

PUBLIC MATTER

FILED

vs

JUN 29 2015

STATE BAR COURT OF CALIFORNIA

**STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO**

HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No. 12-O-17912-LMA
)	
STEVEN GREGORY KAPLAN,)	
)	DECISION AND ORDER OF INVOLUNTARY
Member No. 137381,)	INACTIVE ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION¹

In this contested, original disciplinary proceeding, respondent **STEVEN GREGORY KAPLAN** is found culpable on the following two counts of misconduct in a single client matter: one count of failing to deposit \$90,000 in client funds into a trust account (rule 4-100(A)); and one count of engaging in an act involving moral turpitude and dishonesty by misappropriating \$9,628.32 in client funds (§ 6106).

For the reasons set forth *post*, the court will recommend that respondent be disbarred. Moreover, in light of the court's disbarment recommendation, the court will order that respondent be involuntarily enrolled as an inactive member of the State Bar of California under section 6007, subdivision (c)(4).

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.



PERTINENT PROCEDURAL HISTORY

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) on June 4, 2013. Respondent filed his response to the NDC on July 17, 2013.

On October 4, 2013, the parties filed a partial stipulation as to facts and admission of documents. Thereafter, the matter was first called for trial on October 7, 2013. But, after the trial began on October 7, 2013, the matter was abated.

On January 20, 2015, the matter was unabated and reassigned to the undersigned State Bar Court Judge for all purposes. Thereafter, the matter was called for a new trial on April 10, 2015. The court took the matter under submission for decision at the end of trial on April 10, 2015.

The State Bar was represented by Deputy Trial Counsel Ross Viselman. Attorney Edward O. Lear represented respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in California on December 7, 1988, and has been a member of the State Bar of California since that time.

Credibility

After carefully observing respondent testify before it and after carefully considering, inter alia, respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as a whole, the court finds that much, if not most, of respondent's testimony related to the contested

issues lacks credibility.² (See, generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.) This adverse credibility determination is supported by the documentary evidence.

Findings of Fact

David Benullo, David Goldstein, and David Klawans developed a story/movie script titled *Mucho Dinero*, which they wanted to sell. The three men agreed to split any sales proceeds as follows: Benullo and Goldstein would each receive 42.5 percent of the proceeds, and Klawans would receive 15 percent of the proceeds.

Benullo, Goldstein, and Klawans retained respondent to represent them in the sale of the script to Producer Blake Freeman. On about January 10, 2012, Benullo, Goldstein, Klawans, and respondent entered into a written Deal Memorandum, which provides that respondent is to be paid 10 percent of Benullo's share of the sales proceeds and 7.5 percent of both Goldstein's and Klawans's shares of the sales proceeds for respondent's "professional services in negotiating and drafting the terms of the purchase of the Script by Producer" Freeman.

In June 2012, Benullo, Goldstein, Klawans, and Freeman agreed on a sales price of \$90,000. Freeman paid the \$90,000 in two installments. On August 1, 2012, Freeman paid respondent \$65,000. And, on September 6, 2012, Freeman paid respondent the remaining balance due of \$25,000 (\$90,000 less \$65,000). Even though respondent received the money on behalf of his three clients, respondent did not deposit either the \$65,000 payment or the \$25,000 payment into a trust account. Instead, he deposited both payments into a checking account at

///

² Of course, the court's rejection of much of respondent's testimony " 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' " (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265; see also *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

Wells Fargo Bank that is owned by Rainstorm Entertainment, Inc., which is respondent's movie production company.

Under the terms of the January 10, 2012, deal memorandum, based on the \$90,000 sales price, respondent was entitled to a fee of \$7,706.20 $[(\$90,000 \times .425 \times .1) + (\$90,000 \times .425 \times .075) + (\$90,000 \times .15 \times .075)]$. When respondent received the \$65,000 payment, respondent withheld \$5,565.58 as his fee on the \$65,000 payment and then properly paid Benullo, Goldstein, and Klawans their respective shares of the remaining \$59,434.42 (\$65,000 less respondent's \$5,565.58 fee).

When respondent received the \$25,000 payment, respondent withheld \$2,140.62 as his fee on the \$25,000 payment and then properly paid Benullo and Klawans their shares of the remaining of \$22,859.38 (\$25,000 less \$2,140.62). Respondent, however, failed to pay Goldstein his share of the remaining \$22,859.38, which was \$9,828.25.

On September 6, 2012, Goldstein inquired about the status of the \$25,000 payment. Respondent or respondent's agent told Goldstein that his funds were not available for disbursement until October 12, 2012. However, on October 12, 2012, respondent did not pay Goldstein any portion of Goldstein's \$9,828.25 share. Even though Goldstein asked respondent for his share of the \$25,000 payment on October 17, 2012, respondent did not pay Goldstein any portion of the \$9,828.25 for almost a full year. On September 13, 2013, respondent paid Goldstein the \$9,828.25 together with interest thereon. Moreover, September 13, 2013, was more than year after respondent withheld and collected his \$2,140.62 fee from the \$25,000 payment and three months after the State Bar filed and served the NDC in this proceeding on respondent.

Without question, as of September 6, 2012, respondent should have held Goldstein's \$9,828.25 share of the \$25,000 payment in a trust account for Goldstein, but respondent failed to

do so. Moreover, by September 17, 2012, the balance in Rainstorm Entertainment's account at Wells Fargo Bank (i.e., the bank account into which respondent deposited the \$25,000 payment) had dropped below the \$9,828.25 respondent owed to Goldstein to \$7,130.51. And, by October 2, 2012, the balance in that account had dropped to a negative \$61.91 even though respondent had not paid any portion of the \$9,828.25 to Goldstein or to a third-party on Goldstein's behalf.

Conclusions of Law

The court addresses count two before it addresses count one.

Count Two - (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 into a trust account and that no funds belonging to the attorney may be deposited therein or otherwise commingled therewith except for limited exceptions not relevant here. "An attorney violates [rule 4-100(A)] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]" (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.)

In count two, the State Bar charges that respondent willfully violated rule 4-100(A) when respondent failed to deposit into and hold in a trust account the \$65,000 and \$25,000 installment payments that respondent received from producer Freeman on behalf of Benullo, Goldstein, and Klawans.

Respondent denies that he was obligated to deposit or hold the \$65,000 and \$25,000 payments in a client trust account because, according to respondent, he did not have an attorney-client relationship with Benullo, Goldstein, or Klawans. Respondent insists that Benullo, Goldstein, and Klawans did not retain him to act only as an entertainment manager, and not as their attorney. Respondent asserts that, as an entertainment manager on deals like the sale of the Mucho Dinero script to producer Freeman, he does not perform legal services and his role is

limited to discussing general deal points and managing the communications between his clients and the other party.

Respondent denies performing legal services for the Benullo, Goldstein, or Klawans. Respondent claims that producer Freeman's attorney drafted the Mucho Dinero purchase agreement and that he (i.e., respondent) merely reviewed the agreement to make sure it contained the agreed upon terms.

First, as noted *ante*, respondent's testimony that Benullo, Goldstein, and Klawans retained him only as an entertainment manager and not as an attorney lacks credibility. Second, respondent's testimony is rebutted by the plain language of the January 10, 2012, deal memorandum, which provides that respondent is to be paid for his "professional services in negotiating and drafting the terms of the purchase of the Script by Producer [Freeman]." Providing professional services in negotiating and drafting the terms of a purchase agreement for constitutes the practice of law. (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 ["the practice of law encompasses all of the activities engaged in by attorneys in a representative capacity ..."].) Even if respondent did not draft the Mucho Dinero purchase agreement, respondent engaged in the practice of law when he reviewed the agreement for Benullo, Goldstein, and Klawans to make sure it contained the agreed upon provisions.

Moreover, even assuming *arguendo* that respondent was acting only as Benullo, Goldstein, and Klawans's entertainment manager as respondent claims, respondent was still required to adhere to standards of the legal profession and to comply with rule 4-100(A) with respect to the \$65,000 and \$25,000 payments he received for Benullo, Goldstein, and Klawans. It has long been settled that "[a]ttorneys must conform to professional standards in whatever capacity they are acting in a particular matter. [Citations.]" (*Crawford v. State Bar* (1960) 54

Cal.2d 659, 668.) That is because “[p]eople call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel.” (*Ibid.*)

What is more, when an attorney agrees to receive or hold funds for one who is not a client, the attorney “must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed.” (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632, and cases there cited.) In other words, when an attorney receives or holds funds for a nonclient, the attorney owes the nonclient the same fiduciary duties that the attorney owes to his or her clients as set forth in rule 4-100, including the fiduciary duty to safely keep all funds received or held for the nonclient by segregating the funds and depositing them into a properly denominated trust account that does not have any funds belonging to the attorney in it. (See A. Hess, G. Bogert, & G. Bogert, *Law of Trusts and Trustees* § 598 [fiduciaries have a duty to safely keep funds held for a beneficiary by segregating the funds and depositing them into a trust account at a carefully selected bank].) In short, even if Benullo, Goldstein, and Klawans were not respondent’s clients, respondent was still required to comply with rule 4-100(A) by depositing and holding the \$65,000 and \$25,000 payments into a trust account.

The record clearly establishes that respondent willfully violated rule 4-100(A) as charged when respondent deposited and held the \$65,000 and the \$25,000 installment payments in Rainstorm Entertainment’s checking account at Wells Fargo Bank instead of depositing and holding those payments into a trust account. By depositing and holding those two payments in Rainstorm Entertainment’s checking account, respondent put his clients’ funds in outright jeopardy of attachment by Rainstorm Entertainment’s and respondent’s creditors, the very jeopardy that rule 4-100(A) is designed to prevent. (*Peck v. State Bar* (1932) 217 Cal. 47, 51 [rule 4-100(A)’s proscription of commingling “was adopted to provide against the probability in

some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money”].)

Count One - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption whether the act is committed in the course of the practice of law constitutes cause for suspension or disbarment. In count one, the State Bar charges that respondent willfully violated section 6106 by misappropriating, for his own use and benefit, the \$9,828.25 that he received and held in trust for his client Goldstein. The misappropriation of client funds is established whenever the actual balance of the bank account in which the client's funds were deposited drops below the amount credited to that client. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 123.) As noted *ante*, the balance in the bank account in which respondent deposited the \$25,000 payment first dropped below \$9,828.25 on September 17, 2012, and then thereafter continued to drop such that on October 2, 2012, the account was overdrawn by \$61.91.

The record clearly establishes that respondent engaged in acts involving both moral turpitude and dishonesty in willful violation of section 6106 from September 17, 2012, to October 2, 2012, when deliberately misappropriated for his own use and benefit the \$9,828.25 that he received and held in trust for his client Goldstein. The fact that respondent finally made restitution to Goldstein in September 2013 does not vitiate the dishonest misappropriation.

The court rejects for want of credibility respondent's convoluted claim that he could not pay Goldstein the \$9,828.25 because Wells Fargo Bank froze or off set his or Rainstorm Entertainment's account to collect the amount respondent owed on line of credit in default. The court's adverse credibility determination is supported by the fact that respondent failed to substantiate his claim with documentary evidence from Wells Fargo Bank or otherwise proffer

any corroborating evidence. A court may consider a witness's failure to produce corroborating evidence as an indication that his or her testimony is not credible. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122; see also *Breland v. Traylor Engineering & Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426 ["A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse."]; Evid. Code, §§ 412 , 413.)

The bank records for Rainstorm Entertainment account in which respondent deposited the \$65,000 and \$25,000 payments reflect that between September 17, 2011, and October 2, 2012, respondent used the \$9,828.25 he held in trust for Goldstein in the ordinary course of his day-to-day operation of Rainstorm Entertainment.

Count Three - (Rule 4-100(B)(4) [Promptly Pay/Deliver Client Funds])

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive. In count three, the State Bar charges that respondent willfully violated rule 4-100(B)(4) when he failed to pay Goldstein \$9,828.25 after Goldstein asked respondent for it on October 17, 2012.

Even though the record clearly establishes the charged rule 4-100(B)(4) violation, the court has already relied on respondent's failure to pay Goldstein \$9,828.25 to find respondent culpable of dishonest misappropriation of \$9,828.25 under count one, *ante*. Thus, the rule 4-100(B)(4) violation is duplicative of the section 6106 violation found in count one. Because the appropriate level of discipline for an act of misconduct does not depend on how many rules or statues proscribe the misconduct, it is unnecessary, if not inappropriate, to find

redundant/duplicative violations. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148; see also *In the Matter of Van Sickle* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 980, 992.)

In short, count three is DISMISSED with prejudice as duplicative of count one.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

Aggravation

Harm to Client (Std. 1.5(f).)

Respondent's misconduct caused significant harm to Goldstein. Respondent deprived Goldstein of the use of his \$9,828.25 for almost a full year.

Mitigation

No Prior Record (Std. 1. 6(a).)

Respondent has no prior record of discipline. Respondent is entitled to significant mitigation for his almost 24 years of misconduct free practice even though respondent's present misconduct is serious. (Std. 1.6(a); *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13 [noting that the Supreme Court 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 and *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029].)

Good Character (Std. 1. 6(f).)

One attorney testified and two attorneys submitted declarations attesting to respondent's honesty and trustworthiness. Even though respondent presented only three good character witnesses and not a wide range of witnesses, the court finds it appropriate to give respondent some mitigating credit for his good character evidence. (Cf. *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [three witnesses give significant mitigation].)

///

Candor/Cooperation to Victims/State Bar (Std. 1. 6(e).)

Respondent is also entitled to some mitigation for his cooperation in entering into an extensive partial stipulation as to facts. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [extensive mitigation is afforded to attorneys who both stipulate to facts and admit culpability].)

Extreme Emotional/Physical/Mental Difficulties (Std. 1.6(d).)

Respondent is also given mitigation because, at the time of the misconduct, respondent was suffering from extreme stress, anxiety, and financial difficulties caused by a contentious, contested divorce and by the possibility of having to face adverse litigation in Europe.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but 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 profession. (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 afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court does not follow the standards talismanically. 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.’ ” (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.)

///

Next, 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* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 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.)

The applicable disciplinary standard is standard 2.1(a), which 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.”

The amount of money Respondent misappropriated was not insignificantly small. While the mitigating circumstances in the present case are significant, they are not “compelling.” Moreover, respondent’s misappropriation did not result from gross negligence or from his failure to supervise the conduct of others. Instead, his misuse of Goldstein’s \$9,828.25 was intentional.

Misappropriation of client funds has long been viewed as a particularly serious ethical violation because it 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.) Therefore, “misappropriation of client funds ... warrants disbarment unless the most compelling mitigating circumstances clearly predominate. [Citations.]” (*In the Matter of Spaiht* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518.) This is true even in cases that involve a single misappropriation by an attorney who has no prior record of discipline. (E.g., *In re Abbott* (1977) 19 Cal.3d 249, 253-254 [disbarment for misappropriation of \$29,500 in a single client matter despite substantial mitigation for attorney’s 13 years of discipline-free practice and for attorney undergoing

treatment to address emotional problems]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129 [disbarment for misappropriation of less than \$7,900].)

The record fails to establish a compelling reason that justifies a departure from the disbarment recommendation provided for in standard 2.1(a). (*In re Silverton, supra*, 36 Cal.4th at p. 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Accordingly, the court will recommend that respondent be disbarred.

Recommendations

Discipline

The court recommends that respondent **Steven Gregory Kaplan**, State Bar number 137381, 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 **Steven Gregory Kaplan** 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 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

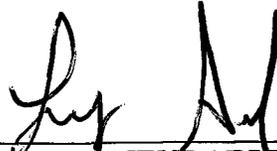
Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that **Steven Gregory Kaplan** be involuntarily enrolled as an inactive member of the

State Bar of California effective three calendar days after the service of this decision and order by mail.³ (Rules Proc. of State Bar, rule 5.111(D)(1).)

Dated: June 29 2015.



LUCY ARMENDARIZ
Judge of the State Bar Court

³ 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.)

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on June 29, 2015, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

EDWARD O. LEAR
CENTURY LAW GROUP LLP
5200 W CENTURY BLVD #345
LOS ANGELES, CA 90045

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

ROSS E. VISELMAN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on June 29, 2015.



Mazie Yip
Case Administrator
State Bar Court