

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: 05-O-00417-PEM
)
CYNTHIA B. SILVERSTEIN,)
) DECISION
Member No. 111294,)
)
A Member of the State Bar.)
_____)

I. INTRODUCTION

In this disciplinary proceeding, which is proceeding by default, Deputy Trial Counsel Wonder J. Liang (hereafter DTC Liang) appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent **CYNTHIA B. SILVERSTEIN** did not appear in person or by counsel.

In this proceeding, the State Bar charges respondent with four counts of professional misconduct. The State Bar recommends that respondent be placed on three years' stayed suspension, three years' probation, and six months' actual suspension.

For the reasons set forth *post*, the court finds respondent culpable on only three of the four counts of misconduct. In addition, the court independently concludes that the appropriate level of discipline is three years' stayed suspension and ninety days' actual suspension, which

actual suspension will continue until respondent makes and the State Bar Court grants a motion to terminate her actual suspension (Rules Proc. of State Bar, rule 205).¹

II. KEY PROCEDURAL HISTORY

On February 25, 2008, the State Bar filed a notice of disciplinary charges (hereafter NDC) against respondent in this proceeding and served a copy of the NDC on respondent at her latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested in accordance with Business and Professions Code section 6002.1, subdivision (c).² That service copy of the NDC was returned to the State Bar by the United States Postal Service (hereafter Postal Service) marked “Undeliverable As Addressed.” However, a courtesy copy of the NDC that the State Bar mailed to respondent at an “alternative” address for her on Masonic Avenue in San Francisco was not returned to the State Bar by the Postal Service.

Moreover, the declaration of DTC Liang, which is attached to the State Bar's May 30, 2008 motion for entry of default establishes that the State Bar undertook additional measures in an attempt to locate respondent and to provide her with actual notice of this proceeding, but that those additional measures were unsuccessful.³ Nevertheless, the court finds that respondent was properly given adequate notice of this proceeding (§ 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

¹ The court rejects the State Bar's recommended three-year period of probation. In a default disciplinary proceeding, it is improper to recommend both a period of actual suspension and a period of probation. (Rules Proc. of State Bar, rule 205; *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110.)

² Unless otherwise noted, all further statutory references are to this code.

³ Those additional measures included DTC Liang telephoning respondent's home and leaving, with respondent's son, a message for respondent asking respondent to call DTC Liang back.

he had been ordered to comply with former rule 955 of the California Rules of Court (now rule 9.20)) particularly in light of the additional measures the State Bar took in an attempt to provide respondent with actual notice of this proceeding (*Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234).

Respondent was required to file a response to the NDC no later than March 21, 2008, (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time]), but did not do so. Therefore, on May 30, 2008, the State Bar filed a motion for the entry of respondent's default and properly served a copy of that motion on respondent at her official address by certified mail, return receipt requested. Respondent, however, never filed a response to that motion or to the NDC.

Because all of the statutory and rule prerequisites were met, this court filed an order on July 16, 2008, in which it entered respondent's default and, as mandated by section 6007, subdivision (e)(1), ordered respondent's involuntary inactive enrollment. This court's case administrators (1) properly served a copy of the court's July 16, 2008 order on respondent at her official address by certified mail, return receipt requested and (2) mailed a courtesy copy of that order to respondent at her "alternative" address on Masonic Avenue.

On August 5, 2008, the State Bar filed a brief regarding the level of discipline, and the court took the case under submission for decision without a hearing that same day.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings of fact are based on: (1) the well-pleaded factual allegations (not the legal contentions or the charges) contained in the NDC, which allegations 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 the official court file in this matter.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 12, 1983, and has been a member of the State Bar of California since that time.

B. Misconduct

Alan Tetenbaum and respondent are beneficiaries of the Earl Liever Trust (hereafter Liever Trust), which was created about June 1, 1982. Through about August 23, 2000, respondent was also the trustee of the Liever Trust. The Liever Trust was administered in a proceeding in the San Francisco County Superior Court.

Under the terms of the Liever Trust instrument, Tetenbaum was to receive income of \$250 a month from the trust, adjusted periodically for increases in the cost of living. However, between about January 1996 and March 1997, respondent made only sporadic monthly payments to Tetenbaum. And, between about March 1997 and August 2000, respondent made no monthly payments to Tetenbaum.

On Tetenbaum's motion, the superior court filed an order on August 23, 2000, in which it removed respondent as the trustee of the Liever Trust (hereafter August 23, 2000 order). In addition, that order directed respondent to make certain payments to Tetenbaum from the trust, including \$20,058.96, which is the total of the additional distributions that respondent should have made to Tetenbaum after the settlor's death. Included in that total was \$17,900 that respondent kept in a ProFunds money market account.

Respondent learned of the August 23, 2000 order shortly after it was filed. At all times relevant hereto, respondent was legally required to comply and had the ability to comply with the August 23, 2000 order. Respondent, however, did not distribute the \$17,900 in a ProFunds account for more than five years in September 2005.

The following aggravating circumstances “occurred” between August 2000 and September 2005. Tetenbaum was required to employ Attorney John Foley to force the distribution of the \$17,900 in the ProFunds account. In about December 2004, Attorney Foley petitioned the superior court for an order compelling respondent to provide an accounting of her administration of the Liever Trust. When respondent failed to provide the required accounting, Attorney Foley sought an order directing respondent to show cause why she should not be held in contempt for failing to provide the accounting. A hearing on the order to show cause (hereafter OSC) was set for March 30, 2005. When respondent failed to appear at that hearing, the superior court issued a writ of body attachment, but respondent affirmatively evaded service of that writ by the sheriff's office. Tetenbaum incurred additional costs and attorney's fees in excess of \$19,500 to enforce his rights under the Liever Trust instrument.

In lieu of presenting an accounting, on September 21, 2005, the parties entered into an agreement regarding distribution of Liever Trust assets to Tetenbaum, which agreement was later “reduced” to a superior court order. Under the terms of that September 21, 2005 agreement, respondent was required to pay Tetenbaum the sum of \$17,900, which was the equivalent of the funds in the ProFunds account, plus interest, attorney's fees, and costs. On about September 22, 2005, respondent paid Tetenbaum \$46,545.25.

At one time, respondent maintained “425 California Street, #1500, San Francisco, California 94102-2203” as her office address on the official membership records of the State Bar. By at least about April 14, 2005, respondent vacated her California Street office and stopped receiving mail there. Yet, respondent never updated her address on the official membership records of the State Bar of California.

Count 1 -- Failure to Comply with Laws (§ 6068, subd. (a))

In count 1, the State Bar charges that respondent willfully violated her duty, under section 6068, subdivision (a), to support the laws of this state. Specifically, the State Bar charges that “By failing to make the monthly income payments to Tetenbaum as specified in the Liever Trust instrument, respondent failed to comply with the provisions of Probate Code section 16000 obligating her to administer the trust in accordance with the trust instrument, thereby violating the laws of this state.”

Undoubtedly, respondent failed to comply with Probate Code section 16000 and thereby violated her duty, under section 6068, subdivision (a), to support the laws of this state. However, the court declines to find respondent culpable of such a violation because the misconduct charged in count 1 is duplicative of the misconduct that is charged and found under count 3, *post*. It is inappropriate to find duplicative violations. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 128, 148.) That is because “the appropriate level of discipline for an act of misconduct does not depend upon how many rules of professional conduct or statutes proscribe the misconduct. [Citation.]” (*Ibid.*) Accordingly, count 1 is DISMISSED with prejudice.

Count 2 -- Failure to Maintain Respect Due Courts (§ 6068, subd. (b))

In count 2, the State Bar charges that respondent willfully violated her duty, under section 6068, subdivision (b), “To maintain the respect due to the courts of justice and judicial officers.” Specifically, the State Bar charges that, by delaying for more than five years (from August 2000 until September 2005) to pay Tetenbaum the \$17,900 in the ProFunds account as ordered by the superior court, respondent failed to maintain the respect due to courts of justice and judicial officers in willful violation of section 6068, subdivision (b). The record clearly establishes this charged violation. As noted *ante*, respondent failed to promptly obey the superior court’s August 23, 2000

order even though she learned of the order shortly after it was filed and even though she had, at all relevant times, the ability to obey it. Moreover, in this disciplinary proceeding, respondent has failed to proffer any explanation or justification for her failure to obey the August 23, 2000 order.

Count 3 -- Failure to Comply with Laws (§ 6068, subd. (a))

In count 3, the State Bar charges that respondent willfully violated her duty, under section 6068, subdivision (a), to support the laws of this state by breaching her common law fiduciary duties to Tetenbaum. According to the State Bar, respondent breached her fiduciary duties to Tetenbaum by: (1) failing to make monthly income payments to Tetenbaum and to otherwise provide him with the income to which he was entitled under the Liever Trust instrument; (2) failing to promptly make the court-ordered distribution of the \$17,900 in the ProFunds account; (3) engaging in some *unspecified* conduct which resulted in Tetenbaum expending unnecessary resources and time to enforce his rights under the Liever Trust instrument.

Without question, as a trustee (and a former trustee) of the Liever Trust, respondent owed Tetenbaum the fiduciary duty of utmost good faith and fair dealing. (*In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307 & fn. 11.) “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. [Citations.]” (*Clark v. State Bar* (1952) 39 Cal.2d 161, 166; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373, and cases there cited.) Thus, such a breach of a fiduciary duty is disciplinable as a willful violation of section 6068, subdivision (a). (*In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 809.)

The record clearly establishes that respondent willfully violated section 6068, subdivision (a) when she breached her fiduciary duty to make the monthly income payments to Tetenbaum and to otherwise provide him with the income to which he was entitled under the Liever Trust instrument.

The court, however, declines to find respondent culpable of violating section 6068, subdivision (a) when she failed to obey the August 23, 2000 order to distribute the \$17,900 in the ProFunds account because this court has already relied on that misconduct to find respondent culpable of the charged violation of section 6068, subdivision (b) in count 2, *ante*. Again, it is inappropriate to find duplicative violations. (*In the Matter of Torres, supra*, 4 Cal. State Bar Ct. Rptr. at p. 148.) Moreover, the court declines to find respondent culpable of violating section 6068, subdivision (a) when she purportedly engaged in some *unspecified* conduct that resulted in Tetenbaum expending unnecessary resources and time to enforce his rights under the Liever Trust instrument. An attorney may not be properly disciplined for *unidentified* conduct. The two foregoing charges under count 3 are DISMISSED with prejudice.

Count 4 – Failure to Maintain Office Address (§ 6068, subd. (j))

In count 4, the State Bar charges that respondent willfully violated section 6068, subdivision (j), which mandates that attorneys maintain their current office addresses on the official membership records of the State Bar as required by section 6002.1. The record clearly establishes that respondent willfully violated her duty, under section 6068, subdivision (j), to maintain her current office address and telephone number or, if no office is maintained, a current address for State Bar purposes on the official membership records of the State Bar as required by section 6002.1, subdivision (a)(1).

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

Respondent engaged in multiple acts of misconduct. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(b)(ii).)⁴ Respondent failed to participate in this disciplinary proceeding before the entry of her default, which is also an aggravating

⁴ All further references to standards are to this source.

circumstance. (Std. 1.2(b)(vi); *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

As the State Bar aptly notes, respondent does not have a prior record of discipline. Respondent was admitted in 1983, and engaged in the misconduct found in this proceeding no later than late 2000 when she failed to promptly obey the August 23, 2000 order. Accordingly, respondent's 17 years of misconduct free practice (i.e., 1983 through 2000) is a very significant mitigating circumstance. (Std. 1.2(e)(i); cf. *In re Mostman* (1989) 47 Cal.3d 725, 741; see also *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, 532.)

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (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 Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 2.6 applies to both respondent's violations of section 6068, subdivision (a) and of section 6068, subdivision (b). Under standard 2.6, a violation of one of the subdivisions of section 6068 "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." According to standard 1.3, the purposes of imposing discipline are:

the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.

To support its discipline recommendation of three years' stayed suspension and six months' actual suspension, the State Bar cites to *Layton v. State Bar* (1990) 50 Cal.3d 889 and to *Schneider v. State Bar* (1987) 43 Cal.3d 784. In *Layton*, the respondent's misconduct included the failure to properly administer a trust and the failure to properly pay out trust proceeds over a five-year period of time. Finding significant mitigation, including 30 years of discipline free practice and the lack of personal gain, the Supreme Court imposed three years' stayed suspension, three years' probation, and thirty days' actual suspension.

In *Schneider v. State Bar, supra*, 43 Cal.3d 784, the respondent was the trustee of two living trusts he had drafted. As the trustee, the respondent made two loans of trusts proceeds to entities in which the respondent had an interest without complying with the former rule of professional conduct dealing with business transactions with clients.⁵ The respondent's misconduct in *Schneider* also included intentionally misrepresenting the status of the loan proceeds to the settlor of the trusts. Even though one of the loans was not repaid until after a civil suit was filed, both loans were repaid with interest before a disciplinary charges were filed against the respondent. Finding a great deal of mitigation, including 13 years of discipline-free practice, extensive community service, personal and financial problems, and acknowledgment of wrongdoing, the Supreme Court imposed three years' stayed suspension, three years' probation, and thirty days' actual suspension.

In *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, the review department found the respondent's misconduct to be similar to, but more serious than the misconduct in *Schneider* in that, inter alia, *Hultman* involved repeated self-dealing by a

⁵ See former rule 5-101 of the State Bar Rules of Professional Conduct (now rule 3-300 of the State Bar Rules of Professional Conduct).

fiduciary. In *Hultman* the respondent was placed on three years' stayed suspension, three years' probation, and sixty days' actual suspension.

In light of respondent's failure to properly administer the Liever Trust for about seven years and failure to obey the August 23, 2000 order for more than five years, this court concludes that respondent's actual suspension in this proceeding should be greater than that imposed in three foregoing cases. On balance, the court concludes that the appropriate level of discipline in the present proceeding is three years' stayed suspension and ninety days' actual suspension.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent **CYNTHIA B. SILVERSTEIN** be suspended from the practice of law in the State of California for three years, that execution of the three-year suspension be stayed, and that she be actually suspended from the practice of law for ninety days and until she makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate her actual suspension.

The court also recommends that, if Silverstein's actual suspension in this matter continues for two or more years, she remain actually suspended from the practice of law until she shows proof satisfactory to the State Bar Court of her rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

The court also recommends that Silverstein be ordered to comply with the conditions of probation, if any, hereinafter imposed on her by the State Bar Court as a condition for terminating her actual suspension. (Rules Proc. of State Bar, rule 205(g).)

VII. MPRE, RULE 9.20 & COSTS

The court also recommends that Silverstein be ordered (1) to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) administered by the National

Conference of Bar Examiners (MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, telephone number (319) 337-1287) within the greater of one year after the effective date of the Supreme Court order in this matter or the period of her actual suspension and (2) to provide satisfactory proof of her passage to the State Bar's Office of Probation in Los Angeles within that same time period. If respondent fails to take and pass the MPRE within the specified time period, she will be placed on actual suspension without a hearing and will remain on actual suspension until she passes the examination. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; see also Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rules 320, 321(a)&(c).)

The court further recommends that Silverstein 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 are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: November ____, 2008.

PAT McELROY
Judge of the State Bar Court