

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO**

In the Matter of)	Case No. 04-O-12255-JMR
DAVID ROHM CUNNINGHAM,)	DECISION AND ORDER OF
Member No. 38892,)	INVOLUNTARY INACTIVE
A Member of the State Bar.)	ENROLLMENT

I. Introduction

In this default matter, respondent **David Rohm Cunningham** is charged with four counts of professional misconduct: (1) misappropriation of more than \$136,000 in partnership funds and assets; (2) concealment; (3) breach of fiduciary duty to his business partnership; and (4) failure to report a judgment in a civil action for fraud to the State Bar.

The court finds, by clear and convincing evidence, that respondent is culpable of three of the four counts of misconduct. In view of respondent's serious misconduct and the evidence in aggravation, despite his 31 years of practice of law without any prior record of discipline, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

On August 31, 2005, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address. (Rules Proc. of State Bar, rule 60.) The mailing was received on September 8, 2005, and the return receipt was signed by "Courtney Bone." Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On May 26, 2005, before the NDC was filed, respondent met with Deputy Trial Counsel Maria Oropeza and a State Bar investigator. Thereafter, on June 13, respondent corresponded with

the State Bar.

On September 30, 2005, the State Bar attempted to telephone respondent at his membership records telephone number but the number was out of service.

On the State Bar's motion, respondent's default was entered on October 19, 2005, and respondent was enrolled as an inactive member on October 22, 2005, under Business and Professions Code section 6007(e).¹ An order of entry of default was sent to respondent's official membership records address but was returned as undeliverable.

Respondent did not participate in the disciplinary proceedings. The court took this matter under submission on November 8, 2005, following the filing of the State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on June 30, 1966, and has since been a member of the State Bar of California.

A. The Yountville Partnership Matter

Yountville Office Building Investors, a California limited partnership, doing business as Beard Plaza, (Partnership) was organized as a limited partnership and was operating under the laws of the State of California. Partnership owned and operated a commercial property commonly known as Beard Plaza located at 6540 Washington Street, Yountville, California.

Respondent was one of two managing general partners of the Partnership, acting in a fiduciary capacity and maintaining a fiduciary relationship with the Partnership and its limited partners. As a general manager for the Partnership, respondent was to maintain complete and accurate financial records for the Partnership.

¹All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

Respondent formed his own companies, Butte Red and KLK & Company, which operated as commercial developers.

In 2000, respondent decided that he wanted to leave the Partnership, and he requested that the other partners purchase his interest. The other partners requested from respondent an accounting of all the assets held by the Partnership in order to value respondent's share; respondent did not provide them with an accounting, as requested. Thus, the partners did not and could not assess the value of respondent's Partnership shares and as such did not release respondent from the Partnership.

Between September 1997 and August 2002, while acting as a managing general partner for the Partnership, respondent had access to the Partnership's bank accounts and custody of moneys in the form of rents and other property belonging to the Partnership. Any funds received from the Beard Plaza tenants as rent payments were to be used for the benefit of the Partnership.

In response to the Partnership's refusal to release respondent from the Partnership, respondent decided to give himself unauthorized loans to benefit himself and Butte Red.

Between September 1997 and August 2002, respondent took money and property belonging to the Partnership and deposited the funds into his own separate accounts or otherwise diverted the funds and property for his own use as follows:

1. Respondent misappropriated the sum of \$67,898.68 from the bank accounts of the Partnership, which included rent payments from the tenants at Beard Plaza. The misappropriation of the funds was done through unauthorized personal loans; and

2. Respondent misappropriated property belonging to the Partnership, by allowing himself unauthorized free rent when he was conducting other businesses out of Beard Plaza. Respondent had an obligation to pay fair market value for the office space he utilized. Respondent misappropriated the rent due to the Partnership in the sum of \$10,800.

During this five-year period, respondent knowingly and intentionally concealed from the Partnership his unauthorized personal loans totaling \$67,898.68 from the Partnership's bank accounts and his failure to pay his office rent, depriving the Partnership of \$10,800, a violation of the Partnership agreement.

While acting as a general partner for the Partnership, respondent also undertook the legal

representation of one of the tenants of Beard Plaza, known as Bouchon Restaurant (Bouchon). Respondent was paid the sum of \$70,000 for his services on behalf of Bouchon.

Without obtaining authority from the Partnership, respondent provided Bouchon with 10 free parking spaces at Beard Plaza with a fair market value of \$58,000. Respondent never reduced the parking agreement with Bouchon to writing or provided the Partnership with any documents delineating the terms of the 10 free parking spaces. Thus, he deprived the Partnership of revenue amounting to \$58,000 by giving Bouchon 10 free parking spaces at Beard Plaza when he was not authorized to do so.

Between September 1997 and August 2002, respondent knowingly and intentionally concealed from the Partnership his representation of Bouchon and the agreement that he entered into granting Bouchon the free parking spaces. Furthermore, respondent intentionally and knowingly concealed his acts of wrongful appropriation of monies and other assets as a fiduciary in his relationship with the Partnership, totaling \$136,698 (\$67,898 + \$10,800 + \$58,000).

In August 2002, respondent was removed as a managing general partner of the Partnership.

B. *Yountville Office v. Cunningham*

The Yountville Partnership sued respondent in *Yountville Office Building Investors, dba Beard Plaza v. David Cunningham et al.*, case No. 26-18725 (*Yountville Office v. Cunningham*). After trial in October and November 2003, the Napa County Superior Court issued a civil judgment on January 7, 2004, against respondent, finding him liable for conversion, constructive fraud, and fraud, suppression of fact and concealment. The two findings of constructive fraud were by clear and convincing evidence. The court ordered respondent to pay the sum of \$161,698.68 in damages to the Partnership, including exemplary and punitive damages of \$25,000 for constructive fraud.

The findings of Napa County Superior Court included the following:

1. Respondent was liable for conversion of monies wrongfully taken from the Yountville Partnership bank accounts in the sum of \$67,898.68 and the sum of \$10,800 for unauthorized free rent that respondent allowed himself at the time that he was conducting other businesses out of the Beard Plaza suite;

2. Respondent was liable for constructive fraud by clear and convincing evidence in that at all times respondent intentionally and knowingly concealed his acts of wrongful appropriation of monies and other assets as a fiduciary in his relationship with the Partnership. He also wrongfully, and without the consent of the Partnership, gave 10 parking spaces to his own client for his own self interest, valued at \$58,000; and

3. Respondent was liable for fraud, suppression of fact and concealment because he knowingly and intentionally concealed and suppressed his activities by withdrawing sums of money from the Partnership bank accounts unrelated to Partnership matters for his own personal and business needs. These acts were done with the intention to deceive and defraud his partners by concealing his wrongful acts from them.

On January 28, 2004, the judgment in *Yountville Office v. Cunningham* was endorsed. Respondent was properly served with a copy of the civil judgment and received it shortly after on or about January 28, 2004.

Respondent should have informed the State Bar of the civil judgment no later than February 27, 2004. To date, he has not reported the civil judgment to the State Bar.

On October 8, 2004, a partial remittitur issued in *Yountville Office v. Cunningham*, granting Yountville their costs and declaring that the judgment entered on January 28, 2004, was final. Respondent received the remittitur shortly after it was issued.

Count 1: Misappropriation (Bus. & Prof. Code, § 6106)

_____ Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

During the period between 1997 and 2002, respondent committed acts of moral turpitude, dishonesty and corruption in wilful violation of section 6106 by misappropriating a total of \$136,698 from the Partnership as follows: (1) \$67,898.68 from the bank accounts of the Partnership in unauthorized personal loans to himself, (2) \$10,800 in unauthorized free rent that respondent allowed himself at the time he was conducting other businesses out of Beard Plaza, and (3) \$58,000 in fair market value for 10 free parking spaces that he provided to his client without the Partnership's authorization.

Count 2: Concealment (§ 6106)

Furthermore, respondent committed acts involving moral turpitude, dishonesty and corruption in wilful violation of section 6106 by knowingly and intentionally concealing his acts of misappropriation (unauthorized personal loans), violations of the Partnership agreement (free parking spaces), and self-dealing (free rent).

Count 3: Breach of Fiduciary Duty (§ 6068, Subd. (a))

The State Bar alleges that by violating the terms of the Partnership agreement and misappropriating the sum of \$136,698.68 from the Partnership, respondent failed to comply with his fiduciary duty to the Partnership, thereby wilfully failed to support the Constitution and laws of the United States and of this state, in wilful violation of section 6068, subdivision (a).

It is well established that respondent, as a general partner, owed fiduciary obligations to the Yountville Partnership, including the duty of good faith and fair dealing and that respondent was not permitted to take unfair advantage. (See *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373.) “Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other.” (*BT-I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410.)

However, because respondent has been charged and found culpable of violating section 6106 in counts 1 and 2 for misappropriation, concealment and violation of the Yountville Partnership agreement, charging that respondent violated his fiduciary duty to the Partnership for the same misconduct serves little purpose. If the misconduct violates a specific Rule of Professional Conduct or statute, there is no need for the State Bar to allege the same misconduct as a violation of an attorney’s duty to obey the law. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 369; *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.) Therefore, count 3 is duplicative and is hereby dismissed with prejudice.

Count 4: Failure to Report Civil Court Judgment re Fraud (§ 6068, Subd. (o)(2))

Section 6068, subdivision (o)(2), requires an attorney to report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of the entry of judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence

committed in a professional capacity.

On January 28, 2004, the Napa County Superior Court endorsed the judgment against respondent for conversion, constructive fraud, and fraud, suppression of fact and concealment.

Respondent was obligated to report the civil judgment to the State Bar on or before February 27, 2004. To date, he has not reported it to the State Bar. His failure to do so was a wilful violation of section 6068, subdivision (o)(2).

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)² However, respondent has no prior disciplinary record in 31 years of practice at the time of his misconduct in 1997, which is a significant mitigating factor. “Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time.” (*In re Young* (1989) 49 Cal.3d 257, 269.)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing, including misappropriating \$136,698 in funds and assets from the Yountville Partnership, concealing his violations of the Partnership agreement, and failing to report the civil judgment to the State Bar. (Std. 1.2(b)(ii).)

Respondent’s misappropriation caused the Partnership substantial financial harm during the five year period. (Std. 1.2(b)(iv).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) The Partnership had to file an action against respondent for his wrongdoings.

Respondent’s failure to participate in this disciplinary matter prior to the entry of his default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

²All further references to standards are to this source.

V. Discussion

The purpose of 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.)

Respondent's misconduct involved acts of moral turpitude. The standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the client. The applicable standards in this matter are standards 1.6, 2.2, 2.3, and 2.6. While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 2.2(a) provides that wilful misappropriation of entrusted funds must result in disbarment absent compelling mitigation. Respondent's misappropriation of more than \$136,000 is significant and there is no compelling mitigation.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person must result in actual suspension or disbarment. As discussed above, respondent's misappropriation and concealment were acts of moral turpitude.

The State Bar contends that respondent's actions, while made in a fiduciary capacity as a partner to the partnership, warrant discipline the same as if it were an attorney-client relationship (*Lewis v. State Bar* (1973) 9 Cal.3d 704). Accordingly, the State Bar argues that cases involving misappropriation of this magnitude warrant disbarment, citing several cases, including *Kelly v. State Bar* (1988) 45 Cal.3d 649 and *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, in support of its recommended discipline.

The court agrees. "An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney. He must maintain proper books of account and records of transactions, and he may not commingle ... funds or use them for personal purposes." (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341.) "When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify

disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.” (*Clark v. State Bar* (1952) 39 Cal.2d 161.) Thus, respondent is subject to discipline for misappropriating the Partnership funds and assets and for concealing his wrongful acts.

Moreover, misappropriation is a grievous breach of an attorney’s ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (See *Grim v. State Bar* (1991) 53 Cal.3d 21.)

In *In the Matter of Kueker, supra*, 1 Cal. State Bar Ct. Rptr. 583, an attorney was disbarred for misappropriating over \$66,000 in client trust funds and repeatedly lying to the client’s agent to conceal the theft. The attorney had 14 years of practice with no prior record of discipline.

In a similar case, *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney was disbarred for his theft of law partnership funds totaling \$29,000 over a seven-month period, followed by several instances of deceit to his partners and the State Bar. The Supreme Court found that the attorney’s conduct was part of a purposeful design to defraud his partners and would not have ceased but for the fact that his partners confronted him. The court also found that his behavior indicative of a level of dishonesty that raised concerns beyond those associated with misappropriation of others’ funds. The attorney had no disciplinary record in 12 years of practice.

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) “It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. [Citations.] A most significant factor . . . is respondent’s complete lack of insight, recognition, or remorse for any of his wrongdoing.” (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 83.) An attorney’s failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.) The State Bar’s last contact with respondent was on June 13, 2005, when he wrote to the State Bar. Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding.

Although respondent has been an attorney since 1966 without any prior record of discipline, it is unfortunate but he “is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law.” (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) Respondent’s failure to participate in this hearing leaves the court without information about the underlying cause of respondent’s offense or of any mitigating circumstances surrounding his misconduct. Therefore, based on the severity of the offense, the serious aggravating circumstances, the standards and the case law, the court recommends disbarment.

VI. RECOMMENDED DISCIPLINE

Accordingly, the court hereby recommends that respondent **David Rohm Cunningham** be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this State.

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

VII. COSTS

The court recommends that costs be awarded to the State Bar pursuant to section 6086.10 and are enforceable both as provided in section 6140.7 and as a money judgment.

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(c)(4) and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after service of this order.

Dated: February 2, 2006

JOANN M. REMKE
Judge of the State Bar Court