice of law. (Supreme Court case No. S022257.)

3. On June 17, 1993, the Supreme Court suspended respondent from the practice of law for 90 days, that execution of that suspension be stayed, and placed him on probation for 90 days for probation violations. (Supreme Court case No. S022257.)

Moreover, there were four disciplinary matters pending at the time of respondent's resignation on April 29, 1994. Respondent was found culpable of failing to maintain client trust funds, failing to promptly return client funds, failing to perform services competently, failing to communicate, clearly to comply with California Rules of Court, former rule 955, failing to maintain the respect due to the courts and committing multiple acts of moral turpitude.

Respondent committed multiple acts of wrongdoing by collecting an illegal fee, failing to return client funds, failing to maintain client funds, misappropriation, seeking an agreement to withdraw a State Bar complaint, failing to perform services, failing to communicate with his client, committing acts of moral turpitude, commingling personal funds with client funds in his CTA, improperly withdrawing from employment and failing to obey a court order. (Std. 1.2(b)(ii).)

Respondent misconduct harmed significantly his clients. (Std. 1.2(b)(iv).) His clients are deprived of their funds.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He had not yet reimbursed his clients of their funds or obey the court orders.

Respondent's failure to appear at trial 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 reproof 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 1.7(b) provides that if the member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding should be disbarment unless the most compelling mitigating circumstances clearly predominate. Here, there is no mitigation.

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 reproof 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 reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges disbarment. The court agrees.

In *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, the attorney committed professional misconduct or was actually suspended as a result of that misconduct, including client abandonments, probation violations and failure to file timely the affidavit required by rule 955 of the Rules of Court, during 18 of the 26 years of his practice. As a result, the Review Department found that he had ample opportunity to conform his conduct to the

ethical requirements of the profession, but has repeatedly failed or refused to do so in his 26 years of practice and that, therefore, disbarment was appropriate.

Here, like *Rose*, respondent had repeatedly committed misconduct during 23 of the 37 years of his practice. This is respondent's fourth disciplinary proceeding. He had resigned with charges pending and was reinstated to the practice of law. He had been given multiple opportunities to reform and to rehabilitate. Probation and suspension have proven inadequate to prevent continued misconduct. And, no compelling mitigation has been shown.

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 rectifying his misconduct, respondent failed to appear at trial and 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, in particular, his extensive prior disciplinary record, and the lack of any mitigating factors, the court recommends disbarment.

VI. Recommendations

A. Discipline

Accordingly, the court recommends that respondent **Roger James Agajanian** 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. Restitution

It is also recommended that respondent make restitution to the following:

- 1. Jim Schnieders**, Conservator of the Person and Estate of Marshall L. Stern, in the amount of \$25,000 plus 10% interest per annum from October 31, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Jim Schnieders, Conservator of the Person and Estate of Marshall L. Stern, plus interest and costs, in accordance with Business and Professions Code section 6140.5); and
- 2. Teri Taylor** in the amount of \$3,600 plus 10% interest per annum from August 31, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Teri Taylor, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

Respondent must furnish satisfactory proof of payment thereof to the State Bar's Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

C. 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.⁴

D. 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: May 24, 2010.

RICHARD A. PLATEL
Judge of the State Bar Court

⁴Respondent 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.)