

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of ) Case No.: **07-O-11390; 07-O-13184;**  
) **07-O-13929; 07-O-13930**  
**CARL EDGAR C. JACOBA** )  
) **DECISION AND ORDER OF**  
**Member No. 200565** ) **INVOLUNTARY INACTIVE**  
) **ENROLLMENT**  
A Member of the State Bar. )

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**I. Introduction**

In this default matter, respondent **Carl Edgar C. Jacoba** (respondent) is charged with 27 counts of professional misconduct involving three separate client matters. The court finds, by clear and convincing evidence, that respondent is culpable of 24 of the charged acts of misconduct.

In view of respondent's misconduct and the evidence in aggravation, the court recommends that respondent be disbarred.

**II. Pertinent Procedural History**

On April 17, 2008, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a 27-count Notice of Disciplinary Charges (NDC)<sup>1</sup> at his official membership records address (official address). The mailing was not returned as undeliverable or for any other reason.

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<sup>1</sup> The NDC numbered each count alphanumerically. For purposes of clarity, the court will identify each count numerically, with the State Bar's alphanumeric numbering in parentheses.

On April 22, 2008, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in person status conference for May 12, 2008. A copy of said notice was properly served on respondent by first-class mail, postage fully prepaid, on April 22, 2008, addressed to respondent at his official address. The mailing was not returned as undeliverable or for any other reason.

On May 12, 2008, the court held an in person status conference in this matter. Respondent failed to appear, either in person or through counsel. That same day, the court filed an order pursuant to the status conference. The order included notice that the State Bar was expected to submit a motion for entry of default within ten days. A copy of the order was properly served on respondent by first-class mail, postage fully prepaid, addressed to respondent at his official address. That order was returned to the State Bar Court stamped, "RETURNED TO SENDER."

Respondent did not file a responsive pleading to the NDC. On May 21, 2008, the State Bar filed a motion for entry of default. The motion was properly served on respondent at his official address by certified mail, return receipt requested.<sup>2</sup> The motion advised respondent that the State Bar would seek his disbarment if he was found culpable of the alleged misconduct. Respondent did not file a response to the motion for entry of default.

On June 6, 2008, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on respondent at his official address on that same date by certified mail, return receipt requested. The order was returned to the State Bar Court by the U.S. Postal Service as undeliverable.

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<sup>2</sup> Pursuant to Evidence Code section 452, subdivision (h), the court grants the State Bar's request that the court take judicial notice of respondent's official membership records address history.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220 [126 S.Ct. 1708, 164 L.Ed.2d 415].)

The court took this matter under submission on June 26, 2008, following the filing of the State Bar's brief on culpability and discipline which requested waiver of a hearing in this matter.<sup>3</sup>

### **III. Findings of Fact and Conclusions of Law**

#### **A. Jurisdiction**

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

Respondent was admitted to the practice of law in California on March 15, 1999, and has been a member of the State Bar of California at all times since that date.

#### **B. General Background**

From September 20, 2006 until at least July 19, 2007, respondent maintained a client trust account at Wells Fargo Bank (Client Trust Account).

#### **C. The Tobias Matter - Counts 1 - 10 (1A - 1J) [07-O-11390]**

In October 2004, Rina Tobias hired respondent to represent her in a personal injury matter arising from her being hit by an automobile driven by Arnulfo G. Alonso while Ms.

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<sup>3</sup> On July 17, 2008, Paul J. Virgo, Esq., filed a Notice of Appearance on respondent's behalf. That same day, the filing of the Notice of Appearance was rescinded due to respondent's default having already been entered. (See Rules of Proc. of State Bar, rule 200(d)(1)(B).) Notice of the rescinding of the Notice of Appearance was properly served on Paul J. Virgo on July 17, 2008. At no time has the court received a motion to vacate respondent's default.

Tobias was crossing an intersection on October 6, 2004. Respondent agreed to be paid a contingency fee of 24% of any settlement or judgment he obtained for Ms. Tobias.

Ms. Tobias is originally from the Philippines and does not speak English. Her native language is Tagalog. Respondent also spoke Tagalog and that is how he communicated with Ms. Tobias.

On October 27, 2004, respondent and Ms. Tobias signed a medical lien on behalf of Bay Area Injury Center, aka Dr. David Bosco, a chiropractor. On January 4, 2005, Ms. Tobias signed a medical lien on behalf of Neuromuscular Consultants, aka Dr. Arun Mehta. On January 13, 2005, respondent was sent notice and a copy of Dr. Mehta's lien. Respondent received this notice and a copy of Dr. Mehta's lien.

On October 4, 2006, respondent negotiated a settlement of Ms. Tobias' matter for \$30,000 with Mr. Alonso's insurance company, Farmers Insurance Company. This was the policy limits on Mr. Alonso's insurance.

On October 5, 2006, Farmers sent respondent a check issued to Ms. Tobias and respondent for \$30,000 and a written release of Ms. Tobias' claims for Ms. Tobias' signature. Considering that respondent and Ms. Tobias had agreed that respondent would be paid a 24% contingency fee; Ms. Tobias and/or her medical providers were entitled to \$22,800 and respondent was entitled to the remaining \$7,800.<sup>4</sup>

On October 6, 2006, Ms. Tobias met with respondent and signed Farmer's release of her claims. Respondent, however, did not inform Ms. Tobias that Farmers had also sent him the

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<sup>4</sup> The present proceeding is not fee arbitration and the court lacks the information necessary to determine whether respondent's fees were actually earned. The court's decision is not intended to preclude any present or future efforts by respondent's clients to recover alleged unearned fees via fee arbitration or through any other forum.

\$30,000 check. Respondent did not present Ms. Tobias with the \$30,000 check issued by Farmers for her signature and did not distribute any of the \$30,000 to her or on her behalf.

On October 6, 2006, respondent signed or caused to be signed Ms. Tobias' name to the \$30,000 check without Ms. Tobias' knowledge or consent. She did not know respondent was signing the check for her or authorize him to sign her name. She did not even know that he had received the check. Respondent then deposited the \$30,000 into his client trust account.

Subsequently, respondent failed to disburse any funds to Ms. Tobias' medical providers, or to or on behalf of Ms. Tobias.

On October 5, 2006, prior to depositing the \$30,000 settlement check into his client trust account, respondent's client trust account had \$5.05 in it. At the same time that respondent deposited the \$30,000 into his client trust account, he also deposited \$1,200 in cash into his client trust account.

Subsequently, respondent failed to maintain the \$22,800 in his client trust account despite failing to disburse any funds to or on Ms. Tobias' behalf. The funds in the client trust account fell below the \$22,800 belonging to Ms. Tobias on October 11, 2006 when the balance in the client trust account was \$22,271.05. By November 9, 2006, the balance in the client trust account fell to \$-42.61.

Respondent intentionally misappropriated \$22,800 belonging to Ms. Tobias (and/or to her medical providers) for his own use and benefit.

Subsequent to October 6, 2006, respondent failed to communicate with Ms. Tobias regarding this matter, despite her numerous attempts to contact respondent to learn the status of the matter and her funds. Respondent also failed to communicate with the medical providers, despite their attempts to contact him regarding their funds and medical liens.

On March 5, 2007, Ms. Tobias' niece, Liza Morse, e-mailed respondent on behalf of Ms. Tobias requesting that respondent advise her or Ms. Tobias of the status of the case and provide a written explanation of what happened to Ms. Tobias' funds. Ms. Tobias had given Ms. Morse authorization to make this request on Ms. Tobias' behalf. Respondent received this e-mail, but failed to respond to either Ms. Morse or Ms. Tobias.

On March 7, 2007, Ms. Morse contacted Farmers directly and learned from Farmers that respondent had received a check for \$30,000 on Ms. Tobias' behalf in October 2006. Ms. Tobias and Ms. Morse then consulted attorney William Gwire regarding this matter.

Subsequently, in mid-April 2007, Mr. Gwire spoke by telephone to respondent about Ms. Tobias' matter. Respondent promised to provide the funds to Mr. Gwire within a few days. However, respondent failed to provide Ms. Tobias' funds to either Mr. Gwire or Ms. Tobias or to contact either of them.

Subsequently, Mr. Gwire sent respondent a letter inquiring about Ms. Tobias' funds. Respondent received this letter, but failed to respond to Mr. Gwire or deliver to Ms. Tobias any of the funds belonging to Ms. Tobias.

Subsequently, Ms. Morse and Ms. Tobias filed a complaint with the State Bar regarding respondent.

As of April 17, 2008, respondent had not refunded to Ms. Tobias any portion of the \$22,800 he misappropriated; nor had he disbursed any funds to the medical providers.<sup>5</sup> Additionally, respondent failed to ever account to Ms. Tobias for the settlement proceeds despite Ms. Morse requesting, on Ms. Tobias' behalf, a written explanation of what happened to the funds.

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<sup>5</sup> There is no indication that any portion of these funds has since been refunded or disbursed to the medical providers.

As of April 26, 2007, Ms. Tobias owed Dr. Mehta \$825. As of February 1, 2007, Ms. Tobias owed Dr. Bosco \$5,700. Ms. Tobias has been financially harmed in the amount of \$22,800 plus interest from October 6, 2006.

Between October 6, 2006 and July 27, 2007, respondent deposited and withdrew personal funds to and from his client trust account on numerous occasions. Said transactions included:

- (1) 17 cash deposits, involving respondent's personal funds, totaling \$27,015;
- (2) 12 transfers of personal funds, from respondent's personal checking account to his client trust account, totaling \$3,740; and
- (3) 107 payments for respondent's personal expenses, unrelated to any client matters, totaling \$46,767.93.<sup>6</sup>

On May 29, 2007, State Bar Investigator, Laura Sharek, sent a letter to respondent at his membership records address at 101 California St., Ste. 2450, San Francisco, CA 94111 regarding Ms. Tobias and Ms. Morse's allegations of misconduct. Ms. Sharek's letter requested a response from respondent and documents. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date of the letter. The United States Postal Service did not return the letter sent to respondent as undeliverable or for any other reason. Respondent received the letter by on or about June 3, 2007.

Ms. Sharek's letter requested a response on or before June 12, 2007. Subsequently, respondent failed to respond to this letter or cooperate in the State Bar's investigation.

On June 18, 2007, Ms. Sharek sent another letter to respondent at his membership

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<sup>6</sup> The court notes that 31 of these payments, totaling \$33,035.04, were made to various casinos.

records address regarding Ms. Morse and Ms. Tobias' allegations. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date of the letter. The United States Postal Service did not return the letter sent to respondent as undeliverable or for any other reason. Respondent received the letter soon after it was sent.

The investigator's letter requested that respondent respond in writing to specified allegations of misconduct on or before July 2, 2007. Subsequently, respondent failed to respond to this letter or cooperate in the State Bar's investigation.

**Count 1 (1A): Business and Professions Code, Section 6106<sup>7</sup> [Moral Turpitude]**

Section 6106 provides that the commission of any act involving moral turpitude, dishonesty or corruption constitutes a cause for suspension or disbarment. By signing Ms. Tobias' signature on the \$30,000 check without her knowledge or consent and by misappropriating \$22,800 funds belonging to Ms. Tobias, respondent willfully engaged in acts involving moral turpitude, dishonesty or corruption, in violation of section 6106. "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.)

**Count 2 (1B): Rules of Professional Conduct of the State Bar of California, Rule 4-100(A)<sup>8</sup> [Failure to Maintain Client Funds in Trust]**

Rule 4-100(A) provides, in part, 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. As set forth above, respondent failed to maintain client funds in his client trust account, in willful violation of rule 4-100(A).

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<sup>7</sup> All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

<sup>8</sup> All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.



**Count 3 (1C): Rule 4-100(B)(1) [Failure to Notify of Receipt of Client 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. By failing to notify Ms. Tobias of the receipt of her funds from Farmers, respondent failed to notify a client promptly of the receipt of the client's funds, securities, or other properties, in willful violation of rule 4-100(B)(1).

**Count 4 (1D): Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]**

Rule 4-100(B)(3) requires that an attorney maintain complete records and render appropriate accounts of all client funds in the attorney's possession. By failing to account for Ms. Tobias' funds, despite Ms. Tobias' representative requesting an accounting, respondent failed to render appropriate accounts to a client regarding all funds of the client coming into respondent's possession, in willful violation of rule 4-100(B)(3).

**Count 5 (1E): Rule 4-100(B)(4) [Failure to Pay Client Funds 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 member which the client is entitled to receive. By failing to disburse any of the funds respondent received on Ms. Tobias' behalf; including the medical liens, despite Ms. Tobias' and Ms. Morse's requests regarding the status of the matter and Ms. Tobias' settlement funds, and despite Mr. Gwire's request to respondent for the funds on behalf of Ms. Tobias, respondent failed to pay promptly, as requested by a client, any funds in respondent's possession which the client was entitled to receive, in willful violation of rule 4-100(B)(4).

**Count 6 (1F): Section 6068, Subdivision (m) [Failure to Communicate]**

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of

significant developments in matters with regard to which the attorney has agreed to provide legal services.

By failing to respond to Ms. Tobias', Ms. Morse's, and Mr. Gwire's attempts to contact respondent regarding the status of the case and funds, respondent willfully failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent agreed to provide legal services, in violation of section 6068, subdivision (m).

Respondent also willfully violated section 6068, subdivision (m), by failing to keep his client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services by failing to inform Ms. Tobias of the receipt of the \$30,000, by failing to inform Ms. Tobias that he had failed to honor the medical liens, and by failing to inform Ms. Tobias that he had misappropriated her funds.

**Count 7 (1G): Section 6068, Subdivision (a) [Failure to Comply with All Laws]**

Section 6068, subdivision (a), provides that it is the duty of an attorney to support the Constitution and laws of the United States and of this state. The State Bar alleges that by failing to distribute any of the settlement funds to medical liens of which respondent was aware, respondent violated his common law fiduciary duty to those medical providers.

The court finds that the State Bar failed to demonstrate, through clear and convincing evidence, a violation of section 6068, subdivision (a). Consequently, Count 7 (1G) is dismissed with prejudice.

**Count 8 (1H): Rule 3-110(A) [Failure to Perform with Competence]**

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

Respondent intentionally and recklessly failed to perform legal services with competence, in willful violation of rule 3-110(A), by willfully failing to honor the medical liens he signed and failing to disburse his client's funds.

**Count 9 (1I): Rule 4-100(A) [Commingling Personal Funds in Client Trust Account]**

Rule 4-100(A) provides, in part, that no funds belonging to an attorney or law firm shall be deposited or otherwise comingled in an identifiable bank account which is properly labeled as a client trust account.

By depositing his own personal funds into his client trust account, by transferring funds from his personal checking account into his client trust account, and by using his client trust account to make personal expenditures, respondent comingled his personal funds with his clients' funds and improperly used his client trust account, in willful violation of rule 4-100(A).

**Count 10 (1J): Section 6068, Subdivision (i) [Failure to Cooperate]**

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a response to any of the State Bar investigator's letters or to the allegations of Ms. Tobias and Ms. Morse.

**D. The Canlas Matter - Counts 11 - 19 (2A - 2I) [07-O-13184]**

In August 2005, Femy Canlas and her daughter Janet Canlas hired respondent to represent Femy, Janet, and Femy's younger daughter, Jessica, in a personal injury matter arising from an automobile accident on July 21, 2005. Janet was an adult, but Jessica was a minor. Respondent agreed to represent them in exchange for a contingency fee of 33.3 percent. Respondent had them sign a written fee agreement, but failed to give them a copy of the written agreement.

In May 2007, respondent settled Femy, Janet, and Jessica's cases with the defendant's insurance company, Allstate Indemnity Insurance (Allstate) for \$6,000 each. Respondent advised them of the settlement but informed Femy that he would attempt to negotiate a reduction in their medical bills. Subsequently, respondent failed to communicate with Femy or Janet, despite their numerous attempts to communicate with him.

On May 21, 2007, Allstate sent respondent the following checks:

<u>AMOUNT</u>	<u>PAYEE</u>
\$6,000	Femy and respondent
\$6,000	Janet and respondent
\$2,500	Jessica
\$2,000	Catanzarite Chiropractic (lien holder)
\$1,500	Respondent (for his fees in Jessica's matter)

Subsequently, respondent received the checks for Femy and Janet and signed Femy and Janet's names to their checks without Femy and Janet's knowledge or consent. Respondent never informed them that he had received their checks. Jessica's funds were deposited directly into a minor's account by Allstate set up for Jessica.

On May 29, 2007, respondent deposited Janet and Femy's checks, totaling \$12,000, into his client trust account. Considering that respondent, Janet, and Femy had agreed that respondent would be paid a 33.3% contingency fee, Janet and Femy were each entitled to \$4,000 (\$8,000 total) and respondent was entitled to the remaining \$4,000. Subsequently, respondent failed to disburse any funds to Janet or Femy or on their behalf.

On May 28, 2007, before respondent deposited Janet and Femy's checks into his client trust account, respondent's client trust account had a balance of \$86.93.

Subsequently, respondent failed to maintain any portion of Femy and Janet's \$8,000 in his client trust account and the funds in the client trust account fell below the \$8,000 belonging to Femy and Janet as follows:

<u>DATE</u>	<u>BALANCE IN CTA</u>
May 29, 2007	\$12,004.93
June 1, 2007	\$7,458.97
June 4, 2007	\$1,229.34
June 5, 2007	\$711.84
June 6, 2007	\$62.39
June 7, 2007	\$50.39
June 27, 2007	\$4.20

Respondent intentionally misappropriated Femy and Janet's settlement funds for his own use and benefit. When combined with his misappropriations in the Tobias matter, respondent misappropriated at least \$30,800 in client funds.

Subsequent to June 2007, respondent failed to communicate with Janet or Femy, despite their numerous attempts to contact respondent to learn the status of their matter and funds. They telephoned respondent at the telephone number that respondent had given them when they hired him and left numerous messages on respondent's answering machine and a few with respondent's assistant, Marlene Modino. In these messages, Femy requested the funds, and an accounting. Respondent received these messages, but failed to communicate with Femy or Janet and failed to disburse their funds to them. He also failed to provide them with an accounting for the funds.

On August 1, 2007, Femy and Janet filed a complaint with the State Bar regarding respondent. On October 29, 2007, Femy telephoned respondent again and left a message requesting that her files and documents be returned to her. Respondent received this message but failed to return the files and documents and failed to communicate with Femy or Janet.

Subsequently, Femy was able to reach Ms. Modino by telephone. Ms. Modino stated to her that she could not find Femy and Janet's files and documents. As of April 17, 2008, respondent had failed to return Femy and Janet's files and documents, and had failed to refund any portion of the funds he misappropriated from them.<sup>9</sup>

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<sup>9</sup> There is no indication that respondent has since returned Femy and Janet's files and documents, or refunded any portion of the misappropriated funds.

On October 25, 2007, State Bar Investigator, Laura Sharek, sent a letter to respondent at his membership records address at 101 California St., Ste. 2450, San Francisco, CA 94111 regarding Femy and Janet's allegations of misconduct. Ms. Sharek requested a response to the allegations and documents. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date of the letter. The United States Postal Service did not return the letter sent to respondent as undeliverable or for any other reason. Respondent received the letter by on or about October 31, 2007.

Ms. Sharek's letter requested a response on or before November 8, 2007. Subsequently, respondent failed to respond to this letter or cooperate in the State Bar's investigation.

On November 8, 2007, Ms. Sharek sent another letter to respondent at his membership records address regarding Femy and Janet's allegations. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date of the letter. The United States Postal Service did not return the letter sent to respondent as undeliverable or for any other reason. Respondent received the letter on or about November 13, 2007.

The investigator's letter requested that respondent respond in writing to specified allegations of misconduct on or before November 23, 2007. Subsequently, respondent failed to respond to this letter or cooperate in the State Bar's investigation.

**Count 11 (2A): Section 6106**

By signing or causing to be signed Janet and Femy's signature on their settlement checks without their knowledge or consent, and by misappropriating \$8,000 of their funds, respondent

engaged in acts involving moral turpitude, dishonesty or corruption, in willful violation of section 6106.

**Count 12 (2B): Rule 4-100(A)**

By failing to maintain Janet and Femy's funds in his client trust account, respondent failed to maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, in willful violation of rule 4-100(A).

**Count 13 (2C): Rule 4-100(B)(1)**

By failing to notify Femy or Janet of the receipt of their funds from Allstate, respondent failed to notify his clients promptly of the receipt of the client's funds, in willful violation of rule 4-100(B)(1).

**Count 14 (2D): Rule 4-100(B)(3)**

By failing to account for Janet and Femy's funds, despite their request for an accounting, respondent failed to render appropriate accounts to a client regarding all funds of the client coming into respondent's possession, in willful violation of rule 4-100(B)(3).

**Count 15 (2E): Rule 4-100(B)(4)**

By failing to disburse any of the funds respondent received on Femy and Janet's behalf, despite their requests regarding the status of the matter and their settlement funds, respondent failed to pay promptly, as requested by a client, any funds in respondent's possession which the client is entitled to receive, in willful violation of rule 4-100(B)(4).

**Count 16 (2F): Section 6068, Subdivision (m)**

By failing to inform Janet and Femy that he had misappropriated their funds and by failing to respond to their inquiries, respondent failed to respond promptly to reasonable status inquiries of a client and 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).

**Count 17 (2G): Rule 3-700(D)(1)**

Rule 3-700(D)(1) states that a member whose employment has terminated shall promptly release to the client, at the request of the client, all the client papers and property.

By failing to release Janet and Femy's files and documents, at the request of Femy and Janet, respondent failed to release promptly, upon termination of employment, to his clients, at the request of the client, all the clients' papers and property, in willful violation rule 3-700(D)(1).

**Count 18 (2H): Rule 3-110(A)**

Count 18 (2H) fails to state or incorporate by reference any factual allegations. Therefore, Count 18 is dismissed with prejudice.

**Count 19 (2I): Section 6068, Subdivision (i)**

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a response to any of the State Bar investigator's letters regarding Femy and Janet's allegations.

**E. The Arciaga/Lizardo Matter - Counts 20 - 27 (3A - 3H) [07-O-13929 & 07-O-13930]**

In September 2005, Evangeline Arciaga<sup>10</sup> and Jennifer Lizardo hired respondent to represent them in a personal injury matter arising from an automobile accident on September 1, 2005. They were in the same automobile. They were referred to respondent by Ms. Tobias, Ms. Lizardo's mother. Respondent agreed to represent each of them for a contingency fee of 24%. Respondent had each of them sign a written fee agreement but failed to provide them with a copy of the written fee agreement.

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<sup>10</sup> Throughout the NDC, Ms. Arciaga's name is also spelled "Arciago" and "Archiaga." These alternative spellings appear to be typographical errors. Consequently, the court will identify her as Ms. Arciaga.



On September 28, 2005, respondent and Ms. Arciaga signed a medical lien with Harbor Bay Chiropractic. Likewise, on September 28, 2005, respondent and Ms. Lizardo signed a medical lien with Harbor Bay Chiropractic.

On November 17, 2006, Geico Insurance, the other driver's insurance company, and respondent agreed to settle these matters. Respondent did so without the knowledge or consent of Ms. Arciaga and Ms. Lizardo.

On November 17, 2006, Geico sent respondent a letter enclosing written releases for Ms. Arciaga and Ms. Lizardo of any claims against Geico. Respondent failed to inform Ms. Arciaga and Ms. Lizardo of the settlement offer, the settlement agreement, or of the written release.

On November 17, 2006, Geico sent to respondent a check issued to Ms. Arciaga and respondent for \$14,700 and a check issued to Ms. Lizardo and respondent for \$10,300. This totaled \$25,000. Geico sent written instructions to respondent that the checks were to be held in escrow and not to be negotiated or disbursed until the enclosed release was signed by his clients and returned to Geico. Respondent received these instructions.

Subsequently, on November 24, 2006, respondent signed or caused to be signed his clients' names on the checks without their knowledge or consent and in violation of Geico's instructions. On November 24, 2006, respondent then deposited these checks into his client trust account, again in violation of Geico's instructions.

Considering that respondent, Ms. Arciaga, and Ms. Lizardo had agreed that respondent would be paid a 24% contingency fee; Ms. Arciaga and/or her medical providers were entitled to \$11,172, Ms. Lizardo and/or her medical providers were entitled to \$7,828, and respondent was entitled to the remaining \$6,000.

Subsequently, respondent failed to disburse any funds to Ms. Arciaga or Ms. Lizardo's medical providers or to Ms. Arciaga or Ms. Lizardo. Instead, respondent misappropriated all of the funds sent to respondent for Ms. Arciaga and Ms. Lizardo.

Prior to depositing Ms. Arciaga and Ms. Lizardo's funds into his client trust account, respondent's client trust account had \$28.38 in it.

Subsequently, respondent failed to maintain any portion of Ms. Arciaga and Ms. Lizardo's \$19,000 (\$11,172 + \$7,828) in his client trust account and the funds in his client trust account fell below the \$19,000 belonging to Ms. Arciaga and Ms. Lizardo as follows:

<u>DATE</u>	<u>BALANCE IN CTA</u>
Nov. 24, 2006	\$20,012.38
Nov. 27, 2006	\$4,608.38
Nov. 28, 2006	\$3,556.39
Nov. 29, 2006	\$3,371.39
Nov. 30, 2006	\$2,966.39
Dec. 1, 2006	\$966.39
Dec. 4, 2006	\$346.89
Dec. 6, 2006	\$46.89
Jan. 3, 2007	\$40.73
Jan. 23, 2007	\$5.51
April 17, 2007	\$0.54

The above balances occurred despite there being other deposits into respondent client trust account during this time period. Respondent intentionally misappropriated Ms. Arciaga and Ms. Lizardo's funds for his own use and benefit. When combined with his misappropriations in the Tobias matter and Femy and Janet's matters, respondent misappropriated at least \$49,800 in client funds.

In late 2006, respondent came to Ms. Lizardo's house to speak to her mother, Ms. Tobias, regarding Ms. Tobias' matter. At that time, respondent misrepresented to Ms. Lizardo that he was still attempting to negotiate with Geico for her and Ms. Arciaga. In fact and in truth, he had already settled their cases and received the settlement funds.

Subsequently, respondent failed to communicate with Ms. Arciaga or Ms. Lizardo, despite their numerous attempts to contact him. They left messages on the telephone number that he had provided them. In these messages, they requested that he contact them and provide them with a status report on their cases. Respondent received these messages. Respondent, however, failed to respond to these requests, and failed to communicate with Ms. Arciaga or Ms. Lizardo or advise them of the status of their case.

Subsequently, when Ms. Arciaga and Ms. Lizardo learned that respondent had misappropriated Ms. Tobias' funds, they contacted Attorney William Gwire regarding their matters. Mr. Gwire obtained documents from Geico and learned that Ms. Arciaga and Ms. Lizardo's cases had been settled without their knowledge or consent, and respondent had received the funds for them. Mr. Gwire informed Ms. Arciaga and Ms. Lizardo that respondent had settled their case and received their funds.

Respondent failed to account to Ms. Arciaga and Ms. Lizardo for the \$25,000 he received on their behalf, despite their numerous attempts to contact him to ascertain the status of their funds.

On September 19, 2007, Ms. Arciaga and Ms. Lizardo complained to the State Bar. As of February 13, 2008, Ms. Lizardo still owed \$2,767 to Harbor Bay Chiropractic and Ms. Arciaga still owed \$2,756 to Harbor Bay Chiropractic.

On October 26, 2007, State Bar Investigator, Laura Sharek, sent a letter to respondent at his membership records address at 101 California St. Ste. 2450, San Francisco, CA 94111 regarding Ms. Arciaga and Ms. Lizardo's allegations of misconduct. Ms. Sharek's letter requested a response to these allegations and documents. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date of the letter. The United States Postal

Service did not return the letter sent to respondent as undeliverable or for any other reason. Respondent received the letter by or about October 31, 2007.<sup>11</sup>

Ms. Sharek's letter requested a response on or before November 8, 2007. Subsequently, respondent failed to respond to this letter or cooperate in the State Bar's investigation.

**Count 20 (3A): Rule 3-510 [Failure to Communicate a Settlement Offer]**

Rule 3-510 states, in part, that an attorney shall promptly communicate to the client all amounts, terms, and conditions of any written offer of settlement made to the client in all matters other than criminal.

Here, the facts demonstrate that respondent agreed to settle Ms. Arciaga and Ms. Lizardo's matters on November 17, 2006. It is unknown whether the offer or offers leading up to this settlement agreement were presented orally or in writing. On November 17, 2006, Geico sent respondent a letter enclosing written releases for Ms. Arciaga and Ms. Lizardo of any claims against Geico. This mailing, however, does not appear to constitute a settlement offer, but rather a distribution of the instruments needed to effectuate the previously negotiated settlement.<sup>12</sup>

Consequently, there is insufficient evidence establishing that Geico ever presented respondent with a *written* settlement offer. Accordingly, Count 20 (3A) is dismissed with prejudice.

**Count 21 (3B): Section 6106**

By signing or causing to be signed Ms. Arciaga and Ms. Lizardo's signatures on their checks without their knowledge or consent, by misrepresenting to Ms. Lizardo that he was still

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<sup>11</sup> The NDC also alleged that a January 31, 2008 letter was sent by Ms. Sharek to respondent. The NDC, however, alleged that this letter was in regard to Femy and Janet's allegations.

<sup>12</sup> Copies of the letter and releases were not introduced into evidence and the court cannot speculate as to whether or not they constituted an offer of settlement.

attempting to settle their matters when in fact he had already settled it and received the funds, and by misappropriating the \$19,000 in client funds, respondent engaged in acts involving moral turpitude, dishonesty or corruption, in willful violation of section 6106.

**Count 22 (3C): Rule 4-100(A)**

By failing to maintain Ms. Arciaga and Ms. Lizardo's funds in his client trust account, respondent failed to maintain client funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, in willful violation of rule 4-100(A).

**Count 23 (3D): Rule 4-100(B)(1)**

By failing to notify Ms. Arciaga or Ms. Lizardo of the receipt of their funds from Geico, respondent failed to notify his clients promptly of the receipt of the client's funds, securities, or other properties, in willful violation of rule 4-100(B)(1).

**Count 24 (3E): Rule 4-100(B)(3)**

By failing to account for Ms. Arciaga and Ms. Lizardo's funds, despite his clients' requesting of an accounting, respondent failed to render appropriate accounts to a client regarding all funds of the client coming into respondent's possession, in willful violation of rule 4-100(B)(3).

**Count 25 (3F): Section 6068, Subdivision (m)**

By failing to inform Ms. Arciaga and Ms. Lizardo that he had settled their matters, by failing to inform them that he had received a written release and checks for them, totaling \$25,000, by failing to inform them that he had signed their names to these checks and deposited these funds into his client trust account, by failing to inform them that Geico had conditioned their receiving these funds on their signing and returning the written releases, by failing to inform them that he had misappropriated their funds, and by failing to respond to their inquiries,

respondent failed to respond promptly to reasonable status inquiries of a client and 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).

**Count 26 (3G): Rule 3-110(A)**

By failing to provide Ms. Arciaga and Ms. Lizardo with the checks and written releases for their signatures; by failing to return the written releases to Geico; by failing to disburse the funds to Ms. Arciaga and Ms. Lizardo, or on their behalf; and by failing to honor their medical liens; respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

**Count 27 (3H): Section 6068, Subdivision (i)**

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a response to the State Bar investigator's letter regarding Ms. Arciaga and Ms. Lizardo's allegations.

**IV. Mitigating and Aggravating Circumstances**

**A. Mitigation**

No mitigating factors were submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)<sup>13</sup>

**B. Aggravation**

The court finds several aggravating factors:

**1. Prior Record of Discipline**

Respondent has a prior record of discipline.<sup>14</sup> (Std. 1.2(b)(i).) On May 29, 2008, the California Supreme Court, in another default matter, issued an order (S162279) suspending

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<sup>13</sup> All further references to standard(s) are to this source.

<sup>14</sup> The court takes judicial notice of respondent's prior record of discipline pursuant to Evidence Code section 452, subdivision (h).

respondent from the practice of law for two years, staying execution of the suspension, and actually suspending respondent from the practice of law for six months and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California. This case involved ten acts of misconduct in two separate client matters. Respondent's misconduct included failing to obey court orders (two counts), failing to perform (two counts), failing to report judicial sanctions to the State Bar, making a misrepresentation to a client, failing to communicate, improperly withdrawing from representation, and failing to cooperate with a State Bar investigation (two counts). In aggravation, respondent committed multiple acts of misconduct; he failed to cooperate in the disciplinary proceedings; and his misconduct significantly harmed his client and the administration of justice. The court found no mitigation.

## **2. Harm**

The court also finds in aggravation that respondent's misappropriation of nearly \$50,000 from four of his clients has caused significant financial harm to each of these clients. (Std. 1.2(b)(iv).)

## **3. Respondent's Failure to Participate**

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).)

## **4. Multiple Acts of Misconduct**

Respondent was found culpable of 24 acts of misconduct. Multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

## **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.)

Standard 1.6 provides that the appropriate sanction for the misconduct found 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, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Here, 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 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 Silvertown* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) 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.)

The State Bar urges that respondent be disbarred. The court agrees. 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* (1990) 51 Cal.3d 215, 221.)

The court finds *In the Matter of Spaith* (1996) 3 Cal. State Bar Ct. Rptr. 511, to be particularly instructive. In that case, the attorney was found culpable of intentionally misappropriating approximately \$40,000 from a client and intentionally misleading the client



over a one-year period as to the status of the money. In mitigation, the attorney demonstrated good character; he provided community service and other pro bono activities; he cooperated with the State Bar by admitting to his wrongdoing and stipulating to the facts and culpability; and he had no prior record of discipline in over fifteen years of practicing law. The attorney did not receive mitigation for making restitution, due to the fact that none of the restitution was paid until after the attorney's client threatened to report him to the State Bar. In aggravation, the attorney's misconduct involved multiple acts of wrongdoing. In ordering the attorney's disbarment, the Review Department noted that the mitigating circumstances were not sufficiently compelling to justify a lesser sanction than disbarment when weighed against the attorney's misconduct and aggravating circumstances. (*Id.* at p. 522.)

The facts in the present case are significantly more egregious than those found in *Spaith*. Respondent misappropriated a total sum of \$49,800 from four clients. Once the money was taken, respondent ignored his clients' inquiries and deceived one of his clients into believing that her matter had yet to settle.

The present case contains more aggravation, and none of the mitigation evident in *Spaith*. And unlike *Spaith*, where the respondent made full restitution to his client, here, respondent has made absolutely no effort to make his clients whole. In fact, respondent has not demonstrated even the slightest inclining of remorse.

Considering the egregious facts and the extensive aggravation, disbarment clearly is the only appropriate recommendation.

## **VI. Recommended Discipline**

Accordingly, the court recommends that respondent **Carl Edgar C. Jacoba** 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 recommended that respondent make restitution to the following clients:

1. Rina Tobias in the amount of \$22,800 plus 10% interest per annum from October 6, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Rina Tobias, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
2. Femy Canlas in the amount of \$4,000 plus 10% interest per annum from May 29, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Femy Canlas, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
3. Janet Canlas in the amount of \$4,000 plus 10% interest per annum from May 29, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Janet Canlas, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
4. Evangeline Arciaga in the amount of \$11,172 plus 10% interest per annum from November 24, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Evangeline Arciaga, plus interest and costs, in accordance with Business and Professions Code section 6140.5); and
5. Jennifer Lizardo in the amount of \$7,828 plus 10% interest per annum from November 24, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Jennifer Lizardo, plus interest and costs, in accordance with Business and Professions Code section 6140.5)

Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

The court further recommends that respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.<sup>15</sup>

### **VII. 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.

### **VIII. 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 of California. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: October \_\_\_\_\_, 2008

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LUCY ARMENDARIZ  
Judge of the State Bar Court

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<sup>15</sup> Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)