FILED FEBRUARY 2, 2011

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No. **08-O-12762-LMA**
	)	
ROBERT JOHN McNAIR,	)	
	)	**DECISION AND ORDER OF**
Member No. 147939,	)	**INVOLUNTARY INACTIVE**
	)	**ENROLLMENT**
A Member of the State Bar.	)	

I. INTRODUCTION

In this contested, original disciplinary proceeding, respondent **Robert John McNair** is charged with misappropriating $42,037.31 and other acts of misconduct in one client matter.

Because respondent admitted to culpability, the only issue reserved for the court is the question of disposition. The State Bar urges disbarment because of the significant harm to the client, his lack of candor to the court and a possible risk to the public. Respondent argues that a lengthy period of actual suspension, short of disbarment, would be adequate, in view of his strong mitigation, including mental illness.

Despite the substantial evidence in mitigation, including 17 years of practice without any disciplinary record, serious mental health problems at the time of misconduct and good character witnesses, the most compelling mitigating circumstances did not clearly predominate to warrant

a lesser discipline than disbarment. Accordingly, the court recommends that respondent be disbarred from the practice of law and be ordered to pay restitution, if he has not done so.

II. PERTINENT PROCEDURAL HISTORY

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) on February 19, 2010. Respondent filed his response to the NDC on April 1, 2010. On August 9, 2010, the parties filed a stipulation as to facts and conclusions of law and admission of documents.

Trial was held on August 25 and October 25-28, 2010. At the State Bar's request, count 6 was dismissed with prejudice. The court took the matter under submission for decision on November 15, 2010.

Deputy Trial Counsel Maria J. Oropeza represented the State Bar. Attorney William M. Balin represented respondent.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court's findings of fact are based on the parties' August 9, 2010 stipulation as to facts and conclusions of law as well as the documentary evidence and testimony presented at trial.

A. Jurisdiction

Respondent was admitted to the practice of law in California on October 5, 1990, and has been a member of the State Bar of California since that time.

B. Findings of Fact

In September 2004, Alison Klippel (formerly Hall, hereinafter, "Klippel") hired attorney Edgar J. Lana to seek enforcement of her child support and spousal arrears from her ex-husband, Frederick Hall, in *Hall v. Hall*, case No. 289206, filed in Contra Costa County Superior Court (Klippel matter).

Mr. Lana, respondent's brother-in-law, friend and mentor, died suddenly of a heart attack in February 2006. Respondent then took over the Klippel matter.

On January 31, 2007, the parties in the Klippel matter reached a stipulation regarding the payment of arrearages.

On April 4, 2007, Equity Title Company issued a check for $42,037.31 payable to Robert J. McNair, Trustee, as payment of Hall's settlement monies to Klippel. These funds belonged, in their entirety, to Klippel.

Respondent received the check for $42,037.31 from Equity Title Company, endorsed it, and deposited these funds into a business checking account unrelated to Klippel on July 3, 2007. Thereafter, respondent misappropriated the full sum of $42,037.31 for personal matters, unrelated to Klippel.

Commencing in March 2007 (when the settlement monies were supposed to be transferred), Klippel sought to contact respondent and obtain the status of her settlement funds. Klippel called every month from March through September 2007. Respondent allowed his voice mail message box to become full, failed to retrieve his messages and return them, and eventually allowed the phone to be disconnected and vacated his office without giving Klippel any forwarding information on how she could contact him.

Finally, in September 2007, Klippel reached respondent by telephone. Respondent told her that the check was with "Jonathan";[1] that Jonathan had gone bankrupt; and the check was in "probation." Respondent also advised Klippel that he had hired a probate attorney at his own expense and would get the money back with interest.

[1] Before respondent took the case, attorney Jonathan Weinberg, who was formerly associated with Edgar Lana, briefly worked on the case.

Respondent's statements to Klippel regarding the settlement monies were false and misleading. In fact, respondent had misappropriated the settlement monies.

Respondent did not promptly notify Klippel when he received the funds in April 2007. Instead, 10 months later, in February 2008, one of respondent's friends, on his behalf, informed Klippel that respondent had received and misappropriated the funds.

To avoid criminal prosecution for grand theft by the Contra Costa County District Attorney's Office, respondent must return all of Klippel's money. Respondent began making installment payments to Klippel on September 26, 2008. As of October 26, 2010, respondent has repaid $38,000 to Klippel.[2]

C. Conclusions of Law

Count 1 – Misappropriation (Bus. & Prof. Code, § 6106)[3]

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

By misappropriating the sum of $42,037.31 of Klippel's funds, respondent committed an act of moral turpitude in willful violation of section 6106.

Count 2 – Failure to Maintain Funds in Trust Account (Rules of Prof. Conduct, Rule 4-100(A))[4]

Rule 4-100(A) 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.

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[2] By the time this decision is filed, respondent may have had made additional restitution payments.

[3] References to sections are to the provisions of the Business and Professions Code, unless otherwise noted.

[4] References to the rules are to the Rules of Professional Conduct, unless otherwise stated.

By failing to deposit and maintain funds received for the benefit of Klippel in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import and, instead, depositing the funds in a business checking account, respondent failed to maintain the $42,037.31 settlement funds in a client trust account on behalf of Klippel in willful violation of rule 4-100(A).

Count 3 – Failure to Notify Client of Receipt of Client Funds (Rules of Prof. Conduct, Rule 4-100((B)(1))

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

Respondent did not notify Klippel when he received the settlement funds from Equity Title Company in April 2007. Instead, the client found out in February 2008 through one of respondent's friends that respondent had received and misappropriated the funds. Thus, by failing to notify Klippel in April 2007 when he received the $42,037.31 settlement funds, respondent willfully violated rule 4-100(B)(1).

Count 4 – Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

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 inform Klippel of his receipt of her funds; by disconnecting his phone without providing Klippel with a new phone number; and by vacating his offices without providing Klippel with new contact information, respondent failed to keep a client 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 5 – Moral Turpitude (Bus. & Prof. Code, § 6106)

By falsely stating to Klippel in September 2007 that the check was with Jonathan who was "bankrupt" when, in fact, respondent had misappropriated the funds, respondent committed acts involving moral turpitude in willful violation of section 6106.

Count 6 – Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))

At the State Bar's request, count 6 was dismissed with prejudice.

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, standards 1.2(b) and (e).)[5]

A. Mitigation

Here, there are several mitigating factors. (Std. 1.2(e).)

Respondent's discipline free record since 1990 until the commencement of the misconduct in 2007 is a significant mitigating factor, even though the present misconduct is serious. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

Respondent was suffering from severe financial and emotional difficulties and mental illness at the time of his misconduct. (Std. 1.2(e)(iv).) He lost his condominium; all his belongings were in his car. Respondent claimed that he "faced a perfect storm of unhappy events" – he experienced two family deaths; he was not able to run his brother-in-law's practice; and he was in financial ruins.

[5]All further references to standards are to this source.

Respondent was also suffering from severe depression combined with a rapid cycling bipolar disorder (manic depression) and attention deficit disorder. He attempted suicide in November 2006 and February 2008. His psychiatrist, Dr. Lawrence McReynolds, and his therapist, Virginia Fullarton, opined that respondent's mental disorders affected his executive functioning; that is, he lacked the ability to weigh the consequences of his actions, spiraling down from one bad decision to another. Respondent testified that when he realized what he had done with Klippel's money, he felt his only recourse was to commit suicide.

Currently, he is responding positively to treatment but his own doctors testified that he needs a structured supervised environment in order to practice law. Dr. McReynolds concluded that respondent is stable under proper medications and is not likely to repeat his misconduct. Respondent participates in Alcoholics Anonymous and church and has a support system in place.

The court concludes that his mental illness may have blurred his moral judgment, but it was not directly responsible for his misconduct. Respondent knew what he was doing – spending the $42,000 for his personal and business expenses.

Respondent's stipulation as to facts and conclusions of law displays candor and cooperation with the State Bar during the disciplinary proceeding. (Std. 1.2(e)(v).)

Respondent demonstrated good character by the attestation of a wide range of references in the legal community and general community. (Std. 1.2(b)(vi).) Respondent produced good character testimony from 10 witnesses who testified at trial, including an administrative law judge, two attorneys and a niece. Many of whom have known respondent for a long time and they were fully aware of his misconduct. They were impressed with his ongoing restitution payments to the client. But, they were not aware that respondent would be criminally prosecuted if he did not do so. Nevertheless, they opined that he is trustworthy and honest and that his

misconduct was aberrational. They were encouraged by his mental recovery and praised his dedication to help others, particularly those who are poor.

Respondent has performed community work in two charitable organizations, the Rock Harbor Christian Fellowship Church and the Bay Area Rescue Mission. (Std. 1.2(e)(vi).) He has done extensive volunteer work from being a handyman at the church to tutoring and mentoring members of the church and clients of the Bay Area Rescue Mission. He takes at-risk children to sporting events and fishing and works with substance abusers at Alcoholics Anonymous.

While respondent's extensive volunteering is laudable and impressive, most of the community work started around the time when Klippel complained to the State Bar and when he was caught stealing. There is little evidence of pro bono or volunteer activities before the Klippel complaint. He also serves on the board of directors in Clean Living Learning Center in El Sobrante. Since his caregiving of an elderly sick man was in exchange for rent, minimal mitigation weight is given.

Respondent has taken steps demonstrating remorse and willingness to accept responsibility for his acts of misconduct. (Std. 1.2(e)(vii).) He argued that at the time he committed his misconduct, he was suffering from an undiagnosed and untreated severe mental condition and facing a number of personal setbacks and crises. Now that he has been properly diagnosed, receives proper medication and has a supportive community of friends and relatives, he is able to function again. Although respondent is on a limited income (Social Security disability insurance benefits), he has consistently been repaying back the money to Klippel. In fact, he has almost completed restitution payment as of October 2010.

However, respondent's guilt and shame did not result in objective steps *promptly* taken by him to atone for his misconduct. While his act of repayment is commendable, little weight is

given since he began payment in November 2008 – only after his client complained to the State Bar in June 2008 – and he would be criminally prosecuted for grand theft if he did not pay it back, according to Contra Costa County Deputy District Attorney Steve Bolen. Respondent "is not entitled to any indulgence by reason of restitution of moneys wrongfully retained [or taken], especially where such restitution is made merely as a matter of expediency and under pressure." (*In re Abbott* (1977) 19 Cal.3d 249, 254.) As noted by the Supreme Court, "expressing remorse for one's misconduct is an elementary moral precept which, standing alone, deserves no special consideration in determining the appropriate discipline." (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2.)

B. Aggravation

The record establishes two factors in aggravation by clear and convincing evidence. (Std. 1.2(b).)

The current misconduct by respondent evidences multiple acts of misconduct. (Std. 1.2(b)(ii).) He failed to maintain and notify client of funds, failed to communicate, failed to inform Klippel of his new address or phone number after he had moved, misappropriated more than $42,000 in settlement funds for his own use and benefit, and misrepresented to Klippel about her funds.

Respondent's misconduct significantly harmed a client. (Std. 1.2(b)(iv).) His misappropriation deprived Klippel of the use of her funds, particularly at a very difficult and vulnerable period in her life when her two children were young and her mother was terminally ill. More than three years have elapsed since the issuance of the funds and Klippel still has not been made whole as of October 2010, albeit respondent had paid her $38,000 of the $42,037.31.

There is no clear and convincing evidence, as urged by the State Bar, that respondent's misconduct was aggravated by bad faith, as he was already found culpable of committing acts of

moral turpitude (std. 1.2(b)(iii)); that he demonstrated indifference (std. 1.2(b)(v); or that he lacked candor (std. 1.2(b)(vi)). Yet, the court found that respondent was not completely forthright with his witnesses in that they did not know he was compelled to return the misappropriated funds or otherwise, he would face criminal charges. He would not have paid but for the fact that he was caught. And when he was caught, respondent was stricken with guilt and attempted suicide.

V. DISCUSSION

The purpose of 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 shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Discipline is progressive; however, the standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.7(c).)

Standards 2.2(a) and (b), 2.3, 2.4(b) and 2.6 apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension. The one-year "minimum discipline" set forth in the standard "is not faithful to the teachings of [the Supreme] court's decisions" and "should be

regarded as a guideline, not an inflexible mandate." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.)

The 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.)

Respondent admitted that he should be suspended from the practice of law for a significant period but not disbarred. Respondent cited *Bradpiece v. State Bar* (1974) 10 Cal.3d 742 in support of his argument (one year actual suspension for $11,250 misappropriation; full restitution made within three months after the misconduct).

But the misdeed in *Bradpiece* is far less egregious than that of respondent.

The State Bar urges that respondent be disbarred for his misappropriation and be ordered to make restitution, citing several cases, including *Kaplan v. State Bar* (1991) 52 Cal.3d 1067 (disbarment for $29,000 misappropriation); *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 (disbarment for $40,000 misappropriation); and *In re Abbott* (1977) 19 Cal.3d 249 (disbarment for $30,000 misappropriation), in support of its disbarment recommendation.

The court finds these cases instructive.

In *Kaplan v. State Bar, supra,* 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.

In a similar case, *In re Abbott*, *supra*, 19 Cal.3d 249, the attorney intentionally misappropriated approximately $30,000 from a single client, and as a result, he was convicted of grand theft. In mitigation, he had practiced law blemish-free for 13 years before his misconduct, presented evidence that he suffered from manic-depressive psychosis, submitted character evidence from several attorneys and judges, and had displayed remorse. The Supreme Court again did not find these factors sufficiently compelling to warrant less than disbarment.

Moreover, in *Grim v. State Bar* (1991) 53 Cal.3d 21, the attorney misappropriated over $5,500 of client funds and did not return the funds to the client until after almost three years later and after the State Bar had initiated disciplinary proceedings and held an evidentiary hearing. The Supreme Court did not find compelling mitigating circumstances to predominate and rejected his defense of financial stress as mitigation because his financial difficulties which arose out of a business venture were neither unforeseeable nor beyond his control. Finally, the attorney intended to permanently deprive his client of her funds. The Supreme Court therefore did not find his cooperation with the State Bar and evidence of good character to constitute compelling mitigation in view of the aggravating factors. He was disbarred.

In *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37, an attorney was not disbarred but suspended for one year for misappropriation of $3,000 because of extenuating circumstances – his good faith in refraining from acts of deceit towards the client, making full repayment within three months after the misappropriation and before the attorney was aware of the complaint to the State Bar, cooperating candidly throughout the proceedings, and voluntarily taking steps to improve his management of entrusted funds. The Supreme Court explained: "Disbarment would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors." (*Id.* at p. 38.)

However, "[a]n attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Edwards v. State Bar, supra,* 52 Cal.3d 2, 39.)

In this matter, unlike the attorney in *Edwards*, respondent's misconduct was not a single act of negligent misappropriation. Like the attorneys in *Kaplan*, *Abbott* and *Grim*, he intentionally took his client's funds, spent them for his own benefit, and lied to the client that another attorney was withholding the settlement check.

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.) Here, respondent had flagrantly breached his fiduciary duties by violating rules 4-100(A) and 4-100(B)(1) and sections 6068, subdivision (m), and 6106.

More significantly, 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 her funds." (*Grim v. State Bar, supra,* 53 Cal.3d 21, 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." (*Id.* at p. 31.)

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.) 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. (*Grim v. State Bar, supra,* 53 Cal.3d 21.)

While the court sympathizes with respondent regarding his mental and financial issues, the court's "primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause …." (*In re Abbott, supra,* 19 Cal.3d 249, 254.) Lesser discipline than disbarment is not warranted because the amount misappropriated is not insignificantly small and the most compelling mitigating circumstances do not clearly predominate. Therefore, having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

VI. RECOMMENDATIONS

A. Discipline

Accordingly, the court recommends that respondent **Robert John McNair** 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. Restitution

It is also recommended that respondent make restitution to Alison Klippel in the amount of $4,037[6] plus 10% interest per annum from October 27, 2010 (or to the Client Security Fund to the extent of any payment from the fund to Alison Klippel, plus interest and costs, in accordance with Business and Professions Code section 6140.5). Respondent must furnish satisfactory proof of payment thereof to the State Bar's Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

[6] Since respondent has paid $38,000 to Klippel as of October 26, 2010, he still owes her $4,037 plus interest ($42,037 - $38,000).

To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent will be given credit for such payments provided satisfactory proof of such is or has been shown to the Office of Probation. Respondent is still liable for interest payments for the principal amount of $4,037, accruing from October 27, 2010, as set forth above.

C. 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.[7]

D. Costs

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

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 *new* rule 5.111(D) of the Rules of Procedure of the State Bar, effective January 1, 2011. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: February ___, 2011.

LUCY ARMENDARIZ
Judge of the State Bar Court

[7]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.)