FILED JULY 1, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **EUGENIA YEHUDIT ZACKS-CARNEY,** **Member No. 181811,** A Member of the State Bar.	Case No.: **11-O-19340-PEM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

Introduction[1]

In this disciplinary proceeding, respondent Eugenia Yehudit Zacks-Carney (respondent) is charged with six counts of acts of misconduct in two related client matters. The charged misconduct includes: (1) failing to maintain client funds in a trust account; (2) commingling personal funds in a client trust account; (3) failing to account; and (4) committing acts of moral turpitude, including misrepresentation and misappropriation. The court finds, by clear and convincing evidence, that respondent is culpable of all of the counts of misconduct. In light of the serious nature and extent of respondent's misconduct, as well as the aggravating and mitigating circumstances, the court recommends that respondent be disbarred.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on October 25, 2013, and on December 19, 2013, respondent filed her response. On February 25, 2014, at the request of the

[1] 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.

State Bar, the court dismissed Count Three of the NDC. On March 24, 2014, the parties filed with the court a partial stipulation of facts and admission of documents.

A four-day trial began on April 1, 2014. The State Bar was represented by contract attorney Melissa Marshall and respondent was represented by Stephen Strauss. On April 18, 2014, following closing briefs, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on March 19, 1996, and has been a member of the State Bar of California at all times since that date.

Case No. 11-O-19340 – The Peter Zacks and Lily Carballo Matter

Facts

In February 2006, Peter Zacks (Peter) and Lily Carballo (Lily) retained respondent to represent them in a personal injury case related to a three-vehicle car accident that occurred in California on March 25, 2005. Respondent is a resident of Michigan licensed to practice in California. Peter is respondent's uncle and Lily was Peter's wife at the time of the car accident. Respondent was reluctant to take the case because she lived in Michigan and she was inexperienced in personal injury cases. However, because Peter was her uncle and she frequently advised him on legal issues she took his case. Respondent did not execute a written fee agreement with Peter and Lily.

On February 27, 2007, respondent filed a personal injury lawsuit against Sam and Esther DeGroote (the Degrootes), Donald Ensminger (Ensminger), the California Highway Patrol, and Robert McCloud (McCloud) in the San Bernadino County Superior Court. Ensminger was the driver of vehicle one, McCloud was the driver of vehicle two, Peter was the driver of vehicle three, and Lily was a passenger in vehicle three.

Ensminger was driving the DeGrootes' vehicle during the car accident. The Degrootes were insured by Interinsurance Exchange of the Automobile Club (AAA) with policy limits of $25,000 per person. Respondent, AAA, Peter, and Lily, agreed to engage in mediation to attempt to settle the third-party liability portion of Peter's and Lily's case. After attending mediation, this claim settled for the policy limits of $25,000 per person with the informed consent of Peter and Lily

On August 18, 2008, respondent received, on behalf of Peter, a settlement check from AAA made payable to respondent and Peter in the sum of $25,000, and, on behalf of Lily, a settlement check from AAA made payable to respondent and Lily in the sum of $25,000. That same day, respondent deposited both checks, totaling $50,000, into respondent's CTA. Respondent opened the CTA with the deposit of these settlement proceeds and a $200 check.

On August 28, 2008, respondent sent Peter an email entitled "rough apportionment," informing him that the checks from the insurance companies had cleared. Though there was no written fee agreement it was clear from respondent's email that respondent was assuming there was a one-third contingency fee and, as such, she was entitled to $8,333.33 in fees from each client. As a result Peter was entitled to $16,666.67 and Lily was entitled to $16,666.67. It is equally clear from the email that respondent was warning Peter that from her calculations there would be nothing for Peter and Lily if the lienholders were paid in full. On that same date, Peter sent an email to respondent regarding the settlement proceeds. In that email Peter acknowledged there may be nothing left over for him and Lily given the fact that the lienholders were owed so much.

On September 11, 2008, respondent wrote a check to Ed Manturuk (Manturuk) for reimbursement of costs of $5,672.42 ($2,974.21 related to Peter's case and $2,698.21 related to Lily's case). On September 12, 2008, when the check was debited, Peter was entitled to

$13,692.46 ($16,666.67 - $2,974.21) and Lily was entitled to $13,968.46 ($16,666.67 - $2,698.21). That same day, respondent issued a check from her CTA to a medical provider on behalf of Peter and Lily in the amount of $3,000 ($1,500 related to Peter's case and $1,500 related to Lily's case.) On September 19, 2008, when the check was debited, Peter was entitled to $12,192.46 ($13,692.46 - $1,500) and Lily was entitled to $12,468.46 ($13,968.46 - $1,500). Therefore, by the end of September 2008, Peter and Lily were entitled to a total of $24,660.92 ($12,192.46 + $12,468.46).

On September 23, 2008, respondent withdrew $5,555.55 from her CTA account. On November 12, 2008, respondent withdrew $12,000 from her CTA. On November 20, 2008, respondent withdrew another $5,000 from her CTA. And then on November 26, respondent withdrew another $15,000 from her CTA. On November 26, 2008, the balance in respondent's CTA fell to $3,830.70. And as of that date, respondent still should have been holding $24,660.92 on behalf of Peter and Lily.

Respondent claims that Peter authorized her to take the entire amount of $37,555.55 in attorney fees. She testified that Peter told her that since the case went nowhere and she did a lot of work on the case and had always represented him in prior cases for nothing, she deserved something for her efforts and hence she was free to as much money as she needed as attorney fees. The court does not believe respondent's testimony because Peter's testimony and the documentary evidence directly contradict respondent's claims.

On March 23, 2009, the balance in respondent's CTA dipped to $1,780.42. As of that day, respondent still should have been holding $24,660.92 on behalf of Peter and Lily, and had misappropriated $22,880.50 ($24,660.92 - $1,780.42) of those funds.

In March 2009, respondent sent a series of emails to Peter. On March 6, 2009, respondent sent an email to Peter stating that it is "rare to keep funds in a trust account for more

than one quarter" and that they "are now in the 'second quarter' of holding these funds." Attached to this email was a quarterly statement which inaccurately stated that the costs and attorney fees had not yet been disbursed. This statement did accurately reflect the disbursement of the $3,000 medical provider payment.

In an email on March 26, 2009, respondent attached three different settlement payout options she classified as "models A, B, and C." In the attached models, she again quoted her fees at $8,333.33 for Peter, but offered to waive portions of her fees relating to Lily. In these models, she also stated that the costs and attorney fees were "not yet disbursed." Again, this representation was false, as respondent had already been paid fees and costs, and the CTA was nearly drained.

Between May and July 2009, respondent paid several liens on behalf of Peter and Lily. Specifically, she paid $1,260 to Dr. Rashti on behalf of Peter and Lily on May 4, 2009; $2,727.03 to Dr. Fierstein on behalf of Peter and Lily on June 30, 2009; $1,300 to Dr. Schmidt on behalf of Peter on May 7, 2009; and $1,500 to Dr. Rozenberg on behalf of Lily on July 14, 2009.

By 2011, respondent still had not disbursed any monies from the settlement to Peter or Lily. On January 24, 2011, Peter sent respondent an email expressing his frustration over not knowing the status of the settlement funds in the *DeGroote* matter.

On January 25, 2011, respondent sent Peter a return email apologizing for taking so long to give him a status report and vowing to "get [him] a check cut." However, despite her reassurance, respondent did not promptly provide Peter with any settlement funds and failed to give Peter and Lily a written accurate accounting of their settlement funds.

On March 28, 2011, respondent sent Peter an email stating that the "trust account can't be touched until the Federal lien resolves." This statement was false, as there was no federal lien on

the trust account. Moreover, respondent did not tell Peter that at the time respondent made this statement only $290.08 remained in the CTA.

In her March 28, 2011 email, respondent attached the unchanged settlement models from her March 26, 2009 email. Since the models were unchanged, they still stated that respondent was entitled to a one-third contingency fee and identified a number of outstanding liens which had already been negotiated and paid. The models also still falsely represented that none of the attorney fees or costs had been disbursed.

On August 27, 2011, Peter, unsatisfied with respondent's status report on his settlement funds, sent respondent an email. In that email, Peter bitterly complained about the fact that he had no idea how the settlement funds were distributed.

On November 1, 2011, Peter and Lily sent a letter to respondent regarding their dissatisfaction relating to respondent's handling of their settlement funds and their intent to go to State Bar if respondent did not come up with satisfactory answers to their questions regarding the distribution of settlement funds. Hearing nothing back from the respondent, Peter and Lily made a complaint against respondent to the State Bar in a November 21, 2011 letter.

On December 28, 2011, State Bar Investigator Craig Matheny (Matheny) called Peter to determine whether the complaint involved unpaid medical liens. Peter told Matheny that all the medical liens had been paid, and, on January 18, 2012, Peter sent a fax to the State Bar informing them that he and Lily were withdrawing their complaint against respondent. Matheny wrote a letter to respondent's former counsel and Peter, stating that the matter was closed at Peter's request.

In January or February 2012, Peter and Lily received $3,000 from Manturuk. On March 16, 2012, Peter wrote a letter to the State Bar requesting that the complaint against respondent be reopened. He explained that he had worked out an agreement with Manturuk, who was

respondent's friend, whereby Manturuk would send them $3,000 immediately and then pay them another $25,000 by the end of February. Also, Peter expected to receive a detailed accounting of respondent's CTA. Peter further explained that by March 14, 2012, he had received only $3,000 and no accounting of the funds. As such, he felt it necessary to contact the State Bar to reopen the case.

On February 6, 2013, the State Bar sent letters to respondent, Peter, and Lily advising them that Peter's complaint had been reopened for further consideration. And on February 14, 2013, a State Bar investigator sent a letter to respondent's former counsel requesting a response to the allegations of misconduct.

On March 26, 2013, respondent met with Peter and tendered $12,000 to him. Peter refused to take the $12,000 and told respondent to give the money Lily instead. Respondent went to Lily's workplace and delivered the $12,000 to her.

Over the four-year span that respondent represented Peter and Lily, she deposited personal funds into her CTA on multiple occasions, as follows:

Date of Deposit	**Amount Deposited**	**Form of Deposit**
August 18, 2008	$200	Check
May 11, 2009	$1,300	Check
May 20, 2009	$2,727.03	Check
June 3, 2010	$6,078.66	Check
July 9, 2010	$1,100	Check
July 9, 2010	$900	Check
August 30, 2010	$3,055.55	Check
March 26, 2012	$4,366.66	Check
April 12, 2012	$2,500	Check
November 29, 2012	$5,500	Check

Respondent used some of these deposited funds to pay Peter's and Lily's medical liens out of her CTA.

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Conclusions

Count One – § 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. "'There is no doubt that the wilful misappropriation of a client's funds involves moral turpitude. [Citations.]' [Citations omitted.]" (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, the law is clear that where an attorney's fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support such a charge. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

By misappropriating $22,880.50 of Peter's and Lily's funds, respondent committed an act involving moral turpitude, dishonesty, or corruption in willful violation of section 6106.

Count Two – § 6106 [Moral Turpitude - Misrepresentation]

By writing to her clients, on March 26, 2009 and March 28, 2011, that fees and costs related to their lawsuit had not been disbursed when respondent knew these statements were false, respondent committed acts involving moral turpitude and dishonesty, in willful violation of section 6106.

Count Four – Rule 4-100(A) [Failure to Maintain Client Funds in Trust]

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. By failing to maintain $12,192.46 in her CTA on Peter's behalf, respondent failed to maintain funds received for the benefit of a client in a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import, in willful violation of rule 4-100(A).

Count Five – Rule 4-100(A) [Failure to Maintain Client Funds in Trust]

By failing to maintain $12,468.46 in her CTA on Lily's behalf, respondent failed to maintain funds received for the benefit of a client in a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import, in willful violation of rule 4-100(A).

Count Six – Rule 4-100(B)(3) [Failure to Account]

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

The written accountings respondent provided to Peter and Lily were, by respondent's own admission, inaccurate or simply untrue. Respondent claimed she gave Peter accurate oral accountings. This testimony was not believable considering it was contradicted by overwhelming documentary evidence. Accordingly, the court finds respondent failed to render an appropriate/accurate accounting to Peter and Lily regarding their settlement funds following Peter's request for such accounting in or about September 2011, in willful violation of rule 4-100(B)(3).

Count Seven – Rule 4-100(A) [Commingling Personal Funds in CTA]

By repeatedly depositing personal funds into her CTA between August 18, 2008 and November 29, 2012, respondent commingled personal funds into a client trust account, in willful violation of rule 4-100(A).

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Aggravation[2]

Prior Record of Discipline (Std. 1.5(a).)

Respondent has one prior record of discipline. Effective January 20, 2000, respondent was publicly reproved with conditions in State Bar Court case no. 97-O-17316. In this single-client matter, respondent stipulated to improperly withdrawing from employment. In mitigation, respondent acted in good faith, demonstrated candor and cooperation, and was suffering from severe financial stress and extreme difficulties in her personal life at the time of the misconduct. No aggravating circumstances were involved.[3]

Multiple Acts/Pattern of Misconduct (Std. 1.5(b).)

Respondent has been found culpable of six acts of misconduct. Respondent's multiple acts of misconduct warrant some consideration in aggravation.

Concealment, Dishonesty, and Overreaching (Std. 1.5(d).)

For about five years respondent did not tell Peter that she had taken money from the CTA for her own personal use. Respondent sent emails to Peter and Lily stating that the trust account could not be touched until the federal lien was resolved when she knew there was no federal lien pending and that she had already spent the settlement funds. Respondent's dishonesty and efforts to conceal her misconduct warrant significant consideration in aggravation.

Harm to Client/Public/Administration of Justice (Std. 1.5(f).)

Respondent's misconduct caused significant financial harm to her clients. Lily was forced to borrow money with a credit card at a high interest rate to make repairs to her home and

[2] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[3] Respondent argued that her prior discipline was remote in time and did not warrant consideration in aggravation. The court disagrees, noting that the present misconduct began about eight years after the effective date of respondent's public reproval. That being said, the court gives respondent's prior discipline limited weight considering it stems from a single count of comparatively minor misconduct that is unrelated to the present misconduct.

Peter was unable to save his business during the economic downturn due to the fact that he did not have money in a savings account. Respondent ultimately paid Peter and Lily $12,000; however, that money was not returned until March 2013, more than four years after it was misappropriated. The financial harm respondent caused her clients warrants some consideration in aggravation.

Failure to Make Restitution (Std. 1.5(i).)

Before and after the present misappropriation, respondent made payments on behalf of Peter and Lily. The evidence before the court indicates the following distribution of payments on behalf of Peter:

$25,000	Settlement Funds Received by Respondent for Peter
-$8,333	Attorney Fees
-$2,974.21	September 12, 2008 Payment of Costs to Manturuk
-$1,500	September 12, 2008 Payment to Medical Provider (Half)
-$630	May 4, 2009 Payment to Dr. Rashti (Half)
-$1,300	May 13, 2009 Payment to Dr. Schmidt
-$1,818.02	June 30, 2009 Payment to Dr. Fierstein (Half)
-$1,500	February 2012 Payment to Peter from Manturuk (Half)
-$6,000	March 26, 2013 Payment to Peter from Respondent (Half)[4]
$944.77	Balance Due to Peter

Similarly, the evidence before the court indicates the following distribution of payments on behalf of Lily:

$25,000	Settlement Funds Received by Respondent for Lily
-$8,333	Attorney Fees
-$2,698.21	September 12, 2008 Payment of Costs to Manturuk
-$1,500	September 12, 2008 Payment to Medical Provider (Half)
-$630	May 4, 2009 Payment to Dr. Rashti (Half)
-$909.01	June 30, 2009 Payment to Dr. Fierstein (Half)
-$1,500	July 14, 2009 Payment to Dr. Rozenberg
-$1,500	February 2012 Payment to Lily from Manturuk (Half)
-$6,000	March 26, 2013 Payment to Lily from Respondent (Half)
$1929.78	Balance Due to Lily

[4] Peter refused respondent's payment of $12,000 and told her to give the money to Lily. It appears that this payment was intended for the benefit of both Peter and Lily.

While respondent has made considerable restitution, she is not entitled to mitigation for having done so under the pressure of disciplinary proceedings. The outstanding restitution owed to Peter and Lily warrants some consideration in aggravation.

Mitigation

Good Character (Std. 1.6(f).)

Respondent presented testimony or statements from six character witnesses attesting to her honesty and good character. These witnesses demonstrated some understanding of the charges against respondent, as they were generally aware of the charges, but focused on respondent's commingling. By and large, respondent's character witnesses were of the opinion that she made an honest mistake. Respondent's positive character evaluations came from a wide range of references and warrant some consideration in mitigation.

Community Service and Pro Bono Activities

Respondent has been active in community service and pro bono activities. She has conducted pro bono work in asylum cases and has served as a court appointed special advocate for several years. Respondent's community service and pro bono work are entitled to some consideration in mitigation.

Cooperation with the State Bar (Std. 1.6(e).)

Respondent entered into a partial stipulation as to facts and admission of documents. Respondent's cooperation preserved court time and resources, and merits some consideration in mitigation.

Discussion

Standard 1.1 provides that the primary purposes of 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. (*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.) Standard 1.7 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances. 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. 1.7(a).)

Standards 2.1(a), 2.2(a), and 2.7, among others, apply in this matter. The most severe sanction is found at standard 2.1(a) which recommends disbarment for intentional or dishonest misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate.

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.)

The State Bar urges the court to disbar respondent from the legal profession. Respondent, on the other hand, argued for a discipline short of disbarment. While the court gives consideration to respondent's mitigation, the severity of the present misconduct coupled with her concealment and dishonesty is cause for serious concern.

Honesty is the fundamental rule of ethics, "without which the profession is worse than valueless in the place it holds in the administration of justice' [Citations.]" (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. (*Sevin v. State Bar* (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated loan agreement]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations to the State Bar]; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

Cases involving client deceit, misappropriation, and lack of insight have been known to warrant disbarment. (*Kelly v. State Bar* (1988) 45 Cal.3d 649 [disbarment for $20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party with no prior record in mitigation and no aggravation]; and *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 [disbarment for $40,000 misappropriation, intentionally misleading client with mitigation for emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar].)

Here, respondent misappropriated over $24,000. Undoubtedly, respondent's family dynamics played a significant role in this misconduct. Respondent's representation started out flawed when she failed to clearly establish the terms of her services through a written retainer agreement. Respondent likely took liberties that she would not otherwise have taken had the clients not been family.

Had respondent's misconduct been limited to misappropriation and if she had been forthright and accommodating with her clients, then, considering the family dynamics at play, a discipline less than disbarment may have been appropriate. Sadly, however, respondent's misconduct went well beyond misappropriation, as she lied to conceal her misdeeds. For several

years, respondent deceived her uncle and his wife into believing that their money was being held in trust awaiting distribution. And while respondent argued that her uncle gave her permission to withdraw the settlement funds, this assertion was belied by her email correspondence with him.

Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law, the court finds that respondent's disbarment is necessary to protect the public, the courts, and the legal community; to maintain high professional standards; and to preserve public confidence in the legal profession.

Recommendations

It is recommended that respondent Eugenia Yehudit Zacks-Carney, State Bar Number 181811, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

Restitution

The court also recommends that respondent be ordered to make restitution to the following payees:

(1) Peter Zacks in the amount of $944.77, plus 10% interest per annum from March 23, 2009; and

(2) Lily Carballo in the amount of $1,929.78, plus 10% interest per annum from March 23, 2009.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

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. Failure to do so may result in disbarment or suspension.

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 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: August _____, 2014

Pat McElroy
Judge of the State Bar Court