

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos. 08-O-10901-LMA ; 09-N-10330
)	(Cons.)
CRAIG MICHAEL SILMAN, JR.,)	
)	DECISION AND ORDER OF
Member No. 218914,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
A Member of the State Bar.)	

I. Introduction

In this consolidated default disciplinary matter, respondent **Craig Michael Silman, Jr.**, is charged with multiple acts of professional misconduct in two matters, including (1) misappropriation (\$89,844.53); (2) failure to maintain client funds; and (3) failure to comply with California Rules of Court, rule 9.20.

The court finds, by clear and convincing evidence, that respondent is culpable of the alleged counts of misconduct. In view of respondent's serious misconduct and the evidence in aggravation, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

A. First Notice of Disciplinary Charges (Case No. 08-O-10901)

On February 11, 2009, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a first Notice of Disciplinary Charges (NDC) at his official membership records address. Respondent did not file a response.

Respondent's default was entered on April 8, 2009, and respondent was enrolled as an inactive member on April 11, 2009. The matter was submitted on April 29, 2009.

B. Second Notice of Disciplinary Charges (Case No. 09-N-10330)

On March 5, 2009, the State Bar filed and properly served a second NDC on respondent at his official membership records address. The NDC was returned by the U.S. Postal Service due to an expired forwarding order. Respondent did not file a response.

On May 7, 2009, the court consolidated the two cases, vacated the submission date of April 29, 2009, and entered respondent's default. Respondent was enrolled as an inactive member on May 10, 2009.

Respondent did not participate in the disciplinary proceedings. The matter was submitted for decision on May 28, 2009, following the filing of State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

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).) Due to either arithmetical or typographical errors in the NDC, not all allegations were deemed admitted.

Respondent was admitted to the practice of law in California on March 7, 2002, and has since been a member of the State Bar of California.

A. The Riley Matter (Case No. 08-O-10901)

At all relevant times, respondent maintained a client trust account (number ending in 020¹ (CTA)) and a general operating account (number ending in 972) at Bank of the West. The general operating account was not a trust account nor labeled as a trust account.

¹ The account number is abbreviated to protect the privacy of the account.

In or about June 2004, Willie Riley employed respondent to represent him in lawsuits pending in San Benito County regarding the ownership of a piece of real property. The matters were eventually consolidated into one matter titled *Riley v. McDonald*, San Benito County Superior Court, case number CU-03-00156.

In an effort to secure settlement funds for the pending lawsuits, respondent agreed to assist Riley in obtaining a loan against Riley's home in San Jose. On or about June 23, 2004, Riley opened an escrow account at Alliance Title Company pursuant to the terms of a potential settlement of *Riley v. McDonald*.

In or about August 2004, Riley received approval for a loan of \$375,000 against his home. Riley and respondent agreed that respondent would hold in trust a portion of the loan proceeds to fund a settlement of *Riley v. McDonald*.

On or about August 19, 2004, the balance in respondent's CTA was zero.

On or about August 19, 2004, respondent received loan proceeds of \$240,635.38 via wire transfer to his CTA for the purposes of funding a settlement of *Riley v. McDonald*.

After receiving the \$240,635.38 credit, Riley's settlement funds were the only funds on deposit in the CTA. Respondent was obligated to maintain Riley's funds in trust until paid out for the use or benefit of Riley.

But on or about August 20, 2004, respondent withdrew from the CTA \$12,942.50, which belonged to Riley, and transferred it to his general operating account without Riley's knowledge or permission. Respondent used the funds for his own use and benefit.

On or about August 27, 2004, respondent transferred \$7,125 from the general operating account into the CTA to replenish a portion of the funds respondent withdrew from the CTA on August 20, 2004.

After returning \$7,125 to the CTA, respondent still owed Riley \$5,817.50 (\$12,942.50 - \$7,125) from the funds respondent withdrew from the CTA on August 20, 2004.

On or about September 13, 2004, respondent withdrew from the CTA \$6,224 and transferred it to the general operating account without Riley's knowledge or permission. Again, respondent used the funds for his own personal use and benefit.

Between August 19, 2004, and January 6, 2005, respondent withdrew an additional total of \$52,882.50 from the CTA, as follows:

<i>Date</i>	<i>Check No.</i>	<i>Payee</i>	<i>Notation on Check</i>	<i>Amount</i>
8/19/04	9005	"Cash"	none	\$ 8,470
10/20/04	9026	"The Silman Law Group"	none	\$18,500
11/22/04	9066	"Cash"	"Nov. payment"	\$13,375
1/6/05	9092	"Cash"	"Attorney fees"	<u>\$12,537.50</u>
		Total		\$52,882.50

Respondent received all of the \$52,882.50, which belonged to Riley, and made the withdrawals without Riley's knowledge or permission. Respondent used the funds for his own personal use and benefit and not for the use or benefit of Riley. He was not entitled to receive any of the funds as attorney fees or for any other purpose.

To date, respondent has refused and failed to provide Riley with any of the \$52,882.50.

On or about November 1, 2004, respondent transferred \$118,000 from the CTA to Alliance Title Company ("Alliance Title money") for the purposes of funding a settlement in *Riley v. McDonald*.

On or about November 1, 2004, Riley authorized respondent to direct the escrow officer to make distributions from the Alliance Title money on the condition that the disbursements be made for Riley's use and benefit. He never authorized respondent to make disbursements from the Alliance Title money for respondent's own use and benefit.

But, respondent instructed Alliance Title to provide him with the following Alliance Title money without Riley's knowledge or permission, which respondent received:

<i>Date of Withdrawal</i>	<i>Amount</i>
4/22/05	\$ 6,500
4/26/05	\$ 3,000
4/28/05	\$ 3,000
5/12/05	<u>\$ 5,295.53</u>
Total	\$17,795.53²

Respondent used the funds for his own personal use and benefit. To date, respondent has refused and failed to provide Riley with any of the \$17,795.53 that belongs to Riley.

Between on or about January 18, 2005, and on or about February 28, 2005, respondent made payments of \$5,817.50 and \$6,224 on Riley's behalf from the general operating account.

In summary, respondent misappropriated a total of \$89,844.53, as follows:

<i>Date</i>	<i>Amount</i>
8/20/04	\$12,942.50
9/13/04	6,224.00
8/19/04 – 1/6/05	52,882.50
4/22/05 – 5/12/05	<u>17,795.53</u>
Total	\$89,844.53

However, respondent made certain payments on behalf of Riley, as follows:

<i>Date</i>	<i>Amount</i>
8/27/04	\$ 7,125.00
1/18 – 2/28/05	5,817.50
1/18 – 2/28/05	<u>6,224.00</u>
Total	\$19,166.50

Thus, respondent still owes Riley in the amount of \$70,678.03, as follows:

Misappropriated	\$89,844.53
Payments Made On Behalf of Riley	<u>19,166.50</u>
Amount Still Owed	\$70,678.03

² The alleged amount of \$19,295.53 in the NDC should have been \$17,795.53.

Count 1: Misappropriation (Bus. & Prof. Code, § 6106)³

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

Between August 2004 and May 2005, respondent misappropriated a total of \$89,844.53 that belonged to his client without his client's knowledge or permission and then used \$70,678.03 of the funds for his own personal use and benefit. Therefore, respondent misappropriated client funds and committed an act of moral turpitude in willful violation of section 6106.

Count 2: Failing to Maintain Client Funds in Trust Account (Rules Prof. Conduct, Rule 4-100(A))

Rule 4-100(A) of the Rules of Professional Conduct provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith.

Respondent had a fiduciary duty to hold in trust at least \$52,882.50 of entrusted funds belonging to Riley in his CTA. But he withdrew those funds from the CTA without Riley's knowledge or permission and using the funds for his own personal use and benefit. Thus, respondent's failure to hold in trust the client funds in the CTA was clearly and convincingly in violation of rule 4-100(A).

Although respondent withdrew \$12,942.50 on August 20, 2004, and \$6,224 on September 13, 2004, from the CTA without Riley's permission, he had later made payments totaling \$19,166.50 (\$12,942.50 + \$6,224) on Riley's behalf. Therefore, there is no clear and convincing evidence that he had failed to maintain \$19,166.50 for the benefit of Riley.

³ References to sections are to the provisions of the Business and Professions Code.

B. Violation of California Rules of Court, Rule 9.20 (Case No. 09-N-10330)

On November 14, 2008, in California Supreme Court case No. S166642 (State Bar Court case No. 07-H-11875), the Supreme Court suspended respondent for two years, stayed, placed him on probation for three years and actually suspended him for 90 days. Among other things, the Supreme Court ordered respondent to comply with California Rules of Court, rule 9.20(a) and (c), within 30 and 40 days, respectively, after the effective date of the Supreme Court order. The order became effective December 14, 2008, and was duly served on respondent. (Cal. Rules of Court, rules 8.532(a) and 9.18(b).)

California Rules of Court, rule 9.20(c) mandates that respondent “file with the Clerk of the State Bar Court an affidavit showing that he . . . has fully complied with those provisions of the order entered under this rule.”

On January 12, 2009, the Office of Probation mailed a letter to respondent, reminding him of his obligation to comply with rule 9.20 and enclosing an accurate copy of the Supreme Court order as well as a form for reporting compliance with rule 9.20. The mailing was not returned to the State Bar as undeliverable.

Respondent was to have filed the rule 9.20 affidavit by January 23, 2009, but to date, he has not done so and has offered no explanation to this court for his noncompliance. Whether respondent is aware of the requirements of rule 9.20 or of his obligation to comply with those requirements is immaterial. “Willfulness” in the context of rule 9.20 does not require actual knowledge of the provision which is violated. The Supreme Court has disbarred attorneys whose failure to keep their official addresses current prevented them from learning that they had been ordered to comply with rule 9.20. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

Therefore, the State Bar has established by clear and convincing evidence that respondent willfully failed to comply with rule 9.20, as ordered by the Supreme Court in S166642.⁴

Furthermore, respondent's failure to comply with rule 9.20 constitutes a violation of section 6103, which requires attorneys to obey court orders and provides that the willful disobedience or violation of such orders constitutes cause for disbarment or suspension.

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,⁵ stds. 1.2(e) and (b).)

A. Mitigation

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

B. Aggravation

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

Respondent has two prior records of discipline. (Std. 1.2(b)(i).)

1. In 2006, respondent stipulated to a private reproof for his failure to perform services competently and failure to communicate in a single client matter. (State Bar Court case No. 05-O-00339.)
2. In 2008, in the underlying matter, respondent was suspended for two years, stayed, placed on probation for three years, subject to the conditions of probation, including 90 days' actual suspension for his failure to comply with his probation

⁴ Specifically, rule 9.20(d) provides that a suspended attorney's willful failure to comply with rule 9.20 constitutes a cause for disbarment or suspension and for revocation of any pending probation. Additionally, such failure may be punished as a contempt or a crime.

⁵ Future references to standard(s) or std. are to this source.

conditions. (Supreme Court case No. S166642; State Bar Court case No. 07-H-11875.)

Respondent committed multiple acts of wrongdoing by failing to maintain client funds in his CTA, misappropriating client funds and failing to comply with a Supreme Court order. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed significantly his client. (Std. 1.2(b)(iv).) Riley was deprived of a large portion of his funds – more than \$70,000.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by failing to comply with California Rules of Court, rule 9.20(c), even after the NDC in the instant proceeding was filed. He also failed to refund the client funds to Riley. (Std. 1.2(b)(v).)

Respondent's failure to cooperate with the State Bar before the entry of his default, including filing answers to the two NDCs, is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.2(a), 2.3 and 2.6 apply in this matter.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Standard 1.7(b) provides that if a member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate. Respondent has two prior records of discipline and no mitigation.

Standard 2.2(a) provides that culpability of willful misappropriation of entrusted funds must result in disbarment, unless the amount is insignificantly small or if the most compelling mitigating circumstances clearly predominate. Then the discipline must not be less than a one-year actual suspension, irrespective of mitigating circumstances. Here, the misappropriation of \$89,844.53 is significant. Even more egregious is respondent's failure to refund the \$70,678.03 that is still owing to his client.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

The State Bar urges disbarment, citing several cases, including *Chang v. State Bar* (1989) 49 Cal.3d 114, *Baca v. State Bar* (1990) 52 Cal.3d 294 and *Powers v. State Bar* (1988) 44 Cal.3d 337 in support of its recommendation.

The court agrees. Moreover, in *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, the Supreme Court disbarred an attorney who intentionally misappropriated \$29,000 from his law firm. In mitigation, the attorney had no prior record of discipline in 12 years of practice of law and suffered from emotional problems. The court did not find these factors sufficiently compelling to warrant less than disbarment.

Here, respondent had failed to return a large sum of client funds (\$70,678) without any explanation. And, no compelling mitigation has been shown.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) In this matter, respondent had flagrantly breached his fiduciary duties to his client by taking the client funds of more than \$70,000.

The misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (See *Grim v. State Bar* (1991) 53 Cal.3d 21.)

Respondent's misappropriation weighs heavily in assessing the appropriate level of discipline. The "misappropriation in this case . . . was not the result of carelessness or mistake; [respondent] acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that [respondent] intended to permanently deprive his client of [his] funds." (*Grim v. State Bar, supra*, 53 Cal.3d at p. 30.) "It is precisely when

the attorney's need or desire for funds is greatest that the need for public protection afforded by the rule prohibiting misappropriation is greatest." (*Grim v. State Bar*, *supra*, 53 Cal.3d at p. 31.)

Furthermore, respondent's willful failure to comply with rule 9.20(c) is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Such failure undermines its prophylactic function in ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) Respondent has demonstrated an unwillingness to comply with the professional obligations and rules of court imposed on California attorneys although he has been given opportunities to do so.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.) The court is seriously concerned about the possibility of similar misconduct recurring. Respondent has offered no indication that this will not happen again. Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding.

Respondent "is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) Therefore, based on the severity of the offense, willful disobedience of the Supreme Court order, the serious aggravating circumstances and the lack of any mitigating factors, it would undermine the integrity of the disciplinary system and damage public confidence in the legal profession if respondent were not disbarred.

VI. Recommendations

A. Discipline

Accordingly, the court recommends that respondent **Craig Michael Silman, Jr.**, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

B. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.⁶

C. Costs

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

VII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: August ____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court

⁶ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)