

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)
)
VIVIAN GAGLIARDINO)
)
Member No. 177623)
)
A Member of the State Bar.)

Case Nos.:08-O-10483, 08-O-11262
DECISION

INTRODUCTION

Respondent is charged here with willfully violating (1) Business and Professions Code section 6106 (moral turpitude-misappropriation)¹ in two separate matters; (2) section 6106 (moral turpitude- unauthorized endorsement); (3) rule 4-100(B)(1) of the Rules of Professional Conduct² (failure to notify client of receipt of client funds); (4) section 6103 (failure to obey court order); (5) rule 4-100(A) (failure to deposit client funds in trust account); (6) section 6106 (moral turpitude- misrepresentation); and (7) rule 4-100(B)(3) (failure to render accounts of trust funds). Respondent has entered into an extensive stipulation of the facts and has admitted culpability for a number of the charges while disputing others. The court finds culpability and recommends discipline as set forth below.

¹ Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

² Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) in Case No. 08-O-10483 was filed by the State Bar of California on December 9, 2008. On February 26, 2009, Respondent filed her response to the NDC. On June 15, 2009, the case was scheduled for trial on November 10, 2009, with a three day estimate.

Thereafter, new charges were commenced with the filing of an NDC in Case No. 08-O-11262 on July 30, 2009. On September 14, 2009, an initial status conference was held in that new matter. At that status conference the parties requested that the two cases be consolidated, that the existing trial date in the first matter be vacated, and that a new trial date for the consolidated action be scheduled. An order consolidating the actions and establishing a new trial date of January 5, 2010, with a trial estimate of five days, was issued by this court on September 16, 2009. Respondent filed her response to the new NDC on October 23, 2009.

Trial was commenced on January 5, 2010, at which time an extensive stipulation of the parties regarding undisputed facts and conclusions of law was filed by the parties. Trial of the remaining disputed issues was commenced on January 5 and completed on January 6, 2010. A period of post-trial briefing was allowed, with the deadline for briefs being set for January 15, 2010. At that time the matter was submitted. The State Bar was represented at trial by Deputy Trial Counsel Brandon Tady. Respondent was represented by Jack Nelson.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's responses to the NDC's, admitting many of allegations of the NDC's; the extensive stipulation of undisputed facts and conclusions of law filed by the parties; and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on September 5, 1995, and has been a member of the State Bar at all relevant times.

Case No. 08-O-10483 (Magstadt)

On or about April 27, 2007, Paula Magstadt (“Magstadt”) employed Respondent to represent her in her dissolution proceeding pending before the Superior Court.

At the time of the initial meeting between Respondent and Magstadt, Respondent prepared a “Domestic Relations Retainer Agreement” setting forth the fee arrangements between her office and Magstadt. The agreement included a handwritten entry that Magstadt would be paying an initial \$5,000 retainer, that she would be billed at \$375/hour, and that the retainer amount needed to be maintained at a \$1,200 level in the future. This agreement was signed by Respondent on April 26, 2007. It was signed by Magstadt on the following day. On the date of the initial meeting, Magstadt paid Respondent \$5,050 as advanced attorney’s fees.³

At the time Magstadt employed Respondent, Magstadt was entitled to a refund for unearned attorney fees from her prior attorney. During the initial client meeting, Magstadt asked Respondent to obtain this refund from her prior attorney, and Respondent agreed to do so. Respondent wrote a letter to the prior attorney on the same day, requesting that a refund be made and noting that the prior billing statement indicated that it should be in the approximate amount of \$2,043.54. The letter directed the prior attorney to “send a check made out to her, care of my office, as she [Magstadt] will not receive any mail at her home due to her husband intercepting same.”

³ The parties’ stipulation mistakenly stated that Respondent was paid \$5,000 that day. However, all documentary evidence and testimony indicated that the actual charge made by Respondent to Magstadt’s credit card that day was for \$5,050.

On July 21, 2007, Respondent had not yet received a refund check from the prior attorney but had received an updated statement from him. The new statement indicated that the amount to be refunded was \$2,404.50. On that date Respondent sent another letter to the attorney, reminding him of the need to forward the refund check. This letter again requested that the refund check be sent to Respondent's office "as [Magstadt's] husband is intercepting all of her mail." There was no change in the prior direction that the check should be made payable only to Magstadt. A copy of this letter was sent to Magstadt.

On or shortly after July 23, 2007, Respondent received the refund check in the amount of \$2,404.50 from Magstadt's prior attorney, made payable only to Magstadt ("refund check"). The \$2,404.50 amount was entirely Magstadt's funds.

Respondent then endorsed the refund check by printing Magstadt's name on the back of the check, along with the words "pay to the order of Vivian Gagliardino." Respondent had received neither written nor verbal authorization from her client to make this endorsement. Respondent then deposited the refund check into her personal bank account, treating it as a payment of additional advanced fees. She had no authorization from her client to treat the fees in that manner. She did not notify her client of the receipt of the refund fee, of her endorsement of the check, or of her retention of the funds as an additional retainer.

Toward the end of August, Magstadt sought to determine the status of her dissolution action and of the refund request. She did this by both telephoning and emailing Respondent's office. In her email correspondence of August 29, 2007, Magstadt noted that she was "struggling to pay" credit card bills and was concerned that her credit rating might suffer. She specifically asked whether Respondent had received the check. No immediate response was made by Respondent to this inquiry by Magstadt.

On the morning of September 11, 2007, not having received any response from Respondent to her different communications over the last several weeks, Magstadt sent an email to Respondent terminating her services and requesting a refund. Although Respondent then sent a series of emails responding to Magstadt's prior emails, none of them responded to Magstadt's prior inquiry about the status of the refund check.

Magstadt then contacted her prior attorney's office to request a refund. When she did that, she was told by that office that the refund had previously been sent to Respondent. That office then provided Magstadt with a copy of the cancelled refund check, including its endorsement over to Respondent.

On October 2, 2007, Respondent sent an email to Magstadt, stating that the final billing statement "has been completed" and "said statement, with unused portion of retainer fees, will be returned to you/mailed out to you this week." That did not happen. In fact, the final statement had not yet been prepared and would not be until October 15, at the earliest. When it was finally completed, it was then mailed to Magstadt's post office box. The final statement specifically stated that it did not include a refund check. Rather than including the refund, the statement merely asked for instructions on where the check should be sent.

On October 19, 2007, not having received a refund, Magstadt emailed Respondent to complain that no refund had yet been received. She then also complained to the State Bar.

Respondent, during this same time, forwarded a refund check to Magstadt, reflecting the account figures set forth in the final statement. Because this statement mistakenly stated that the initial retainer amount had been \$5,000, rather than the \$5,050 actually charged to Magstadt's account, the refund check was \$50 short of being a full refund. Magstadt deposited the check, but noted on it that she was doing so under protest. The additional \$50 has not yet been refunded.

Count 1 – Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

Here, Respondent knowingly and intentionally took funds owned by her client and converted them to her own use and benefit. She did this without notifying the client of what she was doing. Such conduct by Respondent constituted an intentional and knowing misappropriation by her of her client's funds and a willful violation of section 6106. This willful misappropriation by Respondent of her client's funds involved moral turpitude. (*Lipson v. State Bar* (1991) 53 Cal. 3d 1010, 1020-1021; *McKnight v. State Bar* (1991) 53 Cal. 3d 1025, 1033-4; *Bate v. State Bar* (1983) 34 Cal.3d 920, 923; *In re Freiburghouse* (1959) 52 Cal.2d 514, 516.)

Count 2 - Section 6106 [Moral Turpitude – Unauthorized Endorsement]

State Bar alleged that Respondent also committed an act involving moral turpitude by endorsing and depositing in her own account the refund check made payable to her client without the authorization, consent, or knowledge of that client. This court agrees.

Unless expressly granted, an attorney does not have the authority to endorse a client's signature on negotiable instruments payable to the client. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 794-795.) Respondent did not have that authority. Her conduct here in endorsing the check over to herself constituted another act involving moral turpitude and dishonesty, in willful violation of section 6106.

Count 3 –Section 6068(m) [Failure to Inform Client of Significant Development]

Section 6068(m) of the Business and Professions Code obligates 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.” Here Magstadt requested that Respondent act as her representative in seeking and obtaining a refund from Magstadt’s prior attorney. While Respondent was diligent in pursuing the refund, she did not notify the client when the refund was received. She continued to failure to tell her client of the receipt of the requested refund even after Respondent had received specific inquiries by the client about the status of the refund. This conduct by Respondent constituted a willful violation by her of her duties under section 6068(m).

Case No. 08-O-11262 (Vasquez)

In 2005, Respondent represented Aldo Vasquez (Aldo) against Janelle Vasquez (Janelle) in a marital dissolution proceeding in the Orange County Superior Court, case number 04D003612 (“the *Vasquez* matter”). In the *Vasquez* matter, Janelle was represented by attorneys David W. Paulson (“Paulson”) and, later, Hollie A. Lemkin (“Lemkin”).

On or about March 23, 2005, the court in the *Vasquez* matter issued an order (“Order”) approving a stipulation of the parties concerning disposition of Aldo’s and Janelle’s real and personal property, including the sale of their family residence. This order contained the following provisions:

- a. Escrow shall send a check for the net proceeds from the sale of the family residence to Respondent for deposit in an interest bearing trust account.
- b. Respondent shall open an interest bearing trust account in the names of Aldo and Janelle.
- c. Respondent shall provide monthly trust account statements to Aldo and to Janelle through her counsel.
- d. The net proceeds from the sale of the family residence shall remain in trust until further court order or written agreement of the parties.
- e. The court shall reserve jurisdiction over the issue of the disbursement of the subject funds until time of trial or settlement. Respondent may disburse funds

out of the net proceeds of sale to the parties for payment of reasonable attorney's fees. Whatever is disbursed will come out of the respective portion of each party's proceeds, subject to re-allocation at further hearing or settlement.

Respondent drafted the initial stipulation and later received the order.

The family residence was sold and escrow sent a check to Respondent for \$225,021.17 (net proceeds of sale). Respondent received the check.

On or about March 23, 2005, Respondent opened a Platinum Business Savings Account at Washington Mutual Bank in the name of "Vivian Gagliardino DBA Law Office of Vivian Gagliardino" ("Platinum Account"). The Platinum Account, however, was not designated as a client trust account. It was also not in Aldo's and Janelle's names. Nonetheless, and notwithstanding the court's order, on or about March 23, 2005, Respondent deposited the net proceeds of sale of the Vasquez residence, \$225,021.17, into this account.

Almost immediately after depositing the funds into the account, Respondent surreptitiously began making withdrawals and transfers of monies out of the account for her own purposes. On March 24, the day after the funds were deposited, she made two withdrawals of \$2,500 each. On March 28, she withdrew \$4,983. On the following day she withdrew another \$6,000. On March 30, she withdrew another \$2,000.

At the beginning of April, the balance of the account was down to \$207,131.37. Respondent continued to make repeated withdrawals from the account throughout the month. By the beginning of May, the account balance had been reduced to \$174,530.95.

During the month of May, Respondent withdrew more than another \$50,000 from the account. By the beginning of June, the account balance was \$124,498.87, more than \$100,000 less than the opening balance on March 23.

On June, Respondent withdrew another \$71,000 from the account, including \$57,000 of to purchase a motor home. At the beginning of July, the account balance was \$53,138.

On July 25, 2005, Respondent sold the motor home and made a profit of \$4,000. On July 25, 2005, Respondent deposited two checks totaling \$61,000 into the Platinum Account. These two checks (\$11,000 and \$50,000) were Respondent's personal funds from the sale of the motor home. She continued, however, to also continue to make withdrawals from the account.

On August 1, 2005, Respondent withdrew \$94,938.35 of Aldo's and Janelle's funds from the account. At that time, Respondent was selling her home in Huntington Beach and she was purchasing a home also in Huntington Beach. Respondent intended to use the proceeds of sale of her home to close escrow on a home she was purchasing. However, there was a delay in closing escrow on the home she was selling and so she used \$74,577.72 of the funds to close escrow on the home she was purchasing. Thereafter, on August 12, 2005, Respondent deposited a check for \$74,577.72 back into the Platinum Account from the proceeds of the sale of her original home in Huntington Beach. At the end of the month, the account balance was \$66,024.81.

In September, October, November and December, Respondent's periodic withdrawals continued. By January 3, 2006, the balance in the Platinum Account was \$0 and there was no further account activity.

As noted, the court order required Respondent to provide the Vasquez parties with monthly statements regarding the account. Despite this order, no such statements were ever provided by Respondent even though attorney Paulson repeatedly asked Respondent for copies of the monthly trust account bank statements.

On or about November 30, 2006, Paulson filed an "Order to Show Cause and Affidavit for Contempt" against Respondent in the *Vasquez* matter ("First OSC"). In the First OSC, Paulson complained that Respondent had willfully disobeyed the court's order by failing to provide monthly trust account statements. Respondent received the First OSC, but still did not

provide the monthly statements. Instead, she convinced Paulson to take the motion off calendar by telling him that an accounting was being prepared and would be presented to him.

On or after January 18, 2007, Respondent's Certified Public Accountant ("CPA") prepared a document entitled "Vasquez Dissolution-Attorneys Trusts Accounts Account Activity from 3/1/05 to Present" ("Vasquez Dissolution Accounting"). Respondent provided the information to the CPA that he used to prepare the Vasquez Dissolution Accounting. After the CPA prepared the Vasquez Dissolution Accounting, Respondent reviewed it before she sent it to Paulson.

Respondent also prepared a list of disbursements entitled "Vasquez Accounting" that she provided to her CPA. None of the disbursements listed in these accounting documents were from the Platinum Account. Instead, all of the disbursements Respondent made to Aldo and Janelle listed in the Vasquez Dissolution Accounting were from Respondent's general or business accounts, because she had previously misappropriated the funds from the Platinum Account.

Respondent misappropriated \$90,345 (the disbursements of \$77,095 to Janelle and \$13,250 to Aldo) by taking these funds from the Platinum Account without Janelle's and Aldo's consent and using these funds to pay personal expenses. This misappropriation was separate from the \$57,000 that Respondent misappropriated to purchase the motor home and the \$74,577.72 that Respondent misappropriated to fund the escrow for her purchase of the home in Huntington Beach.

On February 26, 2008, after receiving the Vasquez Dissolution Accounting, Paulson's client, Janelle, complained that the accounting included purported disbursements to her that had not occurred. As a result, Paulson filed a second Order to Show Cause and Affidavit of

Contempt against Respondent in the *Vasquez* matter (“Second OSC”). This pleading was again for the purpose of obtaining the monthly statements of the court-ordered client trust account.

Respondent avoided having this Second OSC heard by the court by agreeing to pay Janelle \$9,763.00 to settle issues about the account. As a result, the Second OSC was also taken off calendar. In the meanwhile, Janelle complained to the State Bar about the situation.

Count 1 – Section 6103 (Failure to Obey a Court Order)

Section 6103 prohibits an attorney from willfully disobeying or violating an order of the court requiring the attorney to do an act connected with or in the course of the profession which the attorney ought in good faith to do.

The parties have stipulated to the following: By failing to deposit funds from the sale of the family residence in an interest-bearing trust account in Aldo’s and Janelle’s name and by failing to provide monthly trust account statements to Janelle or her attorneys, Respondent disobeyed or violated an order of the Court requiring her to do an act connected with or in the course of Respondent’s profession which she ought in good faith to do in willful violation of section 6103. This court agrees and finds accordingly.

Count 2 - Rule 4-100(A) [Failure to Deposit Client Funds in Trust Account]

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 that no funds belonging to an attorney or law firm shall be deposited in such an account or otherwise commingled with such funds. The parties have stipulated: By not depositing in a trust account the funds received on behalf of Aldo and Janelle Vasquez from the sale of their family residence, Respondent failed to deposit funds received on behalf of a client into a trust account in violation of rule 4-100 (A). This court agrees and finds accordingly.

Count 3 – Section 6106 [Moral Turpitude – Misappropriation]

The parties have stipulated as follows: By misappropriating \$57,000, \$90,345, and \$74,577.72 of Aldo's and Janelle's funds from the proceeds of the sale of the family residence, Respondent committed an act involving moral turpitude, dishonesty, or corruption in willful violation of section 6106. This court agrees and finds accordingly.

Count 4 – Section 6106 [Moral Turpitude – Dishonesty]

The State Bar alleges that Respondent's action, in concealing her misappropriation by preparing and distributing the inaccurate and misleading Vasquez Dissolution Accounting, constituted an act of moral turpitude. This court agrees. That purported accounting was a complete misrepresentation of both Respondent's handling of the \$225,021.17 entrusted to her for safekeeping and of her compliance with the court's order. The Vasquez Dissolution Accounting falsely indicated that two "Trust Accounts" had been opened for the Vasquez parties, and falsely purported to be a listing of "Account Activity from 3/1/05 to Present" in each of the accounts. In actuality, there were no such client trust accounts and the activity and balances reported in the accounting were both false and incomplete.

This false accounting by Respondent was a knowing and intentional act of misrepresentation to the parties, including to her own client. It was an act of moral turpitude and a willful violation of section 6106.

Count 5 – Rule 4-100(B)(3) [Failure to Render Accounts of Trust Funds]

Rule 4-100(B)(3) of the Rules of Professional Conduct requires attorneys to render appropriate accounts of all funds of a client coming into the possession of the attorney. The parties have stipulated as follows: By failing to provide an accurate accounting to Janelle Vasquez of the \$225,021.17 that Respondent was required to deposit into a client trust account,

Respondent failed to render appropriate accounts of funds received in trust in willful violation of rule 4-100 (B)(3). This court agrees and finds accordingly.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)⁴ The court finds as follows:

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)⁵

Significant Harm

Respondent's misconduct significantly harmed a client and others. Magstadt had retained Respondent to obtain the refund check from the prior attorney as quickly as possible because she was suffering financial hardship and uncertainty and needed the funds. Respondent's conduct deprived her for months of those funds. In the *Vasquez* matter, the wife on at least two occasions was required to have her attorney incur the time and expense of filing OSC motions to secure the court-ordered monthly statements and, ultimately, ended up settling the matter without the benefit of those statements. (Std. 1.2(b)(iv).)

Dishonesty

The court rejects the State Bar's contention that the court should aggravate respondent's misconduct because it was surrounded by bad faith, dishonesty, and concealment. The review department has long held that it is duplicative, and therefore improper, to find aggravation based on acts involving bad faith, dishonesty, or concealment when the same acts are relied on to

⁴ All further references to standard(s) are to this source.

⁵ Although the court concludes that respondent violated rule 4-100(B)(1), that violation arises from the same misconduct that provided the basis for finding culpability for violating section 6106. Accordingly, no additional weight is given this violation in determining the appropriate discipline. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

establish the respondent's culpability of violating section 6106 or other ethical obligations.

While there is considerable dishonesty inherent in Respondent's conduct, it is included in the findings of culpability discussed above. (E.g., *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 176; *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 777.)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).)

No Prior Discipline

Respondent practiced law in California for nearly ten years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's tenure of discipline-free practice is entitled to some weight in mitigation. (Std. 1.2(e)(i); *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88.)

Cooperation

Respondent entered into an extensive stipulation of facts and, as noted above, freely admitted violations in this case, for which conduct respondent is entitled to significant mitigation. (Std. 1.2(e)(v); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.)

Restitution

Although Respondent misappropriated the funds of her clients for her own use, she also repaid almost all of such sums to those clients prior to the initiation of disciplinary proceedings. Such conduct is a mitigating factor. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 13, see also *Weller v. State Bar* (1989) 49 Cal.3d 670, 676; *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458.)

DISCUSSION

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” [Citations.]” (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in Standard 2.2(a), which provides: “Culpability of a member of wilful misappropriation of entrusted funds or property shall result in

disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed.”

Disbarment has been imposed on attorneys with no prior record of discipline, even in cases of a single misappropriation. In *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney misappropriated almost \$7,900 from his law firm and was disbarred. In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with over 11 years of practice and no prior record of discipline was disbarred for misappropriating approximately \$29,000 in law firm funds over an 8-month period. In *In the Matter of Blum, supra*, 3 Cal. State Bar Ct. Rptr. 170, an attorney with no prior record of discipline was disbarred for misappropriating approximately \$55,000 from a single client. In *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 511, disbarment was ordered for misconduct involving misappropriation of nearly \$ 40,000 and misleading the client for a year, although the attorney had no prior discipline.

Here the misappropriations by Respondent were of significant amounts of money and involving two separate clients; her actions were intentional and knowingly dishonest; and she sought to conceal those acts by subsequent efforts at concealment and misrepresentation.

In the Magstadt matter, Respondent misappropriated funds paid to her client at a time when Respondent was aware that the client needed the funds. To accomplish her misappropriation Respondent provided a false and unauthorized endorsement on a check made payable only to the client. Then, to conceal her actions, she failed to tell the client of her receipt of the funds and then ignored the client’s subsequent requests for a status report regarding the expected refund. It was only after the client, Magstadt, learned through her own investigation that the refund had previously been made that Respondent disgorged any of the funds.

In the Vasquez matter, Respondent's misconduct goes well beyond a misappropriation of insignificant funds. She misappropriated more than \$220,000 from Mr. and Mrs. Vasquez, funds that were entrusted to Respondent for safekeeping pursuant to a court order. Respondent was required by that order to place the funds into a client trust account in the names of the Vasquez parties and then to provide regular monthly statements of the status of the account. Respondent accepted the funds pursuant to that order but her conduct makes clear that she had no intention of ever complying with it. She did not put the money into a trust account in the clients' names, she never provided monthly statements for the account, and she almost immediately began misappropriating the funds for her own purposes. When confronted by the opposing attorney about her non-compliance with the court's order, she lied to the attorney, to the parties, and to the accountant hired to provide an accounting. Such disregard by an attorney of such critical ethical obligations endangers the public, the courts, and the profession.

Misappropriation of client funds has long been viewed as a particularly serious ethical violation. It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar* (1991) 53 Cal. 3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal. 3d 649, 656.) It is the court's conclusion that disbarment is necessary under the circumstances here to protect the public, the courts, and the profession.

RECOMMENDED DISCIPLINE

Disbarment/Restitution

This court recommends that respondent **Vivian Gagliardino** be disbarred from the practice of law in the State of California and that her name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

It is further recommended that Respondent make restitution to the following individual

within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291): to Paula Magstadt in the amount of \$50 plus 10% interest per annum from October 19, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Magstadt, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

Rule 9.20

The court 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.⁶

Costs

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

VI. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Vivian Gagliardino** be involuntarily enrolled as an inactive member of the State

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⁶ Respondent is required to file a rule 9.20(c) affidavit even if she 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 as 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).)

Bar of California effective three calendar days after service of this decision and order by mail
(Rules Proc. of State Bar, rule 220(c).)⁷

Dated: March _____, 2011

DONALD F. MILES
Judge of the State Bar Court

⁷ Only active members of the State Bar may lawfully practice law in California. (Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice of law, or to even hold himself or herself out as entitled to practice law. (Bus. & Prof. Code, § 6126, subd. (b).) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)