

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case No.: 10-O-00046-RAP (10-O-05416)
	)	
DAVID GREENWALD,	)	DECISION AND FURTHER ORDERS,
	)	INCLUDING ORDER OF
Member No. 129247,	)	INVOLUNTARY INACTIVE
	)	ENROLLMENT
<u>A Member of the State Bar.</u>	)	

**Introduction**<sup>1</sup>

This matter involves a Stipulation Re Facts, Conclusions of Law and Disposition, which was executed by the State Bar of California (State Bar) and respondent David Greenwald, and was approved by the State Bar Court. That matter was later returned by the California Supreme Court for further consideration of the recommended discipline in light of the applicable attorney discipline standards.

Thus, the sole issue in this matter is the level of discipline.

**Significant Procedural History**

On December 20, 2011, the State Bar filed an NDC in case Nos. 10-O-00046 (10-O-05416) (the December 20, 2011 NDC). Respondent filed a response on February 22, 2012. On March 26, 2012 respondent and the State Bar signed a Stipulation Re Facts, Conclusions of Law and Disposition in the matter.

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

The State Bar Court approved the parties' stipulation. The Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving was filed on April 3, 2012.<sup>2</sup> On August 27, 2012, however, the Supreme Court issued order No. S202866, returning the stipulation "for further consideration of the recommended discipline in light of the applicable attorney discipline standards. (*In re Silvertown* (2005) 36 Cal.4th 81, 89-94; see *In re Brown* (1995) 12 Cal.4th 205, 220.)"

Trial in this matter was held on January 10, 2013. On that same date the matter was submitted for decision.

The State Bar was represented by Deputy Trial Counsel Adriana Burger. Respondent represented himself at trial.

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

Respondent was admitted to the practice of law in California on July 8, 1987, and has been a member of the State Bar of California at all times since that date.

#### **Case No. 10-O-00046 – The Greer Matter**

##### **Facts**

In September 2007, Jennifer Greer (Greer) hired respondent to represent her in a personal injury matter on a contingent fee basis. Greer and respondent agreed that he would receive 33½ percent of any recovery that he obtained for her, if the matter were to settle before a lawsuit was filed, and 40 percent of any recovery obtained after a lawsuit was filed. Greer also agreed to reimburse respondent for costs that he paid on her behalf, and to reimburse him for any money that he advanced to her.

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<sup>2</sup> As part of the Stipulation Re Facts, Conclusions of Law and Disposition, the parties requested that "in the interests of justice," the court dismiss Count Three of the December 20, 2011 NDC in case No. 10-O-00046 and Counts Three, Four, and Five of the NDC in case No. 10-O-05416. The State Bar Court **GRANTED** the parties' dismissal request in its April 3, 2012 Order Approving Stipulation.

On January 18, 2008, respondent filed a lawsuit on Greer's behalf in Los Angeles County Superior Court, case No. BC383998, *Jennifer Greer v. Carol Emmitt; Jeffrey Shellow (Greer v. Emmitt and Shellow)*.

In January 2008, respondent paid \$350 in costs on Greer's behalf.

In February 2009, respondent settled *Greer v. Emmitt and Shellow* for \$20,000. The terms of the settlement stated that Shellow would pay \$15,000 to Greer and that Emmitt would pay \$5,000 to Greer.

On April 2, 2009, respondent advanced \$300 to Greer.

On April 16, 2009, Greer signed a release, settling her claim against Shellow.

On April 29, 2009, Granite State Insurance Company, Shellow's insurer, issued a settlement check payable to respondent and Greer in the amount of \$15,000. Respondent received the check.

On May 8, 2009, respondent deposited the \$15,000 settlement check into his client trust account at Wells Fargo Bank, account No. \*\*\*\*\*-05370 (CTA 05370). Since Greer's case settled after respondent had filed a lawsuit, respondent was entitled to retain \$6,000, i.e., 40 percent of the \$15,000 *Shellow* settlement as his fee for legal services. After reducing the settlement amount by: (1) \$6,000 for respondent's legal fees, (2) \$350 (the amount that respondent paid for costs) and, (3) \$300 (the amount that respondent advanced to Greer), respondent was required to maintain \$8,350 of Greer's settlement funds in CTA 05370 [ $\$15,000 - \$6,650 = \$8,350$ ].

Between May 8 and July 2, 2009, the balance in respondent's CTA 05370 fell below \$8,350 on multiple occasions. The "dips" in the account included the following:

DATE	CTA BALANCE	AMOUNT BY WHICH THE CTA FELL BELOW \$8,350
May 29, 2009	\$4,286.11	\$4,063.89
June 02, 2009	\$508.11	\$7,841.89

By June 2, 2009, respondent had withdrawn from CTA 05370 all but \$508.11 of the \$8,350 in funds, which he was supposed to have maintained in that client trust account on Greer's behalf, for his own personal use and purposes.

In August 2009, respondent issued the following checks, payable to Greer from CTA 05370:

DATE	CHECK NO.	AMOUNT
August 03, 2009	1139	\$350
August 07, 2009	1141	\$350
August 14, 2009	1143	\$2,000
August 14, 2009	1144	\$2,000
August 14, 2009	1146	\$2,000
August 21, 2009	1147	\$650
	<b>TOTAL</b>	<b>\$7,350</b>

In August 2009, respondent had paid all remaining monies owed to Greer.

Greer's new counsel received the \$5,000 in settlement funds from Emmitt and disbursed them.

### **Conclusions**

#### ***Count One - (Rule 4-100(A) [Failure to Maintain 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 a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

After reducing the \$15,000 Shellow settlement by making appropriate payments for legal fees, costs, and advances to his client, respondent was required to maintain \$8,350 of Greer's settlement funds in the CTA.

The court, therefore, finds by clear and convincing evidence that respondent failed to maintain client funds in his CTA in willful violation of rule 4-100(A), by allowing the balance in

the CTA 05370 to dip below \$8,350 on May 29 and June 2, 2009, in willful violation of rule 4-100(A), Rules of Professional Conduct.

***Count Two - (§ 6106 [Moral Turpitude - Misappropriation])***

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

An attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.) "There is no doubt the willful misappropriation of a client's funds involves moral turpitude." (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033, 1034.)

By withdrawing \$7,841.89 for his own personal use and purposes from the \$8,350 settlement funds, which he was supposed to maintain in CTA 05370 for the benefit of his client, respondent willfully misappropriated those funds, thereby committing an act of moral turpitude in willful violation of section 6106.<sup>3</sup>

**Case No. 10-O-05416 – The Gyllenhammar Matter**

As set forth, *ante*, in footnote two of this Decision, the parties agreed in the Stipulation Re Facts, Conclusions of Law and Disposition to the dismissal of case No. 10-O-05416, i.e., Counts Three, Four, and Five of the December 20, 2011 NDC, and requested that the court order the dismissal of those counts. The State Bar Court **GRANTED** the parties' dismissal request in its April 3, 2012 Order Approving Stipulation.

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<sup>3</sup> \$8,350.00 Amount of client funds that respondent was required to maintain in CTA  
- 508.11 Balance of funds remaining in CTA on June 2, 2009  
\$7,841.89 Client funds withdrawn by respondent for personal use and purposes

## **Aggravation**

### **Prior Record of Discipline (Std. 1.2(b)(i).)**

Respondent has a prior record of discipline. (Supreme Court case No. S194452; State Bar Court case No. 09-O-12838.)<sup>4</sup> He stipulated to a one-year stayed suspension and two-year probation subject to conditions, including that he be suspended from the practice of law for the first 60 days of probation. Respondent violated rule 4-100(A) in two counts by depositing and maintaining personal funds in each of his two client trust accounts (one of which was CTA 05370) and using those funds to pay his personal expenses. In mitigation, respondent had no prior record of discipline, caused no harm to clients, and showed candor and cooperation with the State Bar. In aggravation, respondent committed multiple acts of wrongdoing.<sup>5</sup>

### **Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)**

Respondent was found culpable of two acts of misconduct. Multiple acts of misconduct are an aggravating factor.

## **Mitigation**

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)

## **Discussion**

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<sup>4</sup> The court takes judicial notice of the pertinent State Bar Court records regarding this prior discipline, admits them into evidence, and directs the Clerk to include copies in the record of this case.

<sup>5</sup> The parties stipulated and the record reflects that respondent's misconduct in the current matter occurred during the same time period as his prior misconduct. Citing *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, the parties acknowledged in the stipulation that prior discipline is always a proper factor in aggravation. However, the aggravating force of the prior discipline is generally diminished if the current misconduct occurred during the same time period as the misconduct in the prior matter, since the offending attorney did not have an opportunity to learn from the imposition of his prior discipline and conform his conduct accordingly. As the misconduct in the instant matter occurred during the same time period as the prior misconduct, the court will determine what the discipline would have been if all the charged misconduct during the time period had been brought as one case.

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), and 2.3)

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickel* (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 1.6(a) provides, in pertinent part, 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 this proceeding, the most severe sanction for respondent’s misconduct is found in standard 2.2(a).

Standard 2.2(a) provides for disbarment for the willful misappropriation of entrusted funds or property unless the amount misappropriated is insignificantly small or unless the most

compelling mitigating circumstances clearly predominate, in which case the discipline recommended must not be less than one-year actual suspension, regardless of mitigating circumstances.

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.)

Here the amount of respondent's misappropriation is not insignificantly small and there are no compelling mitigating circumstances that clearly predominate. Moreover, the record demonstrates that the "misappropriation in this case . . . was not the result of carelessness or mistake; [respondent] acted deliberately . . . ." (*Grim v. State Bar, supra*, 53 Cal.3d at p. 30.)

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 the aggravation present in this matter and the lack of mitigating circumstances, 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.

### **Recommendations**

It is recommended that respondent David Greenwald, State Bar Number 129247, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

### **California Rules of Court, Rule 9.20**

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a)



and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

### **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.

### **Order**

The order filed on April 3, 2012, approving the parties' Stipulation Re Facts, Conclusions of Law and Disposition, in the above-entitled matter is hereby **VACATED**.

The Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving, which was filed on April 3, 2012, is hereby converted to a stipulation as to facts and conclusions of law only, and State Bar Court staff is directed to remove the Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving, filed on April 3, 2012, from the State Bar's website.

In the interest of justice, the court further orders that Count Three of the December 20, 2011 NDC in case No. 10-O-00046 and Counts Three, Four and Five of the NDC in case No. 10-O-05416, which the court had previously dismissed in its April 3, 2012 Order Approving Stipulation, are hereby **DISMISSED**.

### **Order of Involuntary Inactive Enrollment**

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule

5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: March 21, 2013

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RICHARD A. PLATEL  
Judge of the State Bar Court