**FILED MAY 16, 2014**

**STATE BAR COURT OF CALIFORNIA**

**HEARING DEPARTMENT - LOS ANGELES**

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| In the Matter of | ) | Case Nos.: **13-O-11212-RAH** |
| | ) | (13-O-12635) |
| **BARRY IRA BESSER,** | ) | |
| | ) | **DECISION AND ORDER OF** |
| **Member No. 89147,** | ) | **INVOLUNTARY INACTIVE** |
| | ) | **ENROLLMENT** |
| A Member of the State Bar. | ) | |

## Introduction[1]

Respondent Barry Ira Besser misappropriated more than $43,000 from two clients because he faced financial problems arising out of his wife's medical condition. Further, respondent lied to his clients about the status of the misappropriated funds in his trust account and has not repaid the funds taken from these clients. Despite a lengthy and distinguished career as a lawyer without prior discipline, respondent's disbarment is necessary to adequately protect the public.

## Significant Procedural History

The Notice of Disciplinary Charges (NDC) was filed on November 8, 2013. Trial commenced on March 10, 2014. Senior Trial Counsel Ashod Mooradian represented the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent represented himself.

[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.

On the first day of trial, the court granted the parties' stipulation to amend the NDC in two places. Accordingly, paragraph 56 was removed in its entirety and a portion of paragraph 59 (commencing at page 9, line 6 with "by stating to Melanie…" and continuing through the end of that sentence on line 10) was also removed. This matter was submitted for decision on the same day it began, March 10, 2014.

## 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. 13-O-11212 – The Motakef Matter**

**Facts**

On July 21, 2008, Mehri Motakef's (Motakef) legal service plan provider, ARAG, retained respondent on behalf of Motakef to renegotiate a settlement agreement reached by Motakef's prior counsel in a pending civil action entitled *Motakef v. Woodcrest Homes Association, et al.*, filed in the Orange County Superior Court (the Woodcrest HOA litigation). Respondent's first task in renegotiating the settlement agreement was to file an opposition to a Motion to Enforce Settlement Agreement then pending in the Woodcrest HOA litigation.

On July 23, 2008, a substitution of counsel was filed in the Woodcrest HOA litigation naming respondent as counsel of record for Motakef. On October 23, 2008, the renegotiation of the settlement agreement in the Woodcrest HOA litigation was completed and Motakef executed the new agreement.

On December 10, 2008, respondent deposited a $1,200 check from Allstate Insurance Co., received as part of the settlement for the Woodcrest HOA litigation, into his client trust account at Farmers and Merchants Bank (CTA). On January 6, 2009, respondent deposited a $2,000 check from Woodcrest Homeowners Association, received as part of the settlement for

the Woodcrest HOA litigation, into his CTA. That same day, respondent also deposited a $21,500 check from State Farm Insurance Co., received as part of the settlement for the Woodcrest HOA litigation, into his CTA. On February 2, 2009, respondent deposited a $2,500 check from the Interinsurance Exchange of the Automobile Club, received as part of the settlement for the Woodcrest HOA litigation, into his CTA.

As of February 2, 2009, respondent was required to maintain $27,200 in his CTA pending payment of a lien to Motakef's prior attorney and disbursement of the remaining balance to Motakef. Between February 3 and June 18, 2009, respondent withdrew $27,200 of the funds he was to hold on behalf of Motakef and Motakef's prior counsel.

On September 20, 2011, respondent sent an email to Motakef and stated that he could not release any funds to Motakef because the IRS was auditing respondent and would not allow respondent to release any funds from his CTA to Motakef. This statement was false since respondent knew he had already used all of Motakef's funds.

On September 21, 2011, Motakef sent an email to respondent stating that earlier that day she discussed respondent's failure to release her funds with an attorney from ARAG who informed her that the IRS does not place holds on attorney trust accounts but only on an attorney's personal account. Motakef then requested, among other things, that respondent meet with her and provide proof of IRS action against the $27,200.

On September 23, 2011, respondent sent a reply email to Motakef where he complained that Motakef was trying to ruin his reputation by complaining to ARAG. Respondent also stated in his email that his failure to release any funds from his CTA to Motakef was due to "…a personal matter, so [he] can't go into a lot of details." Respondent also stated in the email that he was hopeful that he could soon release "at least a portion of the money" from his CTA.

At the time respondent made this statement to Motakef, he knew that there were no funds to release because he had already used all of Motakef's funds. Respondent admits that the IRS was not preventing respondent from releasing any funds.

To date, respondent has failed to provide Motakef with an accounting for the $27,200 in settlement funds he received on Motakef's behalf. Respondent has also failed to pay any portion of the $27,200 to Motakef.

**Conclusions**

***Count One – 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 in a client trust account and no funds belonging to the attorney or law firm may be deposited therein or otherwise commingled therewith, except for limited exceptions. By not maintaining at least $27,200 in his CTA between February 3 and June 18, 2009, respondent failed to maintain the balance of funds received for his client's benefit in his CTA, in willful violation of rule 4-100(A).

***Count Two – § 6106 [Moral Turpitude – Misappropriation]***

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. By misappropriating $27,200 of Motakef's funds, respondent committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

***Count Three – § 6106 [Moral Turpitude – Misrepresentation]***

By falsely stating to Motakef that the IRS was preventing him from releasing Motakef's funds from his CTA when he knew he had already used all of Motakef's funds and by falsely stating to Motakef that his failure to release any funds from his CTA was due to a "personal

matter" when he knew he had already used all of Motakef's funds, respondent committed acts involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

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

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property. By failing to provide Motakef with an accounting for the $27,200 in settlement funds he received on Motakef's behalf, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession, in willful violation of rule 4-100(B)(3).

***Count Five – 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. By failing to pay Motakef her portion of the $27,200 on or about September 23, 2011, or anytime thereafter, respondent failed to pay promptly, as requested by a client, any funds in respondent's possession which the client is entitled to receive, in willful violation of rule 4-100(B)(4).

**Case No. 13-O-12635 – The Mata Matter**

**Facts**

On May 1, 2008, Victoria Mata (Victoria) retained respondent on behalf of her minor daughter Amanda Mata (Amanda) for representation with respect to the injuries and damages that Amanda received as a result of being struck by a vehicle while she was a pedestrian in a crosswalk.[2] On May 16, 2008, Amanda began treatment for her injuries with Bijan Zardouz, M.D. (Dr. Zardouz) and signed an authorization and Doctor's Lien (Lien). On July 17, 2008,

[2] Amanda is now over 18 years old.

respondent signed the Lien as attorney of record for Amanda and sent the signed Lien to Dr. Zardouz.

On April 20, 2010, respondent filed a civil action entitled *Amanda Mata v. Gloria Jean Rasco, et al.*, in the Orange County Superior Court (the Rasco litigation). In connection with the filing of the Rasco litigation, respondent paid a $355 filing fee on behalf of Amanda.

On December 6, 2010, all claims in the Rasco litigation were settled for $25,000. On December 30, 2010, respondent received and deposited the $25,000 settlement check into his CTA.

As of December 30, 2010, respondent was required to maintain $16,311.67 in his CTA pending payment of all medical expenses including the Lien and disbursement of the remaining balance to Amanda. Between February 10, 2011 and March 13, 2012, respondent withdrew $16,160.48 of the funds he was to hold on behalf of Amanda and the other medical providers, including Dr. Zardouz.

On January 6, 2011, respondent sent an email to Victoria notifying her that he received the $25,000 settlement check and had deposited it into his CTA. On April 15, 2011, Victoria emailed respondent requesting that he send the balance of the settlement to Amanda and to let them know how much is owed to the doctors. Victoria also stated that in January 2011, Kaiser Permanente confirmed to her that there were no outstanding bills from Amanda's accident.

On April 15, 2011, respondent replied to Victoria's email stating that Amanda's share of the settlement is $16,666.67, listing all of the known medical costs and stating that unless Victoria can provide respondent written confirmation from Kaiser that they are not seeking reimbursement he can't distribute any funds to Amanda because the exact amount due and owing to Kaiser as reimbursement was unknown. Then, respondent concluded his email by stating, "Believe me, I don't benefit from hanging on to that money." At the time respondent made this

statement to Victoria in his April 15, 2011 email, respondent knew that he had already withdrawn or transferred $7,220.15 of the $16,311.67 without distributing those funds to the client or lien holders.

Respondent never told Victoria or Amanda, at any relevant time, that he was repeatedly withdrawing or transferring funds from the $16,311.67 he was required to maintain in his CTA on Amanda's behalf.

On August 7, 2012, a representative from Dr. Zardouz's office sent a letter to respondent requesting that Dr. Zardouz's bill be paid. On October 22, 2012, Dr. Zardouz sent a letter to respondent demanding payment of his bill by November 10, 2012. On December 21, 2012, Dr. Zardouz agreed to accept $800 as full and final payment of Dr. Zardouz's bill. On December 29, 2012, respondent sent Dr. Zardouz $800 as full and final payment of Dr. Zardouz's bill.

Respondent has not turned over any portion of the $15,511.67 in remaining outstanding settlement funds to Victoria or Amanda.

**Conclusions**

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

By not maintaining at least $16,311.67 in his CTA between February 10, 2011 and March 13, 2012, respondent failed to maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import.

***Count Seven – § 6106 [Moral Turpitude – Misappropriation]***

By misappropriating $16,160.48 of the funds he was to hold on behalf of Amanda and the other medical providers, including Dr. Zardouz, between February 10, 2011 and March 13, 2012, respondent committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

***Count Eight – § 6106 [Moral Turpitude – Misrepresentation]***

By misleading Victoria by making a statement implying that respondent was holding $16,666.67 on behalf of Amanda in his CTA when he knew that this statement was false and misleading because $7,220.15 had already been withdrawn by or transferred to respondent for his own purposes, respondent committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

**Aggravation**[3]

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

The actions of respondent in these two client matters represented multiple acts of misconduct. This is an aggravating factor.

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

Motakef and Amanda suffered significant harm by the loss of use of the funds which respondent misappropriated. This is an aggravating factor.

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

Respondent failed to repay Motakef and Amanda all or any part of the amount he misappropriated. This is a significant aggravating factor.

**Mitigation**

**No Prior Record (Std. 1.6(a).)**

Respondent has been an attorney since 1979 with no record of discipline prior to this matter. Even though the current misconduct is serious, respondent is still entitled to significant mitigation as a result of his lengthy unblemished record.

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

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

At the time of the misconduct respondent's wife was suffering from serious illnesses which required his attention and involved extensive financial hardship. These illnesses – psoriatic arthritis coupled with bladder problems – resulted in her pulse and blood pressure dropping to zero, before she was revived. Respondent incurred over $100,000 in medical bills from the hospital. As a result, he had difficulties paying for food, utilities, and the mortgage on their home.

However, there was no competent medical evidence involving either his wife's condition or the impact her health had on his ability to make proper financial decisions with the clients' funds. The only evidence of his wife's illness other than the testimony of respondent, were two pictures of her in her hospital bed. Consequently, the weight given to respondent's evidence of emotional and physical difficulties is somewhat limited.

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

Respondent entered into an extensive stipulation covering virtually all areas of culpability. Respondent's cooperation preserved court time and resources and warrants significant mitigation credit.

**Good Character (Std. 1.6(f).)**

Respondent presented outstanding testimony from those he has worked with over the years regarding his good character. Several judges and attorneys who knew respondent well and were fully apprised of the misconduct testified on respondent's behalf. They uniformly commented favorably on his contributions to the Orange County Bar Association and the general profession of law. Several of these witnesses knew respondent when he served for over 27 years on the Conference of Delegates for the State Bar of California (now known as the California Conference of Bar Associations).

Respondent has been recognized by his peers as an outstanding attorney in Orange County and he also has received commendations from the Orange County Bar Association for his commitment as a volunteer. He has participated on continuing legal education panels and has volunteered as an arbitrator and temporary judge. Further, in media and professional publications, he has been recognized as a "top" or "superb" attorney. He has also assisted in drafting legislation which was passed into law by the Legislature. Finally, respondent is a member of the Rotary Club, an international charitable organization.

Respondent is entitled to significant mitigation for the above evidence of good character.

**Remorse/Recognition of Wrongdoing (Std. 1.6(g).)**

During the trial, respondent showed sincere and credible remorse for his misconduct. Respondent, however, has made no payments in restitution to his clients. While respondent has testified as to his serious financial challenges, he presented no clear and convincing evidence of his inability to repay all or at least part of the amount he misappropriated from his clients. As such, the court finds that he should receive only minimal mitigation for his honest remorse expressed during trial.

## Discussion

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.1.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any

other aggravating or mitigating factors. And if two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.7(a).)

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

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urges the court to disbar respondent from the legal profession. Respondent, on the other hand, advocates a limited period of actual suspension. While the court gives significant consideration to respondent's mitigation evidence, the severity of the present misconduct and the significant harm he caused are deeply troubling.

While the misappropriation of client funds is extremely serious misconduct, the court is equally concerned by respondent's willingness to lie to his clients to mask his misconduct. Honesty is the fundamental rule of ethics, "without which the profession is worse than valueless in the place it holds in the administration of justice' [Citations.]" (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. (*Sevin v. State Bar* (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated

loan agreement]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations to the State Bar]; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

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

Here, respondent misappropriated more money than either *Kelly* or *Spaith*. Moreover, respondent prolonged the discovery of his misappropriations by lying to his clients. And despite his misappropriations, respondent has not taken any tangible steps toward returning his clients' funds and making them whole. Accordingly, despite the significant factors in mitigation, the court finds that the interests of public protection mandate a recommendation of disbarment.

## Recommendations

It is recommended that respondent Barry Ira Besser, State Bar Number 89147, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

**Restitution**

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

(1) Mehri Motakef in the amount of $27,200, plus 10% interest per annum from February 3, 2009; and

(2) Amanda Mata in the amount of $15,511.67, plus 10% interest per annum from February 10, 2011.

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

**California Rules of Court, Rule 9.20**

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

**Costs**

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

**Order of Involuntary Inactive Enrollment**

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: May _____, 2014

RICHARD A. HONN
Judge of the State Bar Court