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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **MICHAEL WAYNE BRAA, SR.,** **Member No. 189472,** A Member of the State Bar.	)	Case No.: **07-O-13128-PEM** (08-O-11258-PEM) **DECISION & ORDER OF INACTIVE ENROLLMENT**

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar) charges respondent **MICHAEL WAYNE BRAA, SR.,** with six counts of professional misconduct in two separate client matters. For the reasons set forth *post*, the court finds respondent culpable on all six counts and concludes that the appropriate level of discipline for the found misconduct is disbarment.

The State Bar was represented by Deputy Trial Counsel Treva R. Stewart (hereafter DTC Stewart). Even though he has actual knowledge of this disciplinary proceeding, respondent failed to appear either in person or by counsel.

II. KEY PROCEDURAL HISTORY

On October 30, 2008, the State Bar filed the notice of disciplinary charges (hereafter NDC) in this proceeding and, in accordance with Business and Professions Code section 6002.1, subdivision (c)[1] properly served a copy of it on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar of California (hereafter official address). That service was effective when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; see also *Powers v. State Bar* (1988) 44 Cal.3d 337, 341 [attorney disbarred when his failure to keep his official address current prevented him from learning that he had been ordered to comply with former rule 955].)

On December 1, 2008, DTC Stewart spoke to respondent on the telephone. In that conversation, DTC Stewart told respondent of his obligations to file a response to the NDC and to appear at a status conference set for December 8, 2008. Respondent, however, failed to file a response to the NDC and did not appear at the December 8, 2008 status conference.

Because respondent failed to file a response to the NDC in accordance with Rules of Procedure of the State Bar, rule 103, the State Bar filed a motion for entry of respondent's default on December 26, 2008. The State Bar properly served a copy of that December 26, 2008 motion on respondent by certified mail, return receipt requested, at his official address.

Respondent never filed a response to the motion for entry of default. Nor did respondent ever file a response to the NDC. Thereafter, because all of the statutory and rule prerequisites were met, this court filed an order on January 22, 2009, in which it entered respondent's default

[1] Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

and, as mandated by section 6007, subdivision (e)(1), ordered that respondent be involuntary enrolled as an inactive member of the State Bar of California effective January 5, 2009.[2]

On February 11, 2009, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline. Later that same day, the court took the case under submission for decision without a hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on (1) the allegations contained in the NDC, which are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); and (2) the facts in this court's official file in this matter.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 30, 1997, and has been a member of the State Bar of California since that time.

B. The Simrock Client Matter

On about October 1, 2005, respondent was hired by Walter Simrock (hereafter Walter) to defend his brother Erich Simrock (hereafter Erich) in a criminal case then pending in the United States District Court for the Eastern District of California (hereafter the district court). On about that same date, Walter paid respondent $40,000 in advanced attorney's fees.

On about January 23, 2007, there was a change of plea hearing in Erich's case. Respondent appeared and represented Erich at that hearing. Also, at that hearing, Erich entered a plea of guilty, and the district court scheduled a sentencing hearing for 9:00 a.m. on April 23, 2007. Even though he had actual knowledge that Erich's sentencing hearing was set for 9:00 a.m. on April 23, 2007, respondent failed to appear for the hearing at 9:00 a.m. In fact, respondent did not appear in the district court until 2:00 p.m. that afternoon.

[2] Inactive members of the State Bar cannot lawfully practice law in this state.

When respondent arrived at 2:00 p.m. on April 23, the district court held the sentencing hearing. At that hearing, the district court issued an order to show cause regarding respondent's failure to appear at 9:00 a.m. (hereafter the April 23 OSC). Thereafter, the district court issued a sanctions order (hereafter the sanctions order) in which respondent was ordered to pay Walter $999 in sanctions no later than 4:30 p.m. on April 27, 2007.

Even though he had actual knowledge of the terms of the sanctions order, respondent did not pay the sanctions by the April 27 deadline. Instead, on about April 27, respondent telephoned Walter and asked for a two-week extension of time to pay the sanctions. Walter agreed to the extension. Respondent, however, never sought permission from the district court to make such an extension agreement with Walter. What is more, respondent did not pay Walter the $999 at the end of the two-week extension. Accordingly, on about May 29, 2007, Walter filed an application to enforce the sanctions order. In his application, Walter stated that, as of May 29, 2007, respondent had not paid the sanctions.

Respondent received a copy of Walter's application on about May 31, 2007. And, on about June 1, 2007, respondent mailed Walter a $999 check. Walter promptly deposited the check into his bank account. However, on about June 7, 2007, respondent's bank returned the check unpaid because it was not sufficiently funded.

Also, on about June 7, 2007, the district court issued a second OSC (hereafter the June 7 OSC). The June 7 OSC addressed respondent's failure to comply with the sanctions order. Moreover, in the June 7 OSC, respondent was ordered to appear at an OSC hearing on June 18, 2007. The June 7 OSC was electronically served on respondent at the email address that he had on file with the district court. Even though he actually received the June 7 OSC that was electronically served on him, respondent failed to appear at the OSC hearing on June 18.

Then, on about June 19, 2007, the district court issued yet a third OSC (hereafter the June 19 OSC). The June 19 OSC addressed respondent's failure to comply with (1) the sanctions order and (2) the June 7 OSC. Moreover, in the June 19 OSC, respondent was ordered to appear at an OSC hearing on July 23, 2007. The June 19 OSC was served on respondent both electronically and in person.

On about June 20, 2007, respondent attempted to pay Walter the $999 in cash, but Walter refused to accept the money. On about July 19, 2007, respondent filed a declaration in response to the June 19 OSC. Respondent appeared at the OSC hearing on July 23, 2007, and tendered, to the district court, a $1,100 cashier's check, which represented the sanctions, interest, and bank fees for the $999 NSF check that respondent previously gave to Walter. The district court thereafter issued a $1,100 check to Walter.

At all relevant times, the district court has maintained an electronic notification and filing system under which participating attorneys register an email address with the district court for electronic notification and filing. In about February 2005, respondent registered the email address "braalaw@sbcglobal.net" (hereinafter sbcglobal address) as his email address with the district court for electronic notification and filing purposes. At all relevant times, the sbcglobal address was the only email address that respondent registered with the district court. In fact, from about February 2005 through about July 23, 2007, every case in which respondent appeared as an attorney of record in the district court reflects the sbcglobal address as respondent's email address for electronic notification and filing purposes.

When respondent appeared at the OSC hearing on July 23, 2007, respondent falsely told the district court that he did not receive service of the June 7 OSC or notice of the June 18, 2007 OSC hearing. Respondent also made the following false statements regarding the sbcglobal address at the July 23 OSC hearing: (1) that he did not recognize the sbcglobal address; (2) that

he did not know how the sbcglobal address was provided to the district court; (3) that he registered a different email address with the district court for service of documents; (4) that he had not used the sbcglobal address in at least nine or ten years; and (5) that he received electronic service at a different email address in a 2007 civil action pending before the district court.

On about July 25, 2007, the district court issued a decision and order (hereafter contempt order) in which it found respondent in contempt of court and ordered respondent to pay an additional $400 in sanctions and to notify the State Bar of California of the contempt order. Moreover, in the contempt order, the district court found (1) that respondent failed to pay the $999 in sanctions to Walter by 4:30 p.m. on April 27, 2007, without legal excuse of justification and (2) that respondent's unilateral modification of the sanctions order, without notice to or approval of the district court, was a nullity and did not excuse respondent's violation of the sanctions order. Moreover still, in the contempt order, the district court further found: (1) that respondent registered the sbcglobal address with the district court; (2) that respondent was electronically served with the June 7 OSC; (3) that respondent's failure to appear at the June 18, 2007 OSC hearing was unjustified; and (4) that respondent made numerous false statements at the July 23, 2007 OSC hearing.

Later, respondent paid the $400 in additional sanctions and notified the State Bar that he been held in contempt of court, as he was ordered to do in the contempt order.

Count 1A – Violated Court Order (§ 6103)

The record clearly establishes that respondent willfully violated his duty, under section 6103, to obey 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 by (1) failing to pay $999 in sanctions to Walter no later than April 27, 2007, in accordance with the sanctions order; (2) by unilaterally modifying the payment due date for the $999 in sanctions without notifying the

district court or seeking a court order, authority, or leave to modify the April 27, 2007, payment due date; and (3) failing to appear at the June 18, 2007 OSC hearing in violation of the June 7 OSC.

Count 1B – Misleading a Judge (§ 6068, subd. (d))

The record clearly establishes that respondent willfully violated his duty, under section 6068, subdivision (d) , "never to seek to mislead a judge or any judicial officer by an artifice or false statement of fact or law" when, at the July 23, 2007 OSC hearing, respondent deliberately lied to the district court and falsely stated (1) that he did not receive service of the June 7 OSC; (2) that he did not receive notice of the June 18, 2007 OSC hearing; (3) that he did not recall or recognize the sbcglobal address; (4) that he did not know how the sbcglobal address was provided to the district court; (5) that he registered a different email address with the district court for service of documents; (6) that he had not used the sbcglobal address in at least nine or ten years; and (7) that he received electronic service at a different email address in a 2007 civil action before the district Court.

Count 1C – Moral Turpitude and Dishonesty (§ 6106)

What is more, the record clearly establishes that each of the seven willful and deliberate violations of section 6068, subdivision (d) that is charged and found in count 1B *ante* rises to the level of an act involving moral turpitude and dishonesty in willful violation of section 6106.[3]

C. The Merced Hyundai Client Matter

Before about May 9, 2007, Arturo Alvarado purchased a car from Merced Hyundai. On about May 9, 2007, Alvarado sent a demand for correction to Merced Hyundai in which he

[3] It is not duplicative to find that an attorney's violation of a Rule of Professional Conduct or of a statutory provision also violates section 6106 when the rule or statutory violation is so egregious that it rises to the level of an act involving moral turpitude, dishonesty, or corruption. (E.g., *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520.)

alleged fraud and demanded a full refund of the amount he paid for the car. Thereafter, respondent was hired to represent Merced Hyundai in the matter.

Before about October 9, 2007, respondent falsely told Merced Hyundai that he reached an agreement to settle the Alvarado dispute for $11,255.15. In fact, respondent had not reached an agreement to settle the matter.

On about October 9, 2007, Merced Hyundai sent respondent $11,255.15 check made payable to Michael W. Braa, J.D., for settlement of the Alvarado matter. On October 18, 2007, respondent deposited that check into his personal bank account and misappropriated the $11,255.15 for his own use and benefit. To date, respondent has not repaid any portion of the misappropriated funds.

Count 2A – Trust Account Violation (Rules Prof. Conduct, rule 4-100(A))

The record clearly establishes that respondent willfully violated his duty, under Rules of Professional Conduct, rule 4-l00(A), to deposit funds received for the benefit of a client into a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import when he deposited the $11,255.15 check into his personal bank account.

Count 2B – Dishonesty (§ 6106)

The record clearly establishes that respondent's trust account violation that is charged and found in count 2A *ante* rises to the level of an act involving moral turpitude and dishonesty in willful violation of section 6106. An attorney's deliberate misappropriation of client funds for his or her own use and benefit involves not only moral turpitude, but also dishonesty in willful violation of section 6106.

Count 2C – Dishonesty (§ 6106)

The record clearly establishes that respondent willfully violated section 6106 when he deliberately lied to Merced Hyundai and told it that he had reached an agreement to settle the

Alvarado dispute for $11,255.15. Such a deliberate lie involves not only moral turpitude, but also dishonesty.

IV. MITIGATING/AGGRAVATING CIRCUMSTANCES

A. Mitigation

The State Bar properly admits that respondent has no prior record of discipline. Nonetheless, the State Bar contends that respondent is not entitled to any mitigating credit for his more than nine and one-half years of discipline free practice (from June 1997 through about mid-April 2007) merely because his misconduct is serious. As the State Bar aptly notes, standard 1.2(e)(i) of the Standards for Attorney Sanctions for Professional Misconduct[4] provides that the "absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious" is a mitigating circumstance. However, as the review department pointed out almost 20 years ago, case law authorizes the State Bar Court to find that an attorney's many years of practice without a prior record of discipline is a substantial mitigating circumstance notwithstanding the seriousness of the misconduct and standard 1.2(e)(i)'s express language to the contrary. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13.) In short, the court finds that respondent's more nine and one-half years of discipline free practice is a significant mitigating circumstance.

B. Aggravation

Respondent's misconduct in this proceeding involves multiple acts of misconduct. (Std. 1.2(b)(ii).)

[4] The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

Respondent's failure to file a response to the NDC in this proceeding, which allowed his defaults to be entered, is an aggravating circumstances. (Std. 1.2(b)(vi).)

Respondent's misconduct has caused significant client harm. Specifically, respondent caused Merced Hyundai significant harm when he misappropriated $11,255.15 from it. (Std. 1.2(b)(iv).)

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Ba*r (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylo*r (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

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 2.2(a), which applies to respondent's deliberate misappropriation of $11,255.15 from Merced Hyundai. Standard 2.2(a) provides:

> Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.

Furthermore, the Supreme Court has repeatedly held that the willful misappropriation of client funds is a grievous violation. Moreover, the Supreme Court has made clear that even an isolated instance of misappropriation by an attorney who has no prior record of discipline may

result in disbarment in the absence of compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071-1073.) Clearly, 411,255.15 is not an insignificantly small amount. In addition, even though respondent is entitled to mitigation for his more than nine and one-half years of discipline-free practice, that mitigation simply does not rise to the level of compelling mitigation for purposes of applying standard 2.2(a). What is more, even at this late date, respondent has paid a single dollar of restitution to Merced Hyundai.

In sum, both the standards and case law support a disbarment recommendation in this proceeding. Moreover, the court independently concludes that respondent should be ordered to make restitution to Merced Hyundai in the amount of $11,255.15 plus interest thereon from October 18, 2007, which is the date on which respondent deposited the $11,255.15 check into his personal bank account.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent **MICHAEL WAYNE BRAA, SR.,** 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. The court further recommends that Michael Wayne Braa, Sr., be ordered to make restitution to Merced Hyundai (or its successor in interest) in the amount of $11,255.15 plus 10 percent simple interest per annum from October 18, 2007, (or to the Client Security Fund to the extent of any payment from the fund to Merced Hyundai (or to its successor in interest) plus interest and costs, in accordance with Business and Professions Code section 6140.5) and to furnish satisfactory proof thereof to the State Bar's Office of Probation in Los Angeles. The court further recommends that any restitution to the Client Security Fund be enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

VII. RULE 9.20 AND COSTS

The court further recommends that Michael Wayne Braa, Sr., 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.

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.

VIII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Michael Wayne Braa, Sr., be involuntary 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 (Rules Proc. of State Bar, rule 220(c)).

Dated: May ___, 2009.

PAT E. McELROY
Judge of the State Bar Court