

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES

|                                   |   |                                      |
|-----------------------------------|---|--------------------------------------|
| In the Matter of                  | ) | Case No.: 13-J-15596-DFM             |
|                                   | ) |                                      |
| <b>THOMAS EDWARD KENT,</b>        | ) | <b>DECISION INCLUDING DISBARMENT</b> |
|                                   | ) | <b>RECOMMENDATION AND</b>            |
| <b>Member No. 107238,</b>         | ) | <b>INVOLUNTARY INACTIVE</b>          |
|                                   | ) | <b>ENROLLMENT ORDER</b>              |
| <u>A Member of the State Bar.</u> | ) |                                      |

**INTRODUCTION**<sup>1</sup>

This disciplinary proceeding is based on Respondent Thomas Edward Kent’s professional misconduct found in another jurisdiction.

On September 3, 2013, upon finding that Respondent had committed professional misconduct, including the misappropriation of over \$270,000, the United States Bankruptcy Court of the Central District of California (the “bankruptcy court”) issued a disciplinary order permanently suspending Respondent from practicing law in all divisions of the bankruptcy court and imposing additional sanctions. Thereafter, the decision of that court became final.

As discussed more fully below, in view of Respondent's serious misconduct, the evidence in aggravation, and the absence of any significant mitigating factor, the court recommends that Respondent be disbarred.

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

### **Significant Procedural History**

The State Bar initiated this proceeding by filing a notice of disciplinary charges (NDC) on December 9, 2013. On January 13, 2014, Respondent filed a response to the NDC.

A one-day trial was held on March 5, 2014. The State Bar was represented by Deputy Trial Counsel Timothy G. Byer and Senior Attorney Eli Morgenstern. Respondent was represented by attorney Edward O. Lear of Century Law Group, although Respondent did not personally appear for the trial. At the conclusion of the trial, the court submitted the matter for decision.

### **Statutory Overview**

This proceeding is governed by section §6049.1. Section 6049.1, subdivision (a), provides, in pertinent part, that a certified copy of a final order by a court of record of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction, shall be conclusive evidence that the member is culpable of professional misconduct in this state. After the receipt by the court of such evidence, the issues in this streamlined proceeding are limited to: (1) whether the bankruptcy court proceeding lacked fundamental constitutional protection; (2) whether, as a matter of law, Respondent's culpability in that proceeding would not warrant the imposition of discipline in California under applicable California laws and rules; and (3) the degree of discipline to be imposed on Respondent in California. (Bus. & Prof. Code, section 6049.1, subd. (b); *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 353.) The burden of proof with regard to the first two issues is on the Respondent. (Section 6049.1, subd. (b).)

No evidence was offered in this matter that the bankruptcy court proceeding lacked due process. Nor was any argument advanced that the misconduct found in the bankruptcy court proceeding would not warrant the imposition of discipline in California under applicable

California laws and rules. The only disputed issue raised by the parties during trial was the level of discipline.

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

The following findings of fact are based on Respondent's response to the NDC, the findings in the bankruptcy proceeding, and the documentary evidence admitted at trial.

#### **Jurisdiction**

Respondent was admitted to the practice of law in California on December 3, 1982, and has been a member of the State Bar at all relevant times.

#### **Case No. 12-J-15596**

In June 2012, Respondent was counsel of record for two debtors, James Grove Seely III and Gabriela Paul, in a bankruptcy action previously filed in the bankruptcy court. On June 18, 2012, Respondent was ordered by the bankruptcy court to deposit \$270,357.51, the full amount of the proceeds of a personal injury settlement involving his clients, into a client trust account (CTA). The court also ordered that such funds were to remain in that trust account unless and until otherwise ordered by that court.

Respondent then deposited the \$270,357.51 of settlement funds into his client trust account at Chase Bank. Although there was no order authorizing any disbursements from the account, he then began to making surreptitious withdrawals of those funds from the account for his own purposes. On August 31, 2012, the balance of the account had dipped to \$144,352. Thereafter, the funds in the account continued to be reduced. On October 31, 2012, the balance was \$ 136,052. On November 30, 2012, the balance was \$77,552. On December 31, 2012, the balance was \$18,052. On January 31 and February 28, 2013, the balance was only \$152. On March 29, 2013, even that meager amount had been further reduced to \$58.89.

The \$270,357 settlement funds had been ordered held in a trust account because of competing claims to the funds in the bankruptcy proceeding. When a resolution of those competing claims was reached and approved by the bankruptcy court in early 2013, Respondent was then directed by the bankruptcy court in a series of orders to release \$125,000 from the trust account to the Century Park East Homeowners Association (the HOA). On April 15, 2013, Respondent presented a client trust account check to counsel for the HOA, knowing that there were insufficient funds in his client trust account to honor the check. That check was subsequently rejected for insufficient funds.

Respondent was then ordered by the court to release the balance of the settlement monies to the debtors, his clients. Even at the time of the disciplinary decision in September 2013 by the bankruptcy court, he had not done so. There was no evidence in the instant proceeding that Respondent has repaid any of the funds since that time.

In the prior disciplinary decision, the bankruptcy court concluded that Respondent had failed to maintain funds in his client trust account, in violation of both rule 4-1000 of the California Rules of Professional Conduct and the order of the bankruptcy court. In addition, it found that Respondent had “converted the Settlement Funds to his own account and uses, without Court authority.”

**Section 6103 [Failure to Obey Court Order]**

Section 6103 provides, in pertinent part: “A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, ... constitute causes for disbarment or suspension.”

Respondent was ordered by the bankruptcy court to deposit and maintain the \$270,351 settlement funds in a trust account and not to withdraw those funds except pursuant to a court

order. Respondent's actions in subsequently mishandling the funds constituted a willful violation by him of that court order, in willful violation of section 6103.

**Section 6106 [Moral Turpitude – NSF Checks]**

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. “Writing checks when one knows or should know that there are not sufficient funds to cover them manifests a disregard of ethics and fundamental honesty, at least if such conduct occurs repeatedly. Writing bad checks may, by itself under some circumstances, constitute moral turpitude.” (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11, citing *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1088; *Bambic v. State Bar* (1985) 40 Cal.3d 314, 324; see also *Rhodes v. State Bar* (1989) 49 Cal.3d 50, 58; *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 315.)

By issuing a \$125,000 check from his CTA against insufficient funds, when he knew that there were insufficient funds in the CTA to cover the check, Respondent committed an act of moral turpitude, in willful violation of section 6106. (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 426; *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.)

**Section 6106 [Moral Turpitude – Misappropriation]**

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

Rule 4-100(A) requires that “funds received or held for the benefit of clients” shall be deposited and maintained in a client trust account (CTA). It is well-established that “an attorney has a ‘personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.’ [Citation.] These duties are non-delegable.

[Citation.]” (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411.)

Under this non-delegable duty, an attorney must maintain client funds in the CTA until

outstanding balances are settled. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal State Bar Ct. Rptr. 113, 123.)

Respondent violated rule 4-100(A) by allowing money from the original \$270,357.51 of settlement funds to be removed from his client trust account until only \$58.89 remained on March 29, 2013. (*In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 504.) The fact that the balance of Respondent's CTA repeatedly fell below the amount required to be held in trust for his client supports a finding of willful misappropriation in violation of rule 4-100(A). (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795-796 [trust account violation may be willful for disciplinary purposes when caused by "serious and inexcusable lapses in office procedure"].)

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, supra*, 4 Cal. State Bar Ct. Rptr. at p. 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.) The settlement funds were entrusted to Respondent in the bankruptcy action as a fiduciary for safekeeping. By withdrawing those funds for his own personal use, Respondent's action constituted a misappropriation of such funds in violation of rule 4-100(A) and an act of moral turpitude in violation of section 6106. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034; *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829-830 [attorney's willful misappropriation of trust funds usually compels conclusion of moral turpitude].)

### **Aggravation/Mitigation**

Although the findings of culpability are subject to the process set forth in section 6049.1, such is not true with regard to issues of aggravation and mitigation. Instead, the burdens of proof with regard to those issues are the same as in any other case. (*In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 163-164.) The State Bar had the burden of proving aggravating circumstances by clear and convincing evidence; Respondent had the burden of proving mitigating circumstances. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,<sup>2</sup> stds. 1.5 and 1.6.<sup>3</sup>) The court finds the following with regard to those issues:

#### **Aggravation**

##### **Prior Discipline**

Respondent has been disciplined on two prior occasions, both disciplines resulting in actual suspension.

In 1997, the California Supreme Court ordered Respondent suspended for one year, stayed, and placed on probation for three years, with conditions of probation including 30 days of actual suspension in State Bar case nos. 93-O-14812, 93-O-14836, 94-O-14245, 95-O-13308, 96-O-07541, 96-O-07544, and 96-O-07622 (Supreme Court Order No. S062403). Respondent's stipulated culpability in those cases included, inter alia, violations of rules 3-110(A), 3-700(A)(2), and 4-100(B)(3).

On October 3, 2000, the California Supreme Court ordered Respondent suspended for 18 months, stayed, and placed on probation for three years, with conditions of probation including 45 days of actual suspension in State Bar case no. 98-O-02453. Respondent's stipulated culpability in those cases included, inter alia, violations of sections 6125 and 6126 as a result of his unauthorized practice of law during the above 30-day period of actual suspension.

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<sup>2</sup> All further references to standard(s) or std. are to this source.

<sup>3</sup> Previously standards 1.2(b) and 1.2(e).

This history of prior disciplines is an aggravating circumstance, albeit one reduced in weight by the remoteness of the last discipline and the absence of any discipline during the period from October 2000 until the misconduct giving rise to this proceeding. (Std. 1.8(b).)

### **Multiple Acts of Misconduct**

Respondent's multiple acts of misconduct is an aggravating factor.

Although Respondent's acts of misappropriation were all directed at the funds from the same source, each time that he elected to dip into those funds for his own purposes represented a separate act by him in violation of his duties as an attorney. That this conduct continued over a period of months and did not end until the funds were effectively depleted is a significant aggravating factor. (Std. 1.2(b)(ii); see also *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279.)

### **Mitigation**

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

Except for the discipline-free period of practice by Respondent from October 2000 until late 2012, discussed above, no mitigating factors were shown by the evidence presented to this court.

## **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. (*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 uniform application of disciplinary measures.” (*In re Silverton* (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, supra*, 49 Cal.3d at pp. 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.)

Standard 1.7(a) [previously designated standard 1.6(a)] provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.1(a)<sup>4</sup>, 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.”

In considering the application of standard 2.1(a), the amount of the misappropriated funds certainly cannot be characterized by this court as being “insignificantly small.” Nor is there any mitigation in the current situation, let alone any compelling mitigation.

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<sup>4</sup> Previously standard 2.2(a).

Turning to the case law, 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, supra*, 53 Cal.3d at p. 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 649, 656; *Waysman v. State Bar, supra*, 41 Cal.3d at p. 457; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) The Supreme Court has also 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].)

Here, Respondent was culpable of numerous acts of misappropriation, ultimately totaling more than \$270,000. His numerous acts of improperly dispersing the funds for his own purposes violated the court order entrusting him with the funds. Then, when ordered by the court to distribute a portion of the money, he then issued a \$125,000 check, knowing that there were insufficient funds in his client trust account to cover the amount of the check.

Under such circumstances, it is this court's conclusion that a disbarment recommendation is both appropriate and necessary to protect the profession and the public.

### **RECOMMENDED DISCIPLINE**

#### **Disbarment**

The court recommends that respondent **Thomas Edward Kent**, Member No. 107238, 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.

#### **Restitution**

It is further recommended that Respondent make restitution as follows:

1. To the Century Park East Homeowners Association in the amount of \$125,000, plus 10% interest per annum from April 1, 2013 (or to the Client Security Fund to the extent of any payment from the fund to such party, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
2. To James Grove Seely III and Gabriela Paul in the amount of \$125,000, plus 10% interest per annum from April 1, 2013 (or to the Client Security Fund to the extent of any payment from the fund to either of such individuals, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

**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 **Thomas Edward Kent**, Member No. 107238, be involuntarily enrolled as an 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).)<sup>5</sup>

Dated: March \_\_\_\_\_, 2014.

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**DONALD F. MILES**  
Judge of the State Bar Court

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<sup>5</sup> 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.)