

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

In the Matter of	)	Case No. <b>09-O-11952-RAP</b>
	)	
<b>THOMAS ANDREW HAWBAKER,</b>	)	<b>DECISION AND ORDER OF</b>
	)	<b>INVOLUNTARY INACTIVE</b>
<b>Member No. 140654,</b>	)	<b>ENROLLMENT</b>
	)	
<u>A Member of the State Bar.</u>	)	

**I. INTRODUCTION**

In this contested, original disciplinary proceeding, respondent **THOMAS ANDREW HAWBAKER** is charged with five counts of misconduct in one client matter. The court finds respondent culpable on four counts. Respondent represented himself in this matter. Deputy Trial Counsel Brandon K. Tady of the Office of the Chief Trial Counsel of the State Bar of California represented the State Bar.

Having considered the facts and the law, the court recommends, among other things, that respondent be disbarred from the practice of law and be ordered to pay restitution.

**II. PROCEDURAL HISTORY**

The State Bar of California initiated this proceeding by filing a notice of disciplinary charges (“NDC”) on January 21, 2010. Respondent filed a response to the NDC on May 24, 2010.

On January 25, 2011, the court entered an order precluding respondent from calling any witnesses, other than himself, or submitting any documents into evidence for his failure to file a pretrial conference statement. (Rules Proc. of State Bar, rule 5-101(E).)

Trial was held on February 1 and 2, 2011. At the State Bar's request, count one was dismissed with prejudice. The matter was submitted for decision at the conclusion of the hearing.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on June 6, 1989, and has been a member of the State Bar of California since that time.

#### **B. Credibility Determinations**

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g., Evid. Code, § 780 [list of factors to consider in determining credibility].) The court finds the testimony of respondent to be not credible.

#### **C. Findings of Fact**

In or about July 2002, Michael Jacobson ("Jacobson") employed respondent and his brother, Joseph M. Hawbaker, a Nebraska attorney, to represent respondent in litigation pending in the Dawson County District Court in the State of Nebraska, case No. CI 97-39, entitled *Jacobson v. Donner-Budd Aerial Sprayers, Inc.* ("the Donner-Budd action"). On July 12, 2002, respondent filed a motion to be admitted *pro hac vice* to represent Jacobson in the Nebraska

court with Joseph M. Hawbaker associated as local counsel. The court granted respondent's motion to appear *pro hac vice*.

In or about April 2004, respondent negotiated a settlement on behalf of Jacobson in the Donner-Budd action for a total sum of \$40,000. Respondent received two settlement checks on behalf of Jacobson, each a cashier's check dated April 2, 2004, and payable to respondent and Jacobson in the sum of \$20,000.

On or about April 5, 2004, respondent deposited the \$40,000 received on behalf of Jacobson in his client trust account.

On or about April 5, 2004, respondent issued a check payable to Jacobson in the sum of \$12,500. A notation on the check identified the sum as a partial disbursement of Jacobson's settlement funds from the Donner-Budd action pending a final accounting of respondent's costs.

Jacobson received the check but did not negotiate the check. Jacobson feared that if he negotiated the check he would lose the right to later claim any additional settlement funds in the Donner-Budd action. Jacobson allowed his bank to hold, but not negotiate the check.

Jacobson sent respondent two letters, on June 25 and October 15, 2004, requesting an accounting of the settlement funds in the Donner-Budd action. Respondent received the letters but did not respond.

Jacobson sent respondent a third letter on March 28, 2005, requesting respondent to provide an accounting of the Donner-Budd settlement funds and to reissue the \$12,500 check made payable to Jacobson since the original check had gone stale.

Respondent sent a return letter to Jacobson on April 28, 2005, advising Jacobson that the original check was still negotiable. Respondent's letter did not include an accounting of the Donner-Budd settlement funds.

In October 2005, Jacobson attempted to negotiate the \$12,500 settlement check but it was returned by the bank due to the stale date. At respondent's instructions, Jacobson returned the check to respondent on March 15, 2006. Respondent did not reissue another settlement check to Jacobson.

On September 14, 2006, Jacobson sent respondent a letter requesting respondent to send him another check for the \$12,500 and provide an accounting for Donner-Budd settlement funds. Respondent received the letter but did not provide an accounting of the settlement funds or reissue another settlement check to Jacobson.

Respondent and Jacobson met in January 2007 at respondent's residence. Respondent testified that at this meeting, Jacobson agreed to loan respondent the \$12,500 settlement funds because respondent was out of money due to a pending divorce. Jacobson denied any such arrangement. No loan documents were prepared. Not only were no loan documents prepared or collateral obtained from respondent, respondent did not prepare a conflict-of-interest letter for his client. Thus, respondent's self-serving, unsupported testimony of a purported loan of settlement funds by Jacobson is not credible.

Respondent testified that after receiving the \$40,000 settlement funds in the Donner-Budd action, he met with Jacobson and Jacobson agreed to alter their oral contingency fee agreement of one-third of the settlement funds to go to respondent and two-third of the settlement funds to go to Jacobson. The new arrangement would be \$25,000 to respondent and \$15,000 to Jacobson, minus \$2,500 in cost expense to be paid to respondent. Jacobson denied any such agreement. Other than respondent's self-serving testimony, there is no evidence in the record to support respondent's claim. The court finds respondent's testimony to be not credible.

On September 6, 2008, Jacobson sent respondent a letter informing respondent that he had still not received an accounting of the Donner-Budd settlement funds or a replacement check

from respondent. Respondent received the letter and did not provide an accounting or reissue another settlement disbursement check to Jacobson.

Respondent has never provided an accounting of the Donner-Budd action settlement funds to his client, to the State Bar, or to the court in this action. Respondent has not paid any Donner-Budd settlement funds to Jacobson.

On or about September 4, and October 8, 2009, a State Bar investigator sent a letter to respondent regarding the Jacobson complaint. The letters requested that respondent respond in writing to specified allegations of misconduct under investigation by the State Bar raised by Jacobson's complaint. Respondent received the two letters but did not respond.

#### **D. Conclusions of Law**

##### ***Count One – Failure to Maintain Client Funds in Trust Account (Rules Prof. Conduct, Rule 4-100(A))*<sup>1</sup>**

The State Bar's oral motion to dismiss count one, made at the conclusion of its case on culpability, was granted. Accordingly, count one was dismissed with prejudice.

##### ***Count Two – Failure to Render Accounts of Client Funds (Rules Prof. Conduct, Rule 4-100(B)(3))***

Rule 4-100(B)(3) provides that an attorney must maintain records of all funds of a client in his possession and render appropriate accounts to the client.

The court finds that there is clear and convincing evidence that respondent willfully failed to render accounts of client funds, in violation of rule 4-100(B)(3), by repeatedly failing to provide Jacobson with an accounting of the settlement funds in the Donner-Budd action matter.

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<sup>1</sup> All further references to "rule/s" are to the Rules of Professional Conduct, unless otherwise stated.

***Count Three – Failure to Pay Client Funds Promptly (Rules Prof. Conduct, Rule 4-100(B)(4))***

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

The court finds that there is clear and convincing evidence that respondent willfully failed to pay client funds promptly, in willful violation of rule 4-100(B)(4), by failing to pay Jacobson any of the \$12,500 settlement funds from the Donner-Budd action.

***Count Four – Moral Turpitude (Bus. & Prof. Code, § 6106)<sup>2</sup>***

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

The State Bar has presented clear and convincing evidence that respondent misappropriated \$12,500 in Donner-Budd settlement funds, although the amount may be more, depending on the costs and expenses paid from the settlement funds, which is unknown.

Therefore, the court finds that, by clear and convincing evidence, respondent willfully violated section 6106, by misappropriating, at a minimum, \$12,500 of settlement funds in the Donner-Budd action matter.

***Count Five – Failure to Cooperate (Bus. & Prof. Code, § 6068, Subd. (i))***

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

Respondent's testimony regarding his failure to respond in writing to the State Bar's letters is without merit.

The court finds that there is clear and convincing evidence that respondent willfully failed to cooperate in a State Bar investigation, in violation of section 6068, subdivision (i), by

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<sup>2</sup> References to section are to the provisions of the Business and Professions Code, unless otherwise noted.

failing to respond in writing to two letters from the State Bar requesting information concerning the Jacobson matter.

#### **IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES**

##### **A. Mitigation**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)<sup>3</sup> The instant matter involves one factor in mitigation.

Respondent was admitted to the practice of law in the State of California in 1989 and has no prior record of discipline. (Std. 1.2(e)(i).) (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.) However, this factor in mitigation is given minimal weight due to the seriousness of respondent's misconduct.

##### **B. Aggravation**

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).) The record establishes five factors in aggravation.

Respondent's current misconduct evidences multiple acts of misconduct. (Std. 1.2(b)(ii).) He failed to render an accounting, failed to promptly pay client funds and misappropriated at least \$12,500 in settlement funds for his own use and benefit.

Trust funds were involved in this matter and respondent has refused to account to the client who is the object of the misconduct for improper conduct toward said funds. (Std. 1.2(b)(iii).)

Moreover, there is a finding of uncharged misconduct in this matter. Respondent testified that he received \$7,500 in funds from Jacobson to pay expenses and costs. Respondent placed the funds in his client trust account. Later, before he paid any the expenses or costs,

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<sup>3</sup> All further references to standard(s) are to this source.

respondent removed the \$7,500 from his trust account and placed the funds in his personal account, testifying that the funds were his money. Respondent willfully removed client funds from a client trust account in violation of rule 4-100(A), which 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. (Std. 1.2(b)(iii.)

Respondent's misconduct significantly harmed his client by misappropriating at least \$12,500 in settlement funds. (Std. 1.2(b)(iv).)

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. Respondent is totally without remorse and has yet to return any portion of the settlement funds. Respondent blames his client for any misconduct on respondent's part. (Std. 1.2(b)(v).)

## **V. DISCUSSION**

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In addition, standard 1.6 provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards call for the imposition of a minimum sanction ranging from a suspension to disbarment. (Std. 1.6, 2.2(a), 2.2(b), 2.3 and 2.6.)

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the



court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 2.2(a) provides that “culpability of a member of willful 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.”

The State Bar argues that respondent should be disbarred; respondent urges that a period of stayed suspension and probation would suffice.

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* (1991) 53 Cal.3d 21.)

Respondent’s lack of remorse and lack of recognition of his misconduct demonstrate that his continued ability to practice law would place the public in peril. The amount of respondent’s misappropriation is not insignificantly small and there are no compelling mitigating circumstances that clearly predominate.

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 [the client’s] funds.” (*Grim v. State Bar* (1991) 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.) After considering the standards and relevant case law and balancing the mitigation and aggravation, the court concludes that respondent's disbarment from the practice of law is appropriate to protect the public and preserve public confidence in the profession.

## **VI. RECOMMENDATIONS**

### **A. Recommended Discipline**

It is hereby recommended that respondent **THOMAS ANDREW HAWBAKER** 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 the following client 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 5.136):

1. to **Michael Jacobson** in the amount of \$12,500 plus 10% interest per annum from April 5, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Michael Jacobson, 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 to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

**C. California Rules of Court, Rule 9.20**

It is further recommended that the Supreme court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) within 30 calendar days of the effective date of the Supreme Court order in the present presenting and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing compliance with said order.<sup>4</sup>

**D. 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.

**VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4), and rule 5.111(D) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three days from the date of this order and will terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: February 8, 2011.

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RICHARD A. PLATEL  
Judge of the State Bar Court

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<sup>4</sup> Respondent is required to file a rule 9.20(c) affidavit even if he no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)