FILED JULY 25, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **JOSEPH F. STONE**, **Member No. 120243**, A Member of the State Bar.	)	**Case No. 05-O-00506-RAH** **DECISION**

I. INTRODUCTION

In this disciplinary matter, Anthony J. Garcia appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Joseph F. Stone did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for three years and until he makes specified restitution and until he complies with Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,[1] standard 1.4(c)(ii), stayed; and that he be actually suspended for two years and until he makes specified restitution, complies with standard 1.4(c)(ii) and complies with rule 205 of the Rules of Procedure of the State Bar,[2] among other things.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on October 11, 2005, and was properly served on respondent on that same date at his official membership records address, by

[1]Future references to standard or std. are to this source.

[2]Future references to the Rules of Procedure are to this source.

certified mail, return receipt requested, as provided in Business and Professions Code section[3] 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing.[4] (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

Although respondent was properly served by regular mail with notices advising him, among other things, that status conferences would be held on November 28, 2005,[5] and January 11, 2006, he did not appear at either one.

Respondent did not file a responsive pleading to the NDC. On March 6, 2006, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that minimum discipline of actual suspension or disbarment[6] would be sought if he was found culpable. Respondent did not respond to the motion.

On March 24, 2006, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. This correspondence was returned as undeliverable, bearing a sticker containing another address, but also bearing a stamp stating that the correspondence was unable to be forwarded.

---

[3]Future references to section are to the Business and Professions Code.

[4]The State Bar also served respondent with the NDC at an alternate address. The declaration setting this forth does not indicate what the address was. The court is not considering the copies of the signed return receipts attached as exhibits 2 and 3 to the motion for entry of default as there was no foundation offered in support thereof.

[5]The December 1, 2005, order memorializing this status conference was properly served on respondent at his official address as well as at an alternate address, his residence. On its own motion, the court judicially notices its records pursuant to Evidence Code section 452(d) which indicate that neither item of correspondence was returned as undeliverable to the court.

[6]The motion did not set forth a specific amount of actual suspension that the State Bar intended to recommend if respondent was found culpable. It appears that the purpose for the requirement of rule 200(a)(3) of the Rules of Procedure that the minimum discipline be set forth in the motion is to apprise respondent of the gravity of the case and the possible consequences of inaction. Merely setting forth "actual suspension or disbarment" does not seem impart this information in a meaningful way within the spirit of the rule.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (April 26, 2006, No. 04-1477) 547 U.S. ___ <http://www.supremecourtus.gov/opinions/05slipopinion.html>.)

The matter was submitted for decision without hearing after the State Bar filed a brief on April 28, 2006.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules of Proc. of State Bar, rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 10, 1985, and has been a member of the State Bar at all times since.

B. Case no. 05-O-00506 (The Shear Matter)

1. Facts

In March 2004, Mark A. Shear employed respondent to represent him on a personal injury claim. They entered into an agreement whereby Shear would pay respondent $400 as an advanced fee and respondent would receive $1,000 from any settlement reached. Shear gave respondent a check for $400.

On June 1, 2004, respondent filed a complaint on Shear's behalf in Los Angeles Superior Court. The case was settled in August 2004 for $8,000.

In August 2004, respondent received two settlement drafts payable to Shear and himself, each in the amount of $4,000, from two insurers. He deposited the drafts into his client trust

account (CTA) on September 9, 2004.

Shears asked respondent to pay his medical bills from the settlement funds. These bills were $175 for his chiropractor and $1,500 to GMAC, Shear's insurer who had advanced payment for Shear's medical bills.

On September 13, 2004, respondent issued Shear a check for $5,325 as his share of the settlement and also paid himself $1,000 as attorney fees. He was required to maintain a balance of $1,675 in the CTA to pay the medical bills.

Although respondent did not pay Shear's chiropractor or GMAC, on October 31, 2005, the balance in the CTA fell to $233.81.

Shear began to receive payment demands from his chiropractor and GMAC. He then discovered that respondent had been evicted from his office and that his business telephone had been disconnected.

Shear telephoned respondent at home to inquire about the unpaid medical bills but respondent did not return the calls.

On January 5, 2005, Shear went to respondent's home and was told by a family member that respondent would not come to the door.

On January 6, 2005, Shear left a letter at respondent's home stating that medical providers were after him for money and that he would have no choice but to submit a complaint to the State Bar.

Respondent never contacted Shear nor did he pay the medical bills or turn over the funds to do so to Shear. Shear paid GMAC from his own funds. Respondent misappropriated $1,675 of Shear's settlement funds.

On March 4 and 18, 2005, a State Bar investigator sent respondent letters requesting that he answer in writing specific allegations of misconduct regarding the Shear matter. The letters were addressed to respondent's official membership records address and sent by first-class mail, postage prepaid. Neither letter was returned to the State Bar as undeliverable or for any other reason. Although respondent received the letters, he did not answer them or otherwise communicate with the investigator.

2. Conclusions of Law

a. Count One - Rule of Professional Conduct[7] 4-100(B)(4) (Failure to Promptly Pay)

Rule 4-100(B)(4) requires that an attorney promptly pay or deliver, as requested by the client, any funds, securities or other properties in the possession of the attorney which the client is entitled to receive.

By not paying Shear's medical bills, respondent failed to promptly pay funds, as requested by the client, which the client is entitled to receive and wilfully violated rule 4-100(B)(4).

b. Count Two - Rule 4-100(A)(Failure to Maintain Client Funds in Trust Account)

Rule 4-100(A) requires, in relevant part, that an attorney place all funds held for the benefit of clients, including advances for costs and expenses, in a client trust account.

There is clear and convincing evidence that respondent wilfully violated rule 4-100(A) by not maintaining $1,675 of Shear's funds in the trust account.

c. Count Three - Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by misappropriating $1,675 of Shear's settlement funds. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

d. Count Four - Section 6068, subdivision (i) (Failure to Participate in a Disciplinary Investigation)

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or

[7]Future references to rule are to this source.

herself.

By not responding to the investigator's March 4 and 18, 2005, letters, respondent did not participate in the investigation of the allegations of misconduct regarding the Shear case in wilful violation of 6068, subdivision (i).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Respondent has one prior instance of discipline. (Std. 1.2(b)(i).) In Supreme Court case no. S138176 (State Bar Court case no. 04-O-14934), a default case, discipline was imposed consisting of six months' stayed suspension and one year's probation with conditions, among other things. In one client matter, respondent was found culpable of violating rule 3-700(D)(1) and section 6068, subdivision (i). His failure to participate in the proceedings prior to the entry of default was an aggravating factor. In mitigation, the court found no prior discipline in about 20 years of practice.

On its own motion, the court notes that the misconduct in the prior disciplinary matter overlapped the misconduct in the present case. The prior misconduct occurred between August and December 2004 and the misconduct in the present case occurred between September 2004 and March 2005. Accordingly, the aggravating effect of this prior discipline is diminished as it is not indicative of respondent's inability to conform to ethical norms.[8] The court will consider the totality of the findings in both cases to ascertain what the discipline would have been had the matters been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) Shear had to pay

[8]The court judicially notices its records which indicate that the NDC in the prior case was filed in January 2005 after much of the misconduct herein had occurred.

GMAC from his personal assets rather than from the settlement funds entrusted to respondent.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

C. Discussion

The purpose of State Bar 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.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. 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. 1.6(a).) Discipline is progressive. (Std. 1.7.)

Standards 2.2(a) and (b), 2.3 and 2.6(a) apply. The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is 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.)

As previously stated, the court will consider the totality of the findings in this and the prior disciplinary matter to ascertain what the discipline would have been had both matters been brought as one case.

In the present default case, respondent was found culpable of violating rules 4-100(A) and (B)(4) and sections 6106 and 6068, subdivision (i) in one client matter. In the prior case, also a default, respondent was found culpable of violating rule 3-700(D)(1) and section 6068, subdivision (i). His failure to participate in both proceedings prior to the entry of default is an aggravating factor as are multiple acts of misconduct.

Respondent misappropriated $1,675 of client funds, which is not an insignificantly small amount. However, respondent's approximately 20 years of discipline-free practice is a substantial mitigating factor. Pursuant to standard 2.2(a), therefore, the minimum discipline recommended is one year of actual suspension.

The State Bar recommends actual suspension of two years and until respondent complies with standard 1.4(c)(ii), citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357.

In *Lawhorn*, the Supreme Court held that mitigating factors such as the attorney's inexperience, restitution, the single occurrence, and the impending divorce did not absolve or excuse his misappropriation of $1,355.75, but provided sufficient evidence that disbarment was inappropriate. The attorney paid his client only after she told him that she would file a complaint with the State Bar but before any formal notice that a complaint had been filed and any contact from the State Bar. The attorney was actually suspended for two years with a five-year stayed suspension and a five-year stayed suspension. In the instant case, respondent misappropriated a similar amount of money and had some additional misconduct, but has significant mitigation in 20 years of discipline-free practice.

In contrast, in *Worth v. State Bar* (1978) 22 Cal.3d 707, the Supreme Court disbarred an attorney who was found culpable of misappropriating $1,633 in client settlement funds and then

testified falsely in the disciplinary proceeding against him. The attorney had been admitted to practice for 21 years and had been previously disciplined for mishandling a client's funds and other related misconduct in an earlier proceeding. *Worth* presents greater misconduct than the present case as well as a prior disciplinary record.

The court found most instructive *Boehme v. State Bar* (1988) 47 Cal.3d 448. In *Boehme*, the Supreme Court suspended an attorney from the practice of law for 18 months for misappropriating $3,335 in settlement funds belonging to a client and the client's medical provider and for making false and misleading statements to the State Bar Court. The attorney had been admitted to practice for 20 years and had no prior disciplinary record. *Boehme* presents somewhat more misconduct but similar mitigation as the present case. The fact that respondent herein has defaulted in two proceedings merits additional actual suspension as well as compliance with standard 1.4(c)(ii) and with rule 205 of the Rules of Procedure if he chooses to return to practice.

Respondent's misconduct and lack of participation in two disciplinary cases raises concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a two-year actual suspension to remain in effect until he makes restitution, complies with standard 1.4(c)(ii) and rule 205 of the Rules of Procedure, among other things, is adequate to protect the public and proportionate to the misconduct found. Accordingly, the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent Joseph F. Stone be suspended from the practice of law for three years and until he makes restitution and provides satisfactory proof thereof as specified below; that said suspension be stayed; and that he be actually suspended from the practice of law for two years and until he makes restitution to Mark A. Shear in the amount of $1,675 plus 10% interest per annum from September 13, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Mark A. Shear, plus interest and

costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d); and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rule 205(a), (c), Rules Proc. of State Bar.)

It is also recommended that he be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

It is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.[9]

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners during the period of his actual suspension and furnish satisfactory proof of such to the State Bar's Office of Probation within said period.

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and

[9]Failure to comply with rule 955 of the California Rules of Court could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

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: July ___, 2006

RICHARD A. HONN
Judge of the State Bar Court