FILED FEBRUARY 8, 2011

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case No.: **06-O-15466-RAP**
	)	
DANIEL SOLOMON KLEIN,	)	
	)	**DECISION AND ORDER OF**
Member No. 153436,	)	**INVOLUNTARY INACTIVE**
	)	**ENROLLMENT**
A Member of the State Bar.	)	

I. INTRODUCTION

In this contested, original disciplinary proceeding, respondent **DANIEL SOLOMON KLEIN** is charged with three counts of misconduct in one client matter. The court finds respondent culpable on all three counts. Respondent was represented by attorney Richard B. Rudolph. The Office of the Chief Trial Counsel of the State Bar of California ("State Bar") was represented by Deputy Trial Counsel Charles Calix.

Having considered the facts and the law, the court recommends, among other things, that respondent be disbarred from the practice of law.

II. PROCEDURAL HISTORY

The State Bar of California initiated this proceeding by filing a notice of disciplinary charges ("NDC") on June 14, 2010. Respondent filed a response to the NDC on July 23, 2010.

Trial was held on December 2, 2010. After a short briefing schedule, the matter was submitted for decision on December 16, 2010.

On December 20, 2010, the court issued an order denying respondents motion to "open the trial" to accept an additional exhibit.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 11, 1991, and has been a member of the State Bar of California since that time.

B. Credibility Determinations

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g, Evid. Code section 780 [list of factors to consider in determining credibility].) As illustrated below, the court finds the testimony of respondent and Maryam Akhavan to be not credible.

C. Findings of Fact

On or about November 12, 1998, respondent commenced a civil action, on behalf of Paul Anderson ("Anderson"), against John Hebbeln ("Hebbeln") by filing a complaint titled *Paul C. Anderson v. John M. Hebbeln* in the Riverside Superior Court, case no. RIC 320173 (the "civil matter"). In the civil matter, Anderson made claim to half of Hebbeln's lottery winnings, which were being paid on an annual basis to Hebbeln.

On June 1, 2000, the court filed a judgment in favor of Anderson in the civil matter. On July 31, 2000, Anderson died, leaving his interest in the judgment to his daughter, Patsy Forsyth. After Anderson died, respondent continued to represent the Anderson Estate in the appeal of the civil matter.

On or about January 17, 2006, Hebbeln and Walter Forsyth ("Forsyth"), Patsy Forsyth's husband and administrator of the Anderson Estate, entered into a settlement agreement in the civil matter. On or about January 24, 2006, respondent received, on behalf of the Anderson Estate, the first payment pursuant to the settlement agreement in the civil matter. This came in the form of a $51,650 check payable to respondent. On or about January 27, 2006, respondent deposited this check into his client trust account at Bank of America ("CTA").

On or about January 31, 2006, respondent issued a check from his CTA made payable to Patsy Forsyth in the sum of $36,155. Respondent withheld $15,495 (30% of the $51,650) for his fees as compensation for the legal services he performed on behalf of Anderson in the civil matter and on behalf of the Anderson Estate in Hebbeln's bankruptcy proceedings and civil appeal.

Between February 1 and September 6, 2006, respondent issued checks or authorized electronic transfers from his CTA to pay for his personal expenses, as follows:

Date of Payment	**Payee**	**Amount**
02-01-06	Spring PCS	$827.42
03-15-06	Discover	$15,547.03
07-25-06	American Express	$1,076.00
09-06-06	American Express	$510.00[1]

On or about May 2006, respondent received, on behalf of the Anderson Estate, the second payment pursuant to the settlement agreement in the civil matter. This came in the form of a $51,650 check payable to Forsyth for the Anderson Estate. On or about June 21, 2006, respondent deposited this check into his CTA.

[1] The State Bar also submitted evidence of a debit of funds for Sallie Mae from respondent's CTA. The only evidence concerning this debit indicates that the funds were debited to pay a debt for respondent's brother. Respondent testified that he represents his brother and was holding funds for his brother in his CTA, which funds were rightfully used to pay this debt.

On or about July 5, 2006, respondent mailed Forsyth a letter of accounting and enclosed with it a check drawn upon his CTA in the sum of $35,113 and made payable to the Anderson Estate.

By November 2006, the check respondent mailed to Forsyth had still not been negotiated. On November 21, 2006, respondent placed a stop-payment order on the check, along with stop-payment orders on other CTA checks. That same day, respondent's CTA balance fell below $35,113, to $33,767.99.

Respondent notified Forsyth, by letter, that he had placed a stop-payment order on the check. Shortly thereafter, Forsyth unsuccessfully attempted to negotiate that check. Forsyth then contacted the State Bar and filed a complaint against respondent.

On January 31, 2007, the balance in respondent's CTA was $27,372.38. By March 30, 2007, his balance had dropped to $19,645.69. And by September 28, 2007, his balance was $47.46.

In his defense, respondent claims that a number of his CTA checks had been stolen by a former girlfriend whom he described as a "stalker." This former girlfriend allegedly entered his house and damaged the walls, tore apart pieces of his clothing with a knife, and possibly tampered with the brakes of his automobile. Respondent, however, did not file a police report or attempt to obtain a restraining order against his former girlfriend. Respondent has no evidence that his former girlfriend actually did any of the actions he described.

Respondent testified that he needed to protect his client's funds in the CTA from his former girlfriend.[2] After discussing the matter with his former wife, Maryam Akhavan ("Akhavan"), respondent decided that the Anderson Estate funds would best be protected by

[2] At the time respondent placed the stop-payment order on his CTA checks, almost all the funds in his CTA belonged to the Anderson Estate.

placing them into her bank account at Wells Fargo Bank.[3] Respondent trusted Akhavan and, although divorced, still acted as her attorney.

Respondent, however, did not physically transfer any funds into Akhavan's account. Respondent testified that since Akhavan already owed him approximately $40,000, he kept the $35,113 in his CTA and considered it to be his money. Akhavan was then supposed to segregate $35,113 in her Wells Fargo account as the Anderson Estate funds.

Respondent did not have signature power on Akhavan's account, but her son did. This, however, did not concern respondent, since he considered the funds to be safe. How the funds were "safe" in an account that respondent could not access or control was left unexplained by respondent.

Despite his fears that his former girlfriend might steal the Anderson Estate money from his CTA, respondent was not concerned that she would steal the tens of thousands of dollars that remained in his CTA. Respondent proceeded to use the remaining funds in his CTA as his own funds.

Respondent purportedly had Akhavan sign an agreement acknowledging that she was holding the Anderson Estate funds in her account at Wells Fargo Bank ("first Wells Fargo Bank account"). However, as noted below, the testimony of respondent and Akhavan lacked credibility. Since their "agreement" cannot be verified by any source other than the testimony of respondent and Akhavan, the court finds this evidence to be highly suspect and unreliable.

In January 2010, Akhavan transferred the bulk of the funds in first Wells Fargo Bank account, including the Anderson Estate funds, to another Wells Fargo account ("second Wells Fargo Bank account"). On February 6, 2007, the balance in the first Wells Fargo Bank account was $12,306.90.

[3] Respondent testified that he was not thinking properly due to stress.

Respondent testified that he spoke with Forsyth shortly after respondent issued the stop-order on the $35,113 check. According to respondent, Forsyth threatened to sue respondent during this conversation. Respondent testified he told Forsyth that since he was going to sue respondent, respondent could not communicate with him.

In or about December 2006, the State Bar began investigating the present matter. The State Bar sent respondent written communications on numerous occasions to request certain documents and information. In a December 21, 2006 letter to respondent, the State Bar stated, "[i]f the [Anderson Estate] funds were not deposited into a client trust account, please explain why not and specify where the funds were deposited and maintained."

Respondent's subsequent responses were evasive and failed to include many of the documents requested by the State Bar. In his February 28, 2007 response letter, respondent failed to provide the State Bar with his CTA records and did not acknowledge where the Anderson Estate funds were being maintained.

After the State Bar subpoenaed and reviewed respondent's CTA records, respondent revealed, in his letter dated April 17, 2007, that he "segregated [the Anderson Estate funds] into a different account," but still failed to identify that account.

After further prodding, respondent, in a letter written on May 10, 2007, told the State Bar that the Anderson Estate funds had been segregated into a "Wells Fargo Account, account number 550805161." This account number, however, was inaccurate. Akhavan's true account number was 5508051561. Respondent also failed to reveal that this account was not in his name.

The court further notes that the incomplete bank records introduced into evidence by respondent show that money respondent claimed to include the Anderson Estate funds was removed from the first Wells Fargo Bank account—account number 5508051561—in January 2007. These funds were transferred into the second Wells Fargo Bank account—account number

W19376588. Therefore, respondent: (1) gave the State Bar an inaccurate account number; (2) failed to inform the State Bar that the money had been moved to an entirely different account; and (3) failed to inform the State Bar that the identified Wells Fargo account was not in his name.

Also, during the investigation, respondent also failed to provide the State Bar with a copy of the alleged agreement with Akhavan to hold funds for respondent. Respondent testified that he believes he faxed a copy of the agreement to the State Bar in April 2007, but could not locate a copy of the fax transmittal. Respondent's testimony on this subject was inconsistent with his aforementioned communications with the State Bar.

In or about May 2007, Akhavan issued a check to Forsyth in the amount of $35,113 from her first Wells Fargo account.[4] That check was not negotiated. Respondent did not investigate whether this check had been negotiated or if it was even received by Forsyth.

Akhavan, not respondent, sent Forsyth another check made payable to the Anderson Estate in the amount of $35,113, drawn on her first Wells Fargo Bank account on December 30, 2007. This check was received and negotiated by Forsyth.

Respondent's testimony concerning his handling of the Anderson Estate funds was not credible. Respondent could not adequately explain his failure to place the Anderson Estate funds into a new client trust account or his failure to simply obtain a certified check when he allegedly feared for the safety of these funds. Respondent's claim that he arranged for the funds' safekeeping by having his ex-wife segregate matching funds in her private bank account is shown to be illogical and lacking credibility by his later claim that he was not concerned if the remaining funds in the CTA were stolen. In addition, the credibility of respondent's testimony

[4] The court does not have complete records of Akhavan's first or second Wells Fargo Bank accounts. Therefore, it is unclear how much money was available in the first Wells Fargo Bank account at the time this check was written.

was diminished by his failure to initially inform the State Bar that the Anderson Estate funds were being held in a third party bank account over which he had no control and by his failure to initially provide the State Bar with a copy of his alleged agreement with Akhavan.

Taken as a whole, respondent's and Akhavan's testimony was not believable, nor was it supported by the evidence.[5]

D. Conclusions of Law

Count One – Rule 4-100(A), Rules of Professional Conduct – Failure to Maintain Client Funds in Trust Account[6]

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account and no funds belonging to an attorney or law firm shall be deposited in such an account or otherwise commingled with such funds. The court finds by clear and convincing evidence that respondent willfully failed to maintain client funds in a trust account, in willful violation of rule 4-100(A), by failing to maintain the Anderson Estate funds in his CTA.

Count Two – Business and Professions Code Section 6106 – Moral Turpitude[7]

"'There is no doubt that the wilful misappropriation of a client's funds involves moral turpitude. [Citations.]' [Citations omitted.]" (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) The court finds by clear and convincing evidence that respondent committed an act or acts involving moral turpitude, dishonesty or corruption, in willful violation of section 6106, by misappropriating $35,113 in client funds.

[5] Akhavan testified in support of respondent's version of events regarding respondent's former girlfriend and Akhavan accepting client funds from respondent that she deposited in her Wells Fargo Bank account.

[6] All further references to rule(s) are to this source, unless otherwise indicated.

[7] All further references to section(s) are to this source.

Count Three Rule 4-100(A) – Misuse of Client Trust Account

The court finds by clear and convincing evidence that respondent misused his client trust account, in willful violation of rule 4-100(A), by paying personal expenses from his CTA.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.2.)[8] The instant matter involves the following factors in mitigation.

Respondent was admitted to the practice of law in the State of California in 1991 and has no prior record of discipline. (Std.1.2(e)(i); *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.)

Respondent presented the declaration testimony of three witnesses, attesting to his good character. (Std. 1.2(e)(vi).) Since respondent's character witnesses were not from a wide range of references, the weight of this evidence is limited. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387.)

B. Aggravation

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std 1.2(b).) The record establishes three factors in aggravation.

The current misconduct by respondent evidences multiple acts of misconduct. (Std 1.2(b)(ii).)

Respondent's misconduct resulted in financial harm to Forsyth. (Std. 1.2(b)(iv).) Forsyth unsuccessfully attempted to negotiate his $35,113 settlement check in or about

[8] All further references to standard(s) are to this source.

November 2006. He was subsequently deprived of his settlement funds until on or about January 2008.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Based on the pretense that he might be sued, respondent did not communicate with Forsyth and made very little effort to insure that Forsyth promptly receive the misappropriated funds.

V. DISCUSSION

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

Standards 2.2(a), 2.2(b), and 2.3, among others, apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law

with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be disbarred from the practice of law. In support of its recommended discipline, the State Bar cites *In the Matter of Connor* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, *Grim v. State Bar* (1991) 53 Cal.3d 21, *Chang v. State Bar* (1989) 49 Cal.3d 114, *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, *Kelly v. State Bar* (1988) 45 Cal.3d 649, *In the Matter of Spaith* (1996) 3 Cal State Bar Ct. Rptr. 511, and *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583.

Respondent recommends a one-year stayed suspension and probation. Respondent did not cite any relevant case law in support of this recommendation.

The Supreme Court has repeatedly held that disbarment is the usual discipline for the willful misappropriation of client funds. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; and *Howard v. State Bar*, *supra*, 51 Cal.3d 215, 221.)

"In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client's money is not only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit." (*Howard v. State Bar*, *supra*, 51 Cal.3d 215, 221.)

Here, respondent misappropriated $35,113 in settlement proceeds from Forsyth. He was then evasive during the State Bar investigation and offered less-than-credible testimony at trial. After considering the standards and relevant case law and balancing the mitigation and

aggravation, the court concludes that respondent's disbarment from the practice of law is appropriate to protect the public and preserve public confidence in the profession.

VI. RECOMMENDED DISCIPLINE

Accordingly, it is recommended that respondent **DANIEL SOLOMON KLEIN**, 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.

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 to 40 days, respectively of the effective date of its order imposing discipline in this matter.[9]

VII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(D)(1).)

VIII. COSTS

The court recommends 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.

Dated: February 7, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court

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