

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 12-O-12830-DFM
)	
FRED MARTIN CHARNESS,)	DECISION INCLUDING DISBARMENT
Member No. 44961,)	RECOMMENDATION AND
)	INVOLUNTARY INACTIVE
A Member of the State Bar.)	ENROLLMENT ORDER
_____)	

INTRODUCTION

Respondent **Fred Martin Charness** (Respondent) is charged here with two counts of misconduct involving a single client matter. The counts include allegations that Respondent willfully violated (1) rule 4-100(A) of the Rules of Professional Conduct¹ (failure to maintain client funds in trust account); and (2) Business and Professions Code² section 6106 (moral turpitude - misappropriation). The State Bar had the burden of proving the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

¹ Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

² Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on December 10, 2013. The matter was then assigned to Judge Richard Honn of this court for handling. On January 6, 2013, Respondent filed his response to the NDC.

An initial status conference was held in the matter on January 24, 2014. At that time, the case was given a trial date of June 4, 2014, with a two-day trial estimate.

On May 9, 2014, the case was reassigned to the undersigned.

Trial was commenced and completed on June 4-5, 2014, followed by a period of post-trial briefing. The State Bar was represented at trial by Senior Trial Counsel Michael Glass. Respondent was represented at trial by Lawrence Adamsky.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the stipulation of undisputed facts filed by the parties at the time trial commenced, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in the State of California on January 15, 1970, and has been a member of the State Bar at all relevant times.

Case No. 12-O-12830 (PEIC Matter)

Respondent operated a small law firm in West Hills, California, focusing his practice on handling collection matters for various clients. He was assisted in the practice by his daughter, who was also an attorney, and by her husband, who was not. Although Respondent had represented clients throughout the state, by September 2009, he was concerned that his law practice was failing.

On or about April 6, 2010, Jill Acton (Acton), on behalf of Personal Express Insurance Company (PEIC), employed Respondent to represent PEIC in a subrogation claim against Government Employees Insurance Company (GEICO) pursuant to an oral 33% contingency fee agreement plus costs.

On or before November 2, 2010, Respondent settled PEIC's subrogation claim against GEICO for \$13,949.72. On November 2, 2010, Acton, on behalf of PEIC, signed a settlement release with regard to the \$13,949.72 settlement and returned it to Respondent on November 3, 2010.

On or before November 15, 2010, Respondent received the \$13,949.72 settlement check from GEICO, made payable to PEIC and Respondent. He then personally endorsed the check and had it deposited in his client trust account (CTA) at Wells Fargo Bank on November 15, 2010. Respondent was the sole person having authority to withdraw or transfer funds from the CTA.³

The parties have stipulated, and this court finds, that PEIC was entitled to receive \$9,299.81 of those funds as its share of the settlement. Respondent was obligated both to forward those funds to his client promptly and to maintain his client's portion of the funds in his CTA until he did so. He did neither.

At the end of the day prior to the deposit of the PEIC funds into Respondent's CTA, the balance of that account was \$1,503. At the time that the funds were deposited into the account on November 15, 2010, money from another source was also deposited, resulting in a total deposit that day of \$21,949.72. From November 15 through November 18, 2010, the balance in the account was steadily reduced until it dipped on November 18, 2010, to \$8,826,

³ There is no evidence or contention that anyone other than Respondent was responsible for any of the CTA transactions relevant in this proceeding.

approximately \$473 less than the amount belonging to PEIC. The reductions in the account during that four-day period included the use of the funds to cover previously-issued checks and repeated transfers of funds by Respondent, directed primarily to his operating account, totaling \$10,315.

Thereafter, during the period November 19, 2010 to November 24, 2010, four additional deposits, totaling \$11,388, were made into the account, but Respondent's online transfers of funds during that same period totaled \$11,800, exceeding the amount of new money deposited into the account. At the same time, the remaining funds in the CTA continued to be depleted by the bank's payments of checks previously-issued on the account. As a result of all of those transfers and cleared checks, at the close of business on November 24, 2010, the net balance of funds in Respondent's CTA was \$201.27, representing a misappropriation by Respondent of more than \$9,000 of PEIC's funds.

November 25, 2010, was Thanksgiving Day. Respondent and his wife had traveled to the desert to celebrate the holiday there. On that day, Respondent made two additional online transfers of funds from his CTA to his operating account, effectively depleting all funds in his CTA. The first transfer was for \$175.00; the second was for \$25.00. After these two withdrawals, the balance in the CTA was \$1.27.

On Friday, November 26, 2010, the bank was again open and resumed processing checks previously issued by Respondent on the CTA. Because there was essentially no money in the account on that day, the account was immediately overdrawn. By the end of that business day,

the balance of the account was [-\$4,225.38], meaning that Respondent had now misappropriated all of the \$9,299.81 belonging to PEIC, as well as client funds belonging to others.⁴

On Monday, November 29, 2010, when no additional funds were deposited by Respondent into the CTA, Wells Fargo Bank began to “reverse” the checks that had previously been cleared on the prior Friday. This would, of course, result in the payees of these checks being notified that the checks had bounced. Respondent testified at trial that most of those payees would have been his clients. The bank’s actions also resulted in numerous overdraft charges being levied against the account.

Respondent had been depressed about the financial problems with his law firm since at least September 2009, when he complained to his doctor, Dr. Joshua Trabulus, and was prescribed Lexapro as an anti-depressant. This prescribed medication was subsequently augmented by Dr. Trabulus in late 2009 or early 2010 to include Wellbutrin. However, in September 2010, Dr. Trabulus examined Respondent and noted that he was “doing well.”

On November 28-29, 2010, Respondent was emotionally overwhelmed by the financial crisis that he now faced. Both his daughter and her husband worked for him, and he was no longer able to pay them.⁵ He had misappropriated thousands of dollars of client funds as a temporary salve for his financial problems, but the balance of his client trust account was now a negative number and numerous checks that he had previously issued to clients were now being bounced by the bank. Rather than endure the embarrassment of having to disclose these

⁴ During the trial, Respondent’s evidence indicated that he had misappropriated during this period the funds of two clients. Because the misappropriation from the second client is not alleged in the NDC, it cannot be the basis for an independent finding of culpability. It can, however, be treated as an aggravating factor by this court. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.)

⁵ Despite the growing financial problems of the firm, Respondent’s daughter testified at trial that her father had paid her salary up to and including November 2010. Although her answer was somewhat equivocal, she indicated that her monthly salary was in the range of \$10,000.

problems to his family (from whom he had apparently been concealing his concerns) and others, he decided to commit suicide. To that end, he took an overdose of Lexapro and a medication prescribed to his wife, not knowing that an overdose of Lexapro could not be fatal. He was discovered by his wife and taken to a hospital.

Respondent was hospitalized at BHC Alhambra Hospital (a psychiatric hospital) from November 29, 2010 to December 3, 2010. He was then released to the care of an attending psychiatrist and has continued under her care to the present time.

After his suicide attempt, pursuant to the advice of his therapist, he did not return to the law office for four to six weeks. He returned to work in mid-January 2011.

Between February 16, 2011, and April 21, 2011, Acton sent Respondent several e-mails requesting payment of PEIC's portion of the settlement. Respondent received the e-mails but did not respond or pay PEIC its portion of the settlement.

On May 24, 2011, Acton sent Respondent an e-mail stating that Acton had contacted GEICO and discovered both that GEICO had previously sent Respondent the settlement check for \$13,949.72 on November 9, 2010, and that GEICO's check had cleared GEICO's bank. Respondent received the e-mail. On May 24, 2011, Respondent sent Action an e-mail stating that Respondent would send PEIC its portion of the settlement. Despite this written assurance, Respondent then did not pay PEIC its portion of the settlement.

More than a month later, on July 12, 2011, Acton sent Respondent a letter stating that Acton would make a complaint to the State Bar of California if Respondent did not pay PEIC its portion of the settlement. Respondent received the letter but still did not immediately pay PEIC its portion of the settlement.

It was not until August 4, 2011, that Respondent sent PEIC a check in the amount of \$9,299.81, drawn on Respondent's CTA, as PEIC's portion of the settlement with GEICO.

Count 1 – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]

Rule 4-100(A) of the Rules of Professional Conduct requires that all funds received or held for the benefit of clients by an attorney or law firm, including advances for costs and expenses, shall be deposited and maintained in a designated client trust account. By failing to maintain in his client trust account the settlement funds received by him for PEIC, Respondent willfully failed to comply with rule 4-100(A).⁶

Count 2 –Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.) “[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]” (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.)

Respondent's conduct in using for other purposes the \$9,299.81 he received and was required to hold in trust for PEIC constituted an intentional misappropriation by him of those funds and an act of moral turpitude, in willful violation of section 6106.

⁶ However, the conduct underlying this violation is essentially the same as that underlying the finding, below, that Respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in willful violation of section 6106. Accordingly, the court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,⁷ std. 1.5.)⁸ The court finds the following with respect to aggravating circumstances.

Multiple Acts of Misconduct/Uncharged Violation

Respondent's misappropriation of all of the PEIC funds did not result from a single act of misconduct by him. Instead, portions of the funds were misappropriated in a series of withdrawals. Each of these acts constituted an individual act of misconduct.

Further, as noted above, the evidence makes clear that Respondent had also mishandled other funds in the client trust account and allowed numerous checks to be returned for insufficient funds. These were also acts of misconduct.

Respondent's multiple acts of misconduct is an aggravating factor, and his uncharged misappropriation of funds belonging to others is a further aggravating circumstance. (Stds. 1.5(b) and 1.5(d).)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.)⁹ The court finds the following with regard to mitigating factors.

No Prior Discipline

Respondent had practiced law in California for 40 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is entitled to significant weight in

⁷ All further references to standard(s) or std. are to this source.

⁸ Previously standard 1.2(b).

⁹ Previously standard 1.2(e).

mitigation. (Std. 1.6(a).) Respondent is entitled to some mitigating credit even though his conduct was serious. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13 [noting that the Supreme Court has repeatedly applied former standard 1.2(e)(1) in cases involving serious misconduct and citing *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029].)

Cooperation

Respondent did not admit culpability in the matter but entered into an extensive stipulation of facts, thereby assisting the State Bar in the prosecution of the case. For such conduct, Respondent is entitled to some mitigation. (Std. 1.6(e); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50; cf. *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts but “very limited” where culpability is denied].)

Emotional Difficulties

Extreme emotional difficulties may be considered mitigating where it is established by expert testimony that they were responsible for the attorney’s misconduct and shown by clear and convincing evidence to no longer pose a risk of future misconduct. (Std. 1.6(d); *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.)

This court declines to find that Respondent’s emotional difficulties are a mitigating factor here. While it is clear that Respondent’s depression in November 2010 was the cause of his attempted suicide, the evidence was not clear and convincing that this depression was the cause of his earlier misappropriation of client funds. The medical record of Respondent’s doctor in September 2010 indicated that Respondent was “doing well” at that time. This doctor had previously prescribed Lexapro and Wellbutrin to Respondent. The expert testimony offered by

Respondent at trial, to the extent that it suggested that Respondent's history of depression was the cause of his misconduct, was not persuasive. The expert was not Respondent's long-term treating therapist, but instead an individual selected by Respondent's counsel and hired solely for the purpose of formulating an opinion for use at the trial of this matter. Moreover, that expert's opinions were based solely on the history provided to him by Respondent for that purpose. During the trial of this matter, Respondent was shown to be a poor historian regarding the events leading up to his suicide attempt, and there was a complete lack of any testing by the expert regarding the reliability of Respondent's reporting.

Moreover, the testimony of this doctor, that Respondent's emotional condition would not cause any future misconduct, was also not persuasive. This testimony was expressly based on the expert's assessment that Respondent's depression was being controlled by his use of Lexapro and Wellbutrin. At trial, however, it was developed that Respondent had been prescribed the same drugs months prior to the misappropriation of his client's funds. In other words, if the depression was the cause of the misappropriation, a prescription for Lexapro and Wellbutrin did not prevent that misconduct from occurring. If it was not a sufficient prophylactic measure in the past, its ongoing prescription does not provide convincing evidence that it will always be an adequate safeguard in the future.

Character Evidence

Respondent presented character testimony from a half-dozen individuals. The individuals included two attorneys, a client, his current paralegal, his accountant, and a friend. (Std. 1.6(f).) While the court accords Respondent some nominal mitigation credit for this evidence, it is not significant. (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477; *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at p. 190;

In the Matter of Respondent K (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359.) While the witnesses had been provided a copy of the NDC in this matter, that pleading was prepared after the State Bar had adopted the short form of pleadings and failed to provide any real information regarding the nature of Respondent’s actual misconduct. The letters and testimony of these character witnesses did not show any knowledge at all of Respondent’s mental health issues or any appreciation of his actual actions.¹⁰ (See *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 280; *In re Aquino* (1989) 49 Cal.3d 1122, 1131 [seven witnesses and 20 letters of support not “significant” evidence of mitigation because witnesses unfamiliar with details of misconduct].)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.1; *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.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and

¹⁰ The paralegal qualified her statement with the comment, “I have read the charges by the State Bar of California wherein they accuse Mr. Charness of having his trust account dip below a certain level. I am sure that if there was any violation it was through inadvertence on the part of Mr. Charness and I am aware of the fact that any and all discrepancies have been taken care of with his clients.” (Ex. 1002.) One of the two attorneys referred to Respondent’s conduct as “alleged mis-deeds” and reported that “Mr. Charness told me that he thought the charges had been dropped since his clients had been satisfied and he received a letter from the State Bar advising him that there would be no further inquiries. He was very surprised when the State Bar brought the present action against him for ethical violations.” (Ex. 1005.) The other attorney, who does contract work for Respondent, opined, “I believe the type of activity which the State Bar deems a violation could well have happened to any attorney who practices law in the State of California.” (Ex. 1006.)

uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier, supra*, 1 Cal. State Bar Ct. Rptr. at p. 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

In the present proceeding, the applicable standard regarding discipline for Respondent’s misconduct is found in standard 2.1(a). Standard 2.1(a) provides: "Disbarment is appropriate for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate." Here, the amount of money misappropriated by Respondent was clearly not insignificant, and the mitigating circumstances have not been demonstrated to clearly predominate.

A review of the case law also confirms that disbarment is the appropriate discipline to recommend here. Misappropriation of client funds has long been viewed by the courts as a particularly serious ethical violation. Misappropriation breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal.3d 649,

656.) The Supreme Court has consistently stated that misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar, supra*, 45 Cal.3d at p. 656; *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) The Supreme Court has imposed disbarment on attorneys with no prior record of discipline in cases involving a single misappropriation. (See, e.g., *In re Abbott* (1977) 19 Cal.3d 249 [taking of \$29,500, showing of manic-depressive condition, prognosis uncertain].) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with over 11 years of practice and no prior record of discipline was disbarred for misappropriating approximately \$29,000 in law firm funds over an 8-month period. In *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney misappropriated almost \$7,900 from his law firm, coincident with his termination by that firm, and was disbarred. (See also *In the Matter of Blum, supra*, 3 Cal. State Bar Ct. Rptr. 170 [no prior record of discipline, misappropriation of approximately \$55,000 from a single client]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 511 [misappropriation of nearly \$40,000, misled client for a year, no prior discipline]; *Kennedy v. State Bar* (1989) 48 Cal.3d 610 [disbarment for misappropriation in excess of \$10,000 from multiple clients and failure to return files with no prior misconduct in eight years]; and *Kelly v. State Bar, supra*, 45 Cal.3d 649 [disbarment for misappropriation of \$20,000 and failure to account with no prior discipline in seven years].)

RECOMMENDED DISCIPLINE

Disbarment

The court recommends that respondent **FRED MARTIN CHARNESS**, Member No. 44961, be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

California Rules of Court, Rule 9.20

The court further recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **FRED MARTIN CHARNESS**, Member No. 44961, be involuntarily enrolled as an

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inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(D)(1).)¹¹

Dated: September _____, 2014

DONALD F. MILES
Judge of the State Bar Court

¹¹ An inactive member of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice law, or to even hold himself or herself out as entitled to practice law. (*Ibid.*) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)