

**FILED** *LOS*

MAR 24 2005

STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO**PUBLIC MATTER****THE STATE BAR COURT****HEARING DEPARTMENT - SAN FRANCISCO**

In the Matter of

DOUGLAS McCLELLAN BUSSEY,**Member No. 65358,**

A Member of the State Bar.

Case No. 03-O-00979-JMR**DECISION AND
ORDER OF INVOLUNTARY
INACTIVE ENROLLMENT****I. Introduction**

In this default matter, Respondent **DOUGLAS McCLELLAN BUSSEY** is charged with professional misconduct in one client matter, including: (1) failure to maintain client funds in trust, (2) misappropriation of \$5,398 in client funds, (3) improper withdrawal from employment, and (4) failure to cooperate in a disciplinary investigation.

The court finds, by clear and convincing evidence, that Respondent is culpable of the charged acts of misconduct. In view of Respondent's serious misconduct and the evidence in aggravation, the court recommends that Respondent be disbarred from the practice of law.

II. Pertinent Procedural History

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) on September 22, 2004, at his official membership records address. (Rules Proc. of State Bar, rule 60.) The mailing was received on September 27, 2004, and the return receipt was signed. A courtesy copy was also sent to Respondent at 4750 Peregrine Road, Forest Ranch, California 95942, by regular mail. This mailing was also not returned as undeliverable or for any other reason. Respondent did not file a

1 response to the NDC. (Rules Proc. of State Bar, rule 103.)

2 On the State Bar's motion, Respondent's default was entered on December 9, 2004, and
3 Respondent was enrolled as an inactive member on December 12, 2004, under Business and
4 Professions Code section 6007(e).¹ An order of entry of default was sent to Respondent's official
5 membership records address but was returned as undeliverable.

6 Respondent did not participate in the disciplinary proceedings. The court took this matter
7 under submission on December 29, 2004, following the filing of the State Bar's brief on culpability
8 and discipline.

9 **III. Findings of Fact and Conclusions of Law**

10 All factual allegations of the NDC are deemed admitted upon entry of Respondent's default
11 unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule
12 200(d)(1)(A).)

13 **A. Jurisdiction**

14 Respondent was admitted to the practice of law in California on December 15, 1975, and has
15 since been a member of the State Bar of California.

16 **B. The Lozoya Matter**

17 In 1998, Dolores Lozoya hired Respondent to represent her in an action against her former
18 business partner, Christine Stifter. The two partners were in the business of buying and selling
19 antiques.

20 On November 15, 2001, Respondent wrote to Stifter's attorney, indicating that the items
21 which Lozoya and Stifter had purchased while doing business together would be sold at the Chico
22 Auction Gallery on November 23, 2001, and that the proceeds would be deposited in Respondent's
23 trust account. Respondent further informed Stifter's attorney that the proceeds would not be
24 withdrawn without the attorney's and his signatures or a court order.

25 On November 23, 2001, the items were sold. On January 7, 2002, the Chico Auction Gallery
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27 ¹All references to section are to the Business and Professions Code, unless otherwise
28 indicated.

1 sent Respondent a check for \$5,398 which represented the proceeds from the sale. Respondent
2 received the check. Although he knew that the check was for Lozoya's benefit and that he was
3 obligated to deposit it in a trust account, Respondent did not deposit any of the \$5,398 in a trust
4 account.

5 Instead, Respondent cashed the check and took the \$5,398 for his own personal use in or
6 about early 2002, even though he knew he was not entitled to the funds.

7 At about the same time, he withdrew from employment without informing Lozoya.

8 On April 15, 2003, the State Bar wrote to Respondent regarding Lozoya's complaint. The
9 letter was properly sent to Respondent at his official membership records address. However, it was
10 returned as undeliverable.

11 On April 28 and May 20, 2003, the State Bar sent a copy of the letter regarding the Lozoya
12 matter to Respondent at an alternate address at 4750 Peregrine Road, Forest Ranch, California
13 95942. The two letters were not returned as undeliverable or for any other reason.

14 Respondent did not respond to any of the letters or participate in the investigation.

15 ***Count 1: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A) of the Rules of***
16 ***Professional Conduct)***²

17 Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited
18 in a client trust account and that no funds belonging to the attorney will be deposited therein or
19 otherwise commingled therewith. It further provides that when the right of the attorney to receive
20 a portion of trust funds is disputed by the client, the disputed portion must not be withdrawn until
21 the dispute is finally resolved.

22 Respondent had a fiduciary duty to hold in trust the \$5,398 check from Chico Auction
23 Gallery, received for the benefit of Lozoya, in a trust account. Instead, Respondent cashed the check
24 and took the funds for his own use. Thus, Respondent's failure to deposit the check received for the
25 benefit of Lozoya in a trust account was clearly and convincingly in violation of rule 4-100(A).

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27 ²References to rule are to the current Rules of Professional Conduct, unless otherwise
28 noted.

1 ***Count 2: Misappropriation (Bus. & Prof. Code, § 6106)***

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

4 Here, Respondent misappropriated \$5,398 and committed an act of moral turpitude in wilful
5 violation of section 6106 by cashing the check and taking the funds for his own use, knowing that
6 he was not entitled to the funds.

7 ***Count 3: Improper Withdrawal from Employment (Rule 3-700(A)(2))***

8 Rule 3-700(A)(2) provides that an attorney must not withdraw from employment until he has
9 taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client.

10 Respondent was hired to represent Lozoya against her former business partner. Yet, he
11 abandoned her without giving her due notice. Thus, by failing to notify Lozoya of his withdrawal
12 from employment, Respondent wilfully failed to take reasonable steps to avoid reasonably
13 foreseeable prejudice to his client, in wilful violation of rule 3-700(A)(2).

14 ***Count 4: Failure to Cooperate With the State Bar (§ 6068(i))***

15 Section 6068(i) provides that an attorney must cooperate and participate in any disciplinary
16 investigation or proceeding pending against the attorney. By failing to respond to the State Bar's
17 April 15, April 28, and May 20, 2003 letters or participate in the investigation of the Lozoya matter,
18 Respondent failed to cooperate with the State Bar in wilful violation of section 6068(i).

19 **IV. Mitigating and Aggravating Circumstances**

20 **A. Mitigation**

21 No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds.
22 for Atty. Sanctions for Prof. Misconduct, standard 1.2(e).)³ However, Respondent has no prior
23 disciplinary record in 27 years of practice at the time of his misconduct in 2002, which is a
24 significant mitigating factor. "Absence of a prior disciplinary record is an important mitigating
25 circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989)
26 49 Cal.3d 257, 269.)

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28 ³All further references to standards are to this source.

1 **B. Aggravation**

2 There are several aggravating factors. (Standard 1.2(b).)

3 Respondent committed multiple acts of wrongdoing, including failing to maintain client
4 funds, misappropriating \$5,398 from a client and improperly withdrawing from employment.
5 (Standard 1.2(b)(ii).)

6 Respondent's misappropriation of \$5,398 and abandoning his client caused Lozoya
7 substantial harm. (Standard 1.2(b)(iv).)

8 Respondent demonstrated indifference toward rectification of or atonement for the
9 consequences of his misconduct. (Standard 1.2(b)(v).) He has yet to pay any portion of the funds
10 to Lozoya.

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

13 **V. Discussion**

14 The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect
15 the public, to preserve public confidence in the profession and to maintain the highest possible
16 professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v.*
17 *State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

18 Respondent's misconduct involved one client matter and trust account violations. The
19 standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon
20 the gravity of the offenses and the harm to the client. (Stds. 1.6, 2.2, 2.3, 2.6, and 2.10.) Standard
21 2.2(a) provides that wilful misappropriation of entrusted funds must result in disbarment absent
22 compelling mitigation. Respondent's misappropriation of more than \$5,398 in the Lozoya matter
23 is significant and there is no compelling mitigation.

24 Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward
25 a court or a client must result in actual suspension or disbarment. As discussed above, Respondent's
26 misappropriation was an act of moral turpitude.

27 The standards, however, are only guidelines and do not mandate the discipline to be imposed.
28 (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach

1 case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at
2 p. 251.)

3 The State Bar urges disbarment, arguing that Respondent’s misappropriation violates basic
4 notions of honesty and endangers public confidence in the legal profession, citing *Grim v. State Bar*
5 (1991) 53 Cal.3d 21 in support of its recommended discipline.

6 In *Grim*, the Supreme Court disbarred an attorney for misappropriating \$5,546 from a client.
7 The attorney did not make restitution until after the State Bar had commenced disciplinary
8 proceedings. In aggravation, he was previously disciplined for commingling funds, took advantage
9 of the client residing in another state and mismanaged his trust account. In mitigation, character
10 witnesses testified to his good moral character and the attorney cooperated with the State Bar.

11 In another case involving misappropriation, *In the Matter of McCarthy* (Review Dept. 2002)
12 4 Cal. State Bar Ct. Rptr. 364, disbarment was not warranted for an attorney who misappropriated
13 over \$20,000 where the matter appeared to have been an aberrational, isolated instance of
14 misconduct, the attorney had no prior record of discipline in over 40 years of practice, and the
15 attorney presented evidence of good character and community service.

16 Like *McCarthy*, Respondent had a long and unblemished career for 27 years at the time of
17 the instant misconduct. However, unlike *McCarthy* or *Grim*, Respondent failed to participate in this
18 disciplinary proceeding and the court has no information about the underlying cause of Respondent’s
19 offense or of any mitigating circumstances surrounding his misconduct. In addition, there is no
20 evidence that restitution has been made.

21 It is settled that an attorney-client relationship is of the highest fiduciary character and always
22 requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43
23 Cal.3d 802, 813.) Here, Respondent had flagrantly breached his fiduciary duties to his client by
24 taking the client funds and abandoning the case.

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

1 Respondent's misappropriation of \$5,398 and default in this matter weigh heavily in
2 assessing the appropriate level of discipline. Like the attorney in *Grim*, the "misappropriation in this
3 case ... was not the result of carelessness or mistake; [Respondent] acted deliberately and with full
4 knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that
5 [Respondent] intended to permanently deprive his client of her funds." (*Grim v. State Bar, supra*,
6 53 Cal.3d at p. 30.)

7 In recommending discipline, the "paramount concern is protection of the public, the courts
8 and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) An
9 attorney's failure to accept responsibility for actions which are wrong or to understand that
10 wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-
11 1101.) Instead of cooperating with the State Bar or rectifying his misconduct, Respondent defaulted
12 in this disciplinary proceeding.

13 Respondent "is not entitled to be recommended to the public as a person worthy of trust, and
14 accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.2d 605,
15 615.) Therefore, based on the severity of the offense, the serious aggravating circumstances and the
16 lack of compelling mitigating factors, the court recommends disbarment.

17 VI. Recommended Discipline

18 Accordingly, the court hereby recommends that Respondent **DOUGLAS McCLELLAN**
19 **BUSSEY** be disbarred from the practice of law in the State of California and that his name be
20 stricken from the rolls of attorneys in this State.

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

24 VII. Costs

25 The court recommends that costs be awarded to the State Bar pursuant to section 6086.10 and
26 payable in accordance with section 6140.7.

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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 the date this order is filed.

Dated: March 24, 2005


JOANN M. REMKE
Judge of the State Bar Court

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 March 24, 2005, I deposited a true copy of the following document(s):

**DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT,
filed March 24, 2005**

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

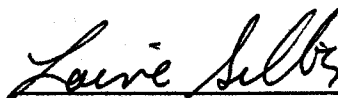
- ☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**DOUGLAS MCCLELLAN BUSSEY
121 W 4TH AVE
CHICO, CA 95926**

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

MARK HARTMAN, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **March 24, 2005.**



Laine Silber
Case Administrator
State Bar Court