

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 07-J-12950-RAP
)	07-J-12951 (Cons.)
JOHN M. GILROY,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 64126,)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

By order filed on April 23, 1992, respondent JOHN M. GILROY was suspended from the practice of law in Nebraska for one year. By order filed on July 29, 2005, he was disbarred there. As a result, the State Bar of California initiated these proceedings. (Bus. & Prof. Code, § 6049.1¹; Rules Proc. of State Bar, rules 620-625.) The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Geraldine Von Freymann. Respondent did not appear in person or by counsel.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability in the proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of respondent's misconduct in Nebraska; and (3) whether the Nebraska proceeding lacked fundamental constitutional protection. (Section 6049.1(b).)

Respondent bears the burden of establishing that the conduct for which he was disciplined in Nebraska would not warrant the imposition of discipline in California and/or that

¹Unless otherwise noted, all statutory references are to this code.

the Nebraska proceedings lacked fundamental constitutional protection. Unless respondent establishes one or both of these, the record of discipline in Nebraska is conclusive evidence of culpability of misconduct in California. (Section 6049.1(a) & (b).) Since respondent did not participate in this proceeding, the court focuses on the degree of discipline to be imposed.

For the reasons indicated below, the court recommends, among other things, that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notices of Disciplinary Charges (NDC) in case nos. 07-O- 12950 and 07-O-12951 were filed on October 4, 2007, and each was properly served on respondent on that same date at his official membership records address by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1(c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) Each NDC was received. Each return receipt was signed by “C. Lausten, agent” on October 11, 2007. Furthermore, courtesy copies of each NDC were served on respondent by regular mail and neither was returned as undeliverable.

On October 10, 2007, notices scheduling a status conference in each matter on November 14, 2007, were properly served at respondent's official address. Respondent did not participate in the status conference during which the two cases were consolidated. A copy of the status conference order was properly served on respondent at his official address on November 14, 2007.

Respondent did not file a responsive pleading to the NDCs. On November 15, 2007, a motion for entry of default was properly served on respondent at his official address by certified mail, return receipt requested. It advised him that, if he was found culpable, his disbarment would be sought. He did not respond to the motion.

On December 6, 2007, the court entered respondent’s default and enrolled him inactive effective three days after service of the order. The order was properly served on him at his official address on that same date by certified mail, return receipt requested.

The State Bar's other attempts to contact respondent were fruitless.

The matter was submitted for decision without hearing on December 12, 2007, after the State Bar waived hearing, submitted a brief and provided copies of the applicable ethics rules. A copy of the brief was properly served on respondent at his official address on December 12, 2007.

III. JURISDICTION

Respondent was admitted to the practice of law in California on June 27, 1975, and has been a member of the State Bar at all times since.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Business and Professions Code section 6049.1(a) provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction shall be conclusive evidence that the member is culpable of professional conduct in this state.

The court admits into evidence the certified record of the disciplinary proceedings in Nebraska, copies of which were attached to each NDC. The court judicially notices the applicable Nebraska ethics rules.

Respondent was admitted to the practice of law in Nebraska on April 21, 1977.

A. Case no. 07-J-12950 (Ludwick Case)

1. Facts

The record of the proceeding conclusively establishes that respondent received a one-year suspension from the Nebraska Supreme Court on April 23, 1992² on the basis of the following facts:

Respondent and Maurice A. Ludwick were close personal friends. Respondent had represented Ludwick in personal and business matters for many years.

In 1986, respondent helped Ludwick obtain a \$99,000 construction loan. At Ludwick's request, respondent agreed to and did handle the loan proceeds, pay the bills and obtain lien

²*State of Nebraska ex rel. Nebraska State Bar Assn. v. John W. Gilroy* (1992) 240 Neb. 578.

waivers as creditors were paid. Ludwick also retained respondent to act as a general contractor for the construction of Ludwick's residence, an activity which respondent did not consider to be legal in nature. Respondent billed but was generally not paid for those services because Ludwick had "a lot of other problems."

Respondent started receiving installments of the loan proceeds on February 4, 1986. He did not place Ludwick's loan proceeds in a separate trust account. He used the loan proceeds for his personal purposes as needed but always repaid the funds. Ludwick admitted that he expected respondent to use the loan proceeds for his personal affairs from time to time. He also agreed with respondent that the proceeds would not be kept apart from respondent's other business funds.

Without utilization of Ludwick's funds, respondent would have been overdrawn from between \$1819.90 on February 7, 1986, to a maximum of \$31,000 on April 11, 1986. Between February 7 and November 25, 1986, respondent's account balance was less than the amount that should have been on hand relative to Ludwick's construction loan.

All funds associated with Ludwick's loan that were in respondent's possession were eventually paid either to Ludwick or to his creditors.

At the beginning of the construction process, respondent advanced Ludwick \$1500 from respondent's own funds.

On the basis of these facts, respondent was found culpable of violating the following rules found in the Code of Professional Responsibility as adopted by the Nebraska Supreme Court:

(1) DR 1-102(A)(1) [violating disciplinary rule], (3) [illegal conduct involving moral turpitude], (4) [dishonesty, fraud, deceit or misrepresentation], (5) [conduct prejudicial to administration of justice] and (6) [conduct adversely reflecting on fitness to practice]; and

(2) DR 9-102(A) [preserving identity of client funds] and (B)(3) [maintaining records and providing accounting].

The Supreme Court found that there were mitigating circumstances, namely the close personal relationship between respondent and Ludwick and good faith.

2. Legal Conclusions

a. Rule of Professional Conduct³ 3-110(A) (Competence)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently. There is not clear and convincing evidence that respondent wilfully violated rule 3-110(A).

b. Rule 4-100(A)(Not Maintaining Client Funds in Trust Account)

Rule 4-100(A) requires, in relevant part, that an attorney place all funds held for the benefit of clients, including advances for costs and expenses, in a client trust account.

There is clear and convincing evidence that respondent wilfully violated rule 4-100(A) by not maintaining Ludwick's funds in the trust account.

c. Rule 4-100(B)(3) (Accounting)

Rule 4-100(B)(3) requires, in relevant part, that an attorney maintain complete records of all client funds, securities or other property coming into the attorney's or law firm's possession and render appropriate accounts to the clients regarding them. The attorney is to preserve such records for no less than five years after final appropriate distribution of the funds or property.

The Nebraska Supreme Court found that there was sufficient evidence that respondent did not provide Ludwick with an accounting of his construction loan funds, therefore respondent wilfully violated rule 4-100(B)(3).

d. Section 6068, subd. (a) (Noncompliance with Laws)

Section 6068(a) requires an attorney to support the Constitution and laws of the United States and of this State.

There is not clear and convincing evidence that respondent wilfully violated section 6068, subdivision (a).

e. Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his

³Future references to rule are to this source.

relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by misappropriating Ludwick's funds. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

B. Case no. 07-J-12951 (Elliott Case)

1. Facts

The record of the proceeding conclusively establishes that respondent was disbarred in Nebraska by order filed July 29, 2005⁴ on the basis of the following facts:

Helene Elliot retained respondent in 1995 primarily for estate planning purposes. Her insurance agent, David Andersen, had referred her to respondent.

Andersen and respondent maintained a professional relationship in which Andersen referred clients to respondent and respondent provided legal services to Andersen and his employer. From January to July 2003, respondent was representing Andersen on a personal matter.

In January 2003, Elliot contacted respondent again to provide additional legal services relating to her estate plan and to help in making arrangements for her to move to an assisted-living facility. Elliot was 86 years old, suffered from short-term memory loss and had recently injured herself. At that time, respondent assumed responsibility for paying Elliot's bills by preparing checks drawn on her bank account for her signature.

In January 2003, Diana, Elliot's daughter, returned to Nebraska to help her mother in selling her home and personal effects and in choosing an assisted living facility. She became concerned that Andersen had sold Elliot unnecessary insurance policies and annuities and asked respondent to look into it. She believed that Andersen may have been cashing in at a loss recently-purchased policies in order to generate thousands of dollars in commissions.

Respondent told Diana and Elliot that he had a business relationship with Andersen and was currently representing him but that he would look into the matter. Respondent also told

⁴*State ex rel. Counsel for Dis. v. Gilroy* (2005) 270 Neb. 339.

them that, if legal action against Andersen became necessary, they would need a different lawyer.

On July 31, 2003, Elliot and Diana terminated respondent's services when they discovered that respondent had not taken immediate action against Andersen.

Moreover, Diana had incurred \$763 in expenses on her mother's behalf which her mother had agreed to reimburse. Diana submitted the receipts to respondent for payment. On February 28, 2003, respondent wrote Diana a check for \$763 from his business account and also billed Elliot for the \$763 he had advanced on her behalf. On March 3, respondent's statement was paid.

The check respondent issued to Diana was returned for insufficient funds. When she told him about it, he assured her that he would pay her. Despite the assurances, he did not pay her until July 31, 2003, when his services were terminated.

On January 8, 2004, the Counsel for Discipline received a grievance from Diana on her mother's behalf alleging several potential ethical violations. The next day, the Counsel for Discipline sent respondent a copy of the grievance by certified mail along with a letter advising him to respond to the grievance in writing within 15 working days. On January 12, respondent signed the certified mail receipt for this correspondence; but he did not respond to it.

On February 4, 11 and 26, 2004, the Counsel for Discipline sent respondent additional letters seeking his reply to the Elliot grievance; however, he did not file a response as instructed in those letters.

On July 29, 2004, the Counsel for Discipline filed formal charges alleging professional misconduct. Respondent did not answer the formal charges. On September 15, 2004, the Nebraska Supreme Court sustained the Counsel for Discipline's motion for judgment on the pleadings.

On the basis of these facts, respondent was found culpable of violating the following rules found in the Code of Professional Responsibility as adopted by the Nebraska Supreme Court:

(1) DR 1-102(A)(1) [violating disciplinary rule] and (5) [conduct prejudicial to administration of justice];

- (2) DR 2-110(B)(2) [not withdrawing from representation known to violate disciplinary rule];
- (3) DR 5-101(A) [accepting employment known to conflict with personal interests];
- (4) DR 5-105 (A) - (C) [refusing to accept or continue employment if interests of another client may impair attorney's independent professional judgment];
- (5) DR 9-102(A) and (B) [preserving identity of client funds];
- (6) Neb. Ct. R. of Discipline 9(E) (rev. 2001); and
- (7) Neb. Rev. Stat. § 7-104 (reissue 1997) [violating oath of office as attorney].

The Supreme Court found no mitigating circumstances but noted that respondent had a prior instance of discipline as well as a temporary suspension order.⁵ The court also noted that respondent had not participated in the proceedings and that the only reason it could discern for his unresponsiveness was “utter contempt for the disciplinary process.” (*State ex rel. Counsel for Dis. v. Gilroy* (2005) 270 Neb. 339, 343.)

2. Legal Conclusions

a. Rule 3-110(A) (Competence)

By not investigating Elliot's concerns with Andersen between January and July 2003, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Rule 3-310(B)(4) (Interest in Subject Matter of Representation)

Rule 3-310(B)(4) prohibits an attorney from accepting or continuing representation of a client without providing written disclosure to the client where the attorney has or had a legal, financial or professional interest in the subject matter of representation.

There is clear and convincing evidence that respondent wilfully violated rule 3-310(B)(4) by agreeing, after providing only oral disclosure, to investigate his client Andersen's

⁵In that unrelated grievance, respondent did not reply to requests by the Counsel for Discipline and did not file an answer with the Supreme Court resisting the temporary suspension order. (*State ex rel. Counsel for Dis. v. Gilroy*, 269 Neb. ____ (Nebraska Supreme Court case no. S-05-163, April 8, 2005).

questionable sale of insurance policies to his client Elliot when he had a professional interest in Andersen's business to continue to obtain referrals from Andersen and to represent Andersen and his employer.

c. Rule 3-310(C)(1) (Potential Conflict)

Rule 3-310(C)(1) prohibits an attorney from accepting representation of more than one client in a matter in which the interests of the client potentially conflict without obtaining the informed written consent of each client.

There is clear and convincing evidence that respondent wilfully violated rule 3-310(C)(1) by simultaneously representing Andersen and Elliot but this charge is subsumed by the violation of rule 3-310(C)(2), discussed below. Accordingly, the court dismisses this charge with prejudice.

d. Rule 3-310(C)(2) (Actual Conflict)

Rule 3-310(C)(2) prohibits an attorney from accepting or continuing representation of more than one client in a matter in which the interests of the clients actually conflict without obtaining the informed written consent of each client.

There is clear and convincing evidence that respondent wilfully violated rule 3-310(C)(2) by representing Elliot in investigating his client Anderson's questionable sale of insurance policies to Elliot with only an oral disclosure of the actual conflict to Elliot and her daughter.

e. Rule 3-700(B)(2) (Mandatory Withdrawal)

Rule 3-700(B)(2) requires an attorney to withdraw from representing a client, either before a tribunal or otherwise, if he knows or should know that continued employment will result in a violation of the Rules of Professional Conduct or of the State Bar Act.

Respondent did not withdraw from representing Elliot even though he knew that continued employment would result in a violation of the ethics rules prohibiting conflicts of interest due to his existing representation of and other professional interests relating to Andersen.

f. Rule 4-100(A)(1) and (2)(Not Maintaining Client Funds in Trust Account)

Rule 4-100(A)(1) requires, in relevant part, that an attorney place all funds held for the benefit of clients, including advances for costs and expenses, in a client trust account. No funds

belonging to the attorney shall be commingled therewith except funds reasonably sufficient to pay bank charges.

Rule 4-100(A)(2) requires that, in the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

There is clear and convincing evidence that respondent wilfully violated rule 4-100(A)(1). Respondent should have placed Elliot's payment in trust until his \$763 check to Diana cleared.

There is not clear and convincing evidence that respondent wilfully violated rule 4-100(A)(2).

g. Rule 4-100(B)(1) (Not Promptly Notifying Client of Receipt of Funds)

Rule 4-100(B)(1) requires that an attorney promptly notify a client of the receipt of the client's funds, securities or other properties.

There is not clear and convincing evidence that respondent did not promptly notify the client of the receipt of funds in wilful violation of rule 4-100(B)(1).

h. Rule 4-100(B)(2) (Not Identifying and Safekeeping Client Property)

Rule 4-100(B)(2) requires that an attorney identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

There is not clear and convincing evidence that respondent wilfully violated rule 4-100(B)(2).

i. Rule 4-100(B)(3) (Failure to Account)

Rule 4-100(B)(3) requires, in relevant part, that an attorney maintain complete records of all client funds, securities or other property coming into the attorney's or law firm's possession and render appropriate accounts to the clients regarding them. The attorney is to preserve such records for no less than five years after final appropriate distribution of the funds or property.

There is not clear and convincing evidence that respondent wilfully violated rule 4-100(B)(3).

j. Rule 4-100(B)(4) (Not Paying Promptly)

Rule 4-100(B)(4) requires that an attorney promptly pay or deliver, as requested by the client, any funds, securities or other properties in the possession of the attorney which the client is entitled to receive.

By not paying Diana the funds her mother owed her as requested by her mother, respondent failed to promptly pay funds, as requested by the client, which the client is entitled to receive and wilfully violated rule 4-100(B)(4).

k. Section 6068, subd. (a) (Noncompliance with Laws)

There is not clear and convincing evidence that respondent wilfully violated section 6068, subdivision (a).

l. Section 6068, subd. (i) (Not Participating in Disciplinary Investigation)

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the Counsel for Discipline's letters regarding the Elliot grievance, respondent did not participate in the investigation of the allegations of misconduct in wilful violation of 6068, subdivision (i).

m. Section 6106 (Moral Turpitude)

There is clear and convincing evidence that respondent violated section 6106 by not paying Diana the \$763 he owed her after his check was returned for insufficient funds.

V. LEVEL OF DISCIPLINE

A. Factors in Mitigation

Since respondent did not participate in these or the Nebraska proceedings, no mitigating evidence was presented. (Standard 1.2(e)(i), Rules Proc. of State Bar, tit. IV, Stds. for Atty.

Sanctions for Prof. Misconduct⁶.)

In the Ludwick case, the Nebraska Supreme Court found, in mitigation, that respondent paid Ludwick and his creditors the amounts owed to them; the close personal relationship between respondent and Ludwick; and good faith.

B. Factors in Aggravation

Respondent engaged in multiple acts of wrongdoing. (Std. 1.2(b)(ii).)

Respondent's misconduct caused significant harm. (Std. 1.2(b)(iv).) Respondent did not reimburse the \$763 he owed Diana for four months until his services were terminated.

Respondent's lack of participation prior to the entry of default in this proceeding is an aggravating circumstance. (Std. 1.2(b)(vi).)

C. Discussion

The primary purposes of attorney disciplinary proceedings are 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. (Standard 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Standard 1.6(b) provides that the appropriate sanction for the misconduct must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards for those acts, the sanction recommended shall be the most severe. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.)

In this instance, the standards provide for the imposition of discipline ranging from reproof to disbarment. (Stds. 2.2(a) and (b); 2.3, 2.4(b); 2.6(a) and 2.10.) The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of

⁶Future references to standard or std. are to this source.

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. However, the one-year “minimum discipline” set forth in the standard “is not faithful to the teachings of [the Supreme] court's decisions” and “should be regarded as a guideline, not an inflexible mandate.” (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.)

The State Bar seeks disbarment. The court agrees.

Attorneys have been disbarred for misappropriation of funds even when significant mitigating factors are present. For example, in *In re Demergian* (1989) 48 Cal.3d 284, the attorney was disbarred for misappropriating \$25,000. Mitigating factors included successful recovery for four years from alcohol and cocaine abuse; municipal court judge’s testimony as to respondent’s participation in The Other Bar and his sincere efforts at recovery; substantial evidence of good character from judges, lawyers, clergy and former clients; and full restitution to victim prior to commencement of disciplinary proceedings. In the instant case, the court has little to consider in terms of mitigation since respondent did not participate in these proceedings.

Accordingly, having considered the evidence and the law, the court feels that disbarment is the only adequate means to protect the public from further misconduct by this attorney. Since respondent did not participate in these proceedings and present evidence, the court has no basis to find that the most compelling mitigating circumstances predominate or that respondent is able and willing to conform to the ethical standards of our profession. Further, lesser discipline than disbarment is not warranted because extenuating circumstances did not show that the misappropriation was an isolated event. The absence of an acceptable explanation for the misconduct along with the self-interest underlying respondent’s actions suggest that he is capable of future wrongdoing. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 659.) Accordingly, the court recommends that respondent be disbarred.

VI. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent JOHN M. GILROY be DISBARRED from the practice of law in the State of California and that his name be stricken

from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VII. COSTS

It is 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.

VIII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: March 6, 2008

RICHARD A. PLATEL
Judge of the State Bar Court