

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES

In the Matter of ) Case No.: **12-O-17395-RAP**  
)  
**MATTHEW HOWARD POWELL,** ) **DECISION INCLUDING DISBARMENT**  
) **RECOMMENDATION AND ORDER OF**  
**Member No. 87602,** ) **INACTIVE ENROLLMENT**  
)  
A Member of the State Bar. )

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

In this contested disciplinary matter, respondent **MATTHEW HOWARD POWELL** is charged with three counts of misconduct in one client matter: not following the law; not obeying a court order; and misappropriating client funds.

Having considered the facts and the law, the court finds respondent culpable of on all counts, and recommends, and among other things recommends that respondent be disbarred from the practice of law.

The State Bar of California (State Bar) was represented by Deputy Trial Counsel Ross Viselman. Respondent represented himself.

**Significant Procedural History**

The Notice of Disciplinary Charges (NDC) initiating this case was filed on June 12, 2013, and respondent filed a response thereto on July 12, 2013.

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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 case was submitted for decision on October 15, 2013 after trial was held that same date.

**Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on November 29, 1979, and has been a member of the State Bar of California at all times since that date.

**Case No. 12-O-17395 – The Carling Matter**

**Facts**

On December 14, 2010, Gregory Charles Carling employed respondent to file a bankruptcy petition. On December 19, 2010, respondent filed a Chapter 11 bankruptcy petition for him. (*In re Gregory Charles Carling*, United States Bankruptcy Court, S. D. Cal., case number 10-22206-PB7.) Respondent represented Carling until October 4, 2012, when he terminated respondent’s employment and substituted in another attorney.

Respondent received \$12,250 in attorney fees from Carling as follows:

<b><u>Date</u></b>	<b><u>Amount</u></b>
December 19, 2010	\$6,205
February 7, 2011	\$2,000
February 26, 2011	\$2,000
April 4, 2011	\$2,000

Respondent did not seek nor did the bankruptcy court approve the payment of any of those attorney fees as required by 11 U.S.C., section 327 and related rules.

Respondent did not seek nor did the bankruptcy court approve continuing his employment as Carling’s attorney after the petition was filed.

On March 7, 2013, the bankruptcy court ordered respondent to disgorge the attorney fees that he received for Carling’s bankruptcy. He was specifically ordered to “disgorge \$12,250 ... within ten (10) days of the entry of this order.” He received this order but has not disgorged the entire \$12,250 fee.

On April 19, 2011, while the bankruptcy matter was pending, Carling sold his residence in San Diego, California, resulting in net sale proceeds of \$272,862.48. These funds were transferred from Chicago Title Company to respondent, who deposited them into his US Bank client trust account (CTA). He was required to maintain the funds in his CTA unless otherwise ordered by the bankruptcy court.

On July 5, 2011, respondent paid \$101,250 in broker fees from the funds in his CTA pursuant to the bankruptcy court's order. He was required to maintain the balance of \$171,612.48 in the CTA.

On January 17, 2012, after the bankruptcy court appointed Richard M. Kipperman as the Chapter 7 trustee in Carling's case, it also ordered respondent to transfer the remaining \$171,612.48 to the trustee immediately upon his appointment.

On March 26, 2012, respondent transferred \$152,000 in Carling's funds from the CTA to the trustee. Respondent has not transferred the remaining \$19,519.97 of Carling's funds to the trustee.

In July 2012, the balance in respondent's CTA was \$92.51. Accordingly, respondent misappropriated \$19,427.46.<sup>2</sup>

In July 2012, Susan C. Stevenson, an attorney retained by the trustee, Kipperman, filed suit against respondent seeking recovery of \$31,862.48, that is, the \$19,612.48 from the sale of Carling's residence and the \$12,250 in fees the court ordered disgorged. A default judgment was entered on March 12, 2013 against respondent in the amount of \$32,155.48, which included \$293 in costs.

During an October 2, 2012, meeting with Kipperman and Stevenson, respondent admitted fault for removing funds from his CTA but told them he was shocked that the funds were not

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<sup>2</sup> This amount represents \$19,519.97 minus \$92.51.

there. He also admitted to serious, ongoing personal financial problems and to improperly spending money from his CTA. He also agreed to self-report his activities to the State Bar and the trustee by October 19, 2012. He did not self-report any improper conduct as agreed, so, on October 24, 2012, Stevenson sent a letter to Haeji Hong, an attorney in the Office of the United States Trustee, outlining the allegations of misconduct against respondent, with a copy also sent to the State Bar.

In June 2013, respondent agreed to resolve the judgment against him and repay all funds to the bankruptcy estate. The stipulation, which was approved by the bankruptcy court on August 7, 2013, required respondent to make \$1,500 monthly payments to the Chapter 7 trustee. As of the time of trial, respondent had paid \$12,500 as ordered.

Respondent contends that he did not willfully remove the \$19,612.48 from his CTA and was shocked to learn the money was not there. Respondent testified that, when he removed the funds from his CTA, he was suffering from depression, which affected his memory. He had always been able to calculate the amounts in his CTA in his mind but, because of his depression, he made a mistake, which led to the removal of the funds. Respondent testified that he currently is in counseling and taking medication to treat his depression. No expert medical evidence was entered in the record of this matter to support respondent's contentions about his depression.

From the record in this matter, it is clear that respondent willfully misappropriated \$19,519.97 in funds belonging to the Carling bankruptcy estate. Respondent's claims that depression and mistake lead him to remove funds from his CTA are without merit. Respondent admitted to Kipperman and Stevenson that, at the time he removed the funds from his CTA, he was experiencing ongoing personal financial problems and admitted to spending the money.

## **Conclusions**

### ***Count One - (§ 6068, subd. (a) [Attorney's Duty to Support Constitution and Laws of United States and California])***

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California.

The court finds clear and convincing evidence that respondent failed to support the law in willful violation of section 6068, subdivision (a) by receiving attorney fees without first obtaining bankruptcy court approval for employment in Carling's bankruptcy matter.

### ***Count Two - (§ 6103 [Failure to Obey a Court Order])***

Section 6103 provides, in relevant part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment.

The court finds clear and convincing evidence that respondent did not obey a court order in willful violation of section 6103 by not disgorging as ordered the \$12,250 he received as attorney fees in Carling's bankruptcy matter.

### ***Count Three - (§ 6106 [Moral Turpitude])***

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

The court finds clear and convincing evidence that respondent willfully committed an act of moral turpitude in violation of section 6106 by dishonestly or with gross negligence misappropriating \$19,519.97 of Carling bankruptcy estate funds.

## **Aggravation<sup>3</sup>**

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

Respondent engaged in multiple acts of misconduct.

### **Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)**

Respondent's misconduct caused harm to clients, the public and to the administration of justice. Bankruptcy estate or court resources were spent in hiring an attorney, filing a civil action against respondent and otherwise pursuing him to collect the funds he removed from his CTA and the funds ordered disgorged. Also, since attorney fees approved by the trustee have priority over unsecured creditor claims, after paying Stevenson, there was less money to pay unsecured creditor claims.

## **Mitigation**

### **No Prior Record (Std. 1.2(e)(i).)**

Respondent has been an attorney since November 1979 has no prior record of discipline, a significant mitigating factor despite the seriousness of the misconduct.<sup>4</sup>

### **Extreme Emotional/Physical Difficulties (Std. 1.2(e)(iv).)**

There is no expert medical evidence on the record to support respondent's claim of depression or any evidence of his recovery from depression.

### **Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)**

Respondent cooperated in the State Bar investigation and entered in an extensive stipulation to facts and admission of documents.

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<sup>3</sup> All references to standards (std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

<sup>4</sup> Case law permits a long record of practice without discipline to be treated as mitigation notwithstanding the seriousness of the present misconduct. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13).)

## **Other**

Respondent presented the declaration testimony of three family members, including his daughter, who is also an attorney and works with him. He also presented the declaration of another attorney. All of the declarants were aware of the charges filed against him and credibly attested to his good character for honesty and integrity; his dedication to his clients; and his dedication to the law. The Supreme Court has usually accorded significant weight to the character evidence of judges and attorneys “on the assumption that such persons possess a keen sense of responsibility for the integrity of the legal profession,” especially when these character witnesses are aware of prior wrongdoing. (Cf. *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1068.) However, respondent’s character evidence did not represent a wide range of references from both the general and legal communities. (See *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387.) Accordingly, the court discounts the weight afforded this evidence.

## **Discussion**

The purpose of State Bar 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), 2.3 and 2.6 apply in this matter. The most severe sanction is prescribed by standard 2.2(a) which suggests disbarment for the willful misappropriation of entrusted funds or property unless the misappropriation is insignificantly small or if the most compelling mitigating circumstances clearly predominate. In that case, the discipline recommended must be no less than a one-year actual suspension irrespective of mitigating circumstances.

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 Silvertan* (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.)

This case involves violations of sections 6103, 6106 and 6068, subdivision (a). In aggravation, the court considered harm and multiple acts of misconduct. Mitigating factors included no prior disciplinary record, candor and cooperation and some good character evidence.

The State Bar recommends disbarment. The court agrees. Respondent willfully misappropriated over \$19,000 in bankruptcy estate funds in the Carling matter and only admitted his misconduct when confronted by Kipperman and Stevenson. The court acknowledges respondent’s admission of misconduct and his restitution efforts but notes that restitution only started after litigation against him was filed and resolved. The amount misappropriated is not insignificantly small nor is there compelling mitigation to merit deviation from the disbarment recommendation called for by standard 2.2(a). Accordingly, the court so recommends.

### **Recommendations**

It is recommended that respondent **MATTHEW HOWARD POWELL**, State Bar Number 87602, 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. 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: December 17, 2013

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RICHARD A. PLATEL  
Judge of the State Bar Court