FILED AUGUST 10, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **DAVID JEFFREY EARLE**, **Member No. 98968**, A Member of the State Bar.	**Case No. 05-O-01322-RAP; 05-O-02212** **DECISION**

I. Introduction

In this default matter, respondent **David Jeffrey Earle** is found culpable, by clear and convincing evidence, of (1) failing to maintain an official address with the State Bar; (2) failing to cooperate with the State Bar; (3) engaging in the unauthorized practice of law; and (4) engaging in acts of dishonesty.

In light of respondent's culpability in this proceeding, and after considering any and all aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends, among others, that respondent be suspended from the practice of law for one year, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On February 28, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing and properly serving a Notice of Disciplinary Charges (NDC) on respondent by certified mail, return receipt requested, at his official membership records

address (official address) under Business and Professions Code section 6002.1, subdivision (a).[1] The NDC was returned to the State Bar, bearing the stamp "Return to Sender. UNCLAIMED."

The State Bar also sent a courtesy copy of the NDC to respondent to P.O. Box 10218, Glendale, CA 91209-3218 (Glendale address), an address obtained by the State Bar. (See, discussion entitled, "C. Respondent's Official Address," *post*.) The mailing sent to the Glendale address was not returned as undeliverable or for any other reason.

Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On March 7, 2006, the State Bar received a voice mail message from an individual, identifying himself as David Earle. Among other things, the respondent stated in his phone message that the disciplinary action was a misunderstanding and requested a return call at a phone number which he left for the State Bar.

On March 14, 2006, when the State Bar returned respondent's call, a message machine picked up, with a recording that identified the speaker's voice as that of David Earle. The State Bar left a detailed message, informing Mr. Earle, among other things, that his response to the NDC was due on or before March 27, 2006. The State Bar also requested a return call so that a meeting could be scheduled in order to discuss a possible resolution of the matter. The message to Mr. Earle also advised that the State Bar was unable to communicate with respondent at his official address, and requested a current mailing address.

On March 30, 2006, respondent left a voice mail message with the State Bar in which he provided the Glendale address and another post office box address that he stated was a personal post office box. Respondent again requested a return call from the State Bar.

On April 5, 2006, the State Bar returned respondent's March 30, 2005 call, but again reached respondent's voice mail. The State Bar left a message that stated, among other things, that respondent's response to the NDC was overdue and that if respondent did not file a response the State Bar would move for entry of default. The message also reminded respondent that he

[1]References to section are to the California Business and Professions Code, unless otherwise noted.

was required to attend a status conference, which was scheduled to take place in the State Bar Court on April 10, 2006, at 9:45 a.m. The State Bar once more requested a return phone call from respondent.

Respondent did not return the State Bar's April 5, 2006 message or thereafter communicate with the State Bar. Respondent also did not attend the April 10, 2006 status conference.,

On the State Bar's motion, respondent's default was entered on April 28, 2006, and respondent was enrolled as an inactive member on May 1, 2006, under section 6007, subdivision (e). An order of entry of default was sent to respondent's official address by certified mail. A courtesy copy of the order of entry of default was sent to respondent at his Glendale address.

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on May 18, 2006, 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).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 1, 1981, and has since been a member of the State Bar of California.

B. The NonSufficient (NSF) Funds Matter

On or about February 1, 2005, respondent had insufficient funds in his client trust account (CTA) at Pacific Western Bank to cover check number 191 for $299.50 (NSF check), which respondent had issued and made payable to the "Los Angeles Superior Court," thereby causing the balance in the account to drop to a negative $163.75.

C. Respondent's Official Address

On September 15, 2003, respondent requested that the State Bar change his official address to 313 E. Broadway #10218, Glendale, California 91205-1010. To date respondent's official address remains unchanged.

On August 30, 2004, Membership Billing Services of the State Bar (Membership Services) sent a letter to respondent's official address. However, the letter was returned bearing the stamped notation, "Insufficient Address" and a handwritten address of "PO Box 10218, Glendale, CA 91209-3218."

On November 3, 2004, Membership Services sent a letter to respondent's official address informing him that a letter sent to his official address had been returned to the State Bar and requesting that he correct his official address. A change of address card was enclosed in the letter for respondent's convenience. The letter was not returned as undeliverable or for any other reason. Although respondent received the November 3, 2004 letter, he did not respond to it, nor did he correct his membership address or otherwise communicate with Membership Services.

D. Failure to Cooperate with the State Bar

In February 2005, the State Bar opened case number 05-0-01322, pursuant to notification from Pacific Western Bank that respondent had overdrawn his CTA on February 2, 2005.

On February 16, 2005, the State Bar sent a letter to respondent requesting that he provide a written explanation of the insufficient funds in his CTA at Pacific Western Bank on February 2, 2005. The letter was mailed to respondent at his official address. The letter was returned with the stamped notation, "Attempted - Not Known - Unable to Forward."

On April 12, 2005, the State Bar sent a second letter to respondent requesting that he provide a written explanation of the insufficient funds in his CTA at Pacific Western Bank on February 2, 2005. On April 26, 2005, the State Bars sent a third letter to respondent requesting the same information. Both the April 12 and April 26, 2005 letters were mailed to respondent's official address. Both letters were returned to the State Bar with the stamped notation, "Attempted - Not Known - Unable to Forward."

On or about April 26, April 28, and May 3, 2005, the State Bar called respondent's official membership records telephone number. Each call was answered by a message system that announced, "you have reached David Earle. . . ." The State Bar left a message on the voice message system each time it called respondent, stating that the call was regarding the insufficient funds in respondent's CTA at Pacific Western Bank on February 2, 2005, and the correspondence that it had sent to respondent's official membership records address, but which had been returned to the State Bar as undeliverable. Each message requested that respondent return the State Bar's call. Although, respondent received the messages left on his voice message system, he did not return any of the calls.

Count 1: Moral Turpitude – NonSufficient Funds Check (Bus. & Prof. Code, §6106)

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

The State Bar alleges that respondent violated section 6106 when he issued check number 191from his CTA for $299.50 (the NSF check), made payable to the Los Angeles Superior Court, thereby causing the balance in the CTA to drop to a negative $163.75.

It is well settled that the "conduct of issuing numerous checks with insufficient funds 'manifests an abiding disregard of the fundamental rule of ethics–that of common honesty–without which the profession is less than valueless in the place it holds in the administration of justice.'" (*Bambic v. State Bar* (1985) 40 Cal.3d 314, 324, citing *Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 577.)

However, for the court to find the respondent culpable of violating section 6106, there must be clear and convincing evidence of respondent's deliberate dishonesty or corruption or an act involving moral turpitude. Here, the alleged facts at most demonstrate that respondent issued one NSF check and not numerous NSF checks. There is no evidence of deception or dishonesty. The issuance of one bad check from respondent's CTA does not provide clear and convincing evidence of corruption or dishonesty. Such an error does not rise to the level of moral turpitude in violation of section 6106, and therefore this count is dismissed with prejudice.

Count 2: Failure to Update Membership Address (Bus. & Prof. Code, §6068, Subd. (j))

Section 6068, subdivision (j) states that a member must comply with the requirements of section 6002.1, which provides that respondent must maintain on the official membership records of the State Bar a current address and telephone number to be used for State Bar purposes. By clear and convincing evidence, respondent wilfully violated section 6068, subdivision (j), when he failed to maintain a current official membership records address and did not provide the State Bar with an alternative address to be used for State Bar purposes. As a result, the letters sent to his official address from the State Bar were returned as undeliverable.

Count 3: Failure to Cooperate With the State Bar (Bus. & Prof. Code, §6068, Subd. (i))

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

Respondent failed to provide a response to the April 26, April 28, and May 3, 2006 telephone messages from the State Bar regarding its investigation into his overdrawn CTA and the letters sent to his official address that were returned to the State Bar as undeliverable. By failing to respond to those three messages, which he received, respondent failed to cooperate in a disciplinary investigation in wilful violation of section 6068, subdivision (i).

E. Unauthorized Practice of Law

On September 16, 2004, the California Supreme Court ordered respondent suspended from the practice of law for non-payment of his 2004 State Bar membership fees. On that same date, respondent was also placed on not-entitled-to-practice-law status (inactive/not entitled status) due to his non-compliance with his Minimum Continuing Legal Education (MCLE) requirements. On November 3, 2004, respondent paid his State Bar membership dues. However, he remained suspended from the practice of law for failing to comply with his MCLE requirements and has remained suspended since September 16, 2004.

Nevertheless, on November 12, 2004, while suspended from the practice of law, respondent appeared as attorney of record for defendant Iain Robert Galt (Galt) in the Los Angeles Superior Court in a matter entitled *People v. Galt*, case No. 4GL05239, (the Galt Case).

At that time, Galt was respondent's stepson. On December 1, 2004, January 11, 2005, February 25, 2005, March 9, 2005, March 25, 2005, April 22, 2005, and April 28, 2005, while respondent remained not entitled to practice law, he appeared as attorney of record in the Los Angeles Superior Court for Galt.

On May 3, 2005, while suspended from the practice of law, respondent again appeared as attorney of record for Galt in the Los Angeles Superior Court. During the hearing, Superior Court Judge John P. Doyle found that respondent had been acting as counsel for Galt while suspended from the practice of law, relieved respondent as counsel for Galt, and referred respondent to the State Bar.

Count 4: Unauthorized Practice of Law (Bus. & Prof. Code, §§6068, Subd. (a), 6125, and 6126)

Section 6068, subdivision (a), provides that an attorney has a duty to support the laws of the United States and of this state. Section 6125 prohibits the practice of law by anyone other than an active attorney and section 6126 prohibits holding oneself out as entitled to practice law by anyone other than an active attorney.

By clear and convincing evidence, respondent wilfully violated sections 6068, subdivision (a), 6125, and 6126. While he was on suspension for failing to comply with his MCLE requirements, respondent knew or should have known that he was not entitled to practice law effective beginning September 16, 2004, to the present. Yet, he held himself out as entitled to practice law and practiced law by appearing before the Los Angeles Superior Court on behalf of his client during his suspension on nine separate occasions beginning November 12, 2004, and continuing through May 3, 2005.

Count 5: Dishonesty (Bus. & Prof. Code, §6106)

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

During his suspension respondent engaged in the unauthorized practice of law and held himself out as entitled to practice law each time he appeared in court between November 2004

and May 2005. Such misconduct constituted acts of moral turpitude and dishonesty in wilful violation of section 6106.

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]

Respondent was admitted to the practice of law in December 1981, and has no prior record of discipline. Respondent's 23 years of discipline-free practice at the time of his misconduct in 2004 is a significant mitigating factor. (Standard 1.2(e)(i).) "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 failure to maintain a current State Bar address, failure to cooperate with the State Bar, unauthorized practice of law, and acts of dishonesty. (Std. 1.2 (b)(ii).)

The State Bar contends in its brief on culpability and discipline that respondent's misconduct was surrounded by concealment and/or dishonesty. (Std. 1.2 (b)(iii).) But, the acts of misconduct on which the State Bar relies are the same acts which serve as the basis for finding respondent culpable of the substantive violation of dishonesty with which he was charged pursuant to section 6106, and thus do not constitute an additional factor that aggravates respondent's misconduct. (See, *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497.)

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

[2]All 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.)

The standards for respondent's misconduct provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 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 2.3 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 was found culpable of moral turpitude in practicing law while suspended.

Standard 2.6 provides that culpability of unauthorized practice of law will result in suspension or disbarment, depending on the gravity of the offense or the harm to the client.

The State Bar recommends a one-year stayed suspension, two-years probation, and 6 months actual probation, citing *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071 and *Farnham v. State Bar* (1976) 17 Cal.3d 605 in support of its recommendation. The court agrees with the State Bar's recommendation except as to imposition of probation. In a default proceeding, "the appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from the actual suspension that may be imposed following his or her default in a disciplinary proceeding." (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110.)

In *Silva-Vidor*, the attorney was found culpable of misconduct which affected 14 clients. The misconduct involved improper withdrawal from employment, failure to return unearned fees, failure to competently perform legal services, trust fund violations, failure to render an accounting of funds held for a client, failure to promptly pay or deliver funds to clients, acts of

moral turpitude, and the unlawful practice of law. The attorney was given a five year stayed suspension, a five-year probation, and a one-year actual suspension.

In *Farnham*, the attorney abandoned two clients and engaged in the unauthorized practice of law while under actual suspension. The Supreme Court found that the attorney's actions "evidence a serious pattern of misconduct whereby he wilfully deceived his clients, avoided their efforts to communicate with him and eventually abandoned their causes." (*Farnham v. State Bar , supra*, 17 Cal.3d at p. 612.) He also had a prior record of discipline for abandonment of clients' interests in four separate matters and lacked insight into the impropriety of his actions. As a result, he was actually suspended for six months with a stayed suspension of two years upon conditions of probation.

There are several cases regarding the unauthorized practice of law that provide additional guidance to the court, including *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229; *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639; *Chasteen v. State Bar* (1985) 40 Cal.3d 586; and *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585.

In *Mason*, the attorney made a court appearance and signed and served a trial brief while suspended by the Supreme Court for misconduct in a prior discipline. He did not inform either the court or opposing counsel that he was suspended from the practice of law. He was found culpable of moral turpitude in practicing law while suspended. As a result, he was actually suspended for 90 days with a three-year stayed suspension and a three-year probation.

In *Chasteen*, the attorney was found culpable of the unauthorized practice of law for over a year as well, as deceit of clients, commingling and failure to return fees. The bulk of his misconduct was attributable to his long history of alcoholism. In light of his prior record of discipline and mitigation, the Supreme Court imposed a two-month actual suspension and until he made restitution of $275 to his client.

In *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, the attorney who had no prior record of discipline in 12 years of practice was actually suspended for

60 days for misconduct in a single client matter. The attorney failed to communicate with his client and failed to perform competently which caused his client to lose her case. He also improperly held himself out as entitled to practice law by misleading his client into believing that he was still working on her case while he was on suspension for not paying his State Bar dues. He defaulted in the disciplinary proceedings as well.

Here, the gravamen of respondent's misconduct is his unauthorized practice of law and the concealment of his inactive status to the court. While suspended respondent appeared before the superior court as counsel of record for his client on nine separate occasions, thereby holding himself out as eligible to practice law and, in fact, practicing law. Respondent's misconduct reflects a blatant disregard of professional and ethical responsibilities.

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.)

Failing to appear and participate in this proceeding shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar*, *supra*, 53 Cal.3d at pp. 507-508.) His failure to participate in this proceeding leaves the court without information about the underlying cause of respondent's misconduct or of any mitigating circumstances surrounding his misconduct. Thus, balancing all relevant factors–respondent's misconduct, the standards, the case law, and the mitigating and aggravating circumstances, the court finds that placing respondent on an actual suspension of six months would be appropriate to protect the public and preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **David Jeffrey Earle** be suspended from the practice of law for one year, that said suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205).

It is also recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

It is also recommended that if respondent is actually suspended for two years or more, he will remain actually suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order or during the period of his actual suspension, whichever is longer. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878,891, fn.8.)

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. **Wilful failure to comply with the provisions of rule 955 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.**[3]

VII. Costs

It is further recommended 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: August 10, 2006

RICHARD A. PLATEL
Judge of the State Bar Court

[3]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.)