FILED JANUARY 29, 2007

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **DAVID TURNER HARNEY,** **Member No. 142760,** A Member of the State Bar.	)	Case No.: **05-O-02544-RAH** **DECISION**

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Shari Sveningson appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent David Turner Harney did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with three counts of misconduct. In the first two counts, the State Bar charges respondent with failing to maintain client funds in a client trust account and misappropriation of client funds. In the third count, the State Bar charges respondent with failing to cooperate in the State Bar's disciplinary investigation into his misconduct.

The State Bar contends that disbarment is the appropriate level of discipline for the three counts of charged misconduct. However, the State Bar established respondent's culpability only on the third court, which charges failure to cooperate in a disciplinary investigation. In light of

the proved misconduct and aggravating circumstances, the court concludes that the appropriate level of discipline is a public reproval.

II. PROCEDURAL HISTORY

On August 21, 2006, the State Bar filed the NDC in this proceeding and properly served a copy of it on respondent at his 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).[1] That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; but see also *Jones v. Flowers* (April 26, 2006) 547 U.S. ____, 126 S.Ct. 1708, 1713-1714, 1717.)

The United States Postal Service did not return, to the State Bar, the copy of the NDC that it served on respondent as undeliverable or otherwise. Accordingly, the court finds that respondent actually received it. (Evid. Code, § 641 [mailbox rule].)

Respondent's response to the NDC was due no later than September 15, 2006. (Rules Proc. of State Bar, rules 63(a), 103(a).) Respondent, however, failed to timely file a response.

On September 19, 2006, the State Bar filed a motion for entry of respondent's default and properly served a copy of it on respondent at his official address by certified mail, return receipt requested. Respondent failed to respond to the State Bar motion or to file a response to the NDC. Because all of the statutory and rule prerequisites were met, the court filed an order on October 11, 2006, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), ordering that he be involuntarily enrolled as an inactive member of the State Bar.

On October 11, 2006, a State Bar Court case administrator properly served a copy of the court's August 10, 2006, order of entry of default on respondent at his official address by

[1] Unless otherwise noted, all further statutory references are to this code.

certified mail, return receipt requested. However, that copy of the order was returned to the court by the Postal Service marked return to sender, unclaimed.

On October 19, 2006, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline. That same day, the court took the case under submission for decision without a hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Notwithstanding the fact that respondent permitted his default to be entered in this proceeding, the State Bar still has the burden to prove the charged misconduct by clear and convincing evidence (Rules Proc. of State Bar, rule 213; cf. *Conroy v. State Bar* (1991) 53 Cal.3d 495, 502, fn. 5); this court must resolve all reasonable doubts in respondent's favor (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216); and when equally reasonable inferences may be drawn from the facts, this court must accept the inference that leads to a conclusion of innocence (*In re Aquino* (1989) 49 Cal.3d 1122, 1130; *Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794).

To meet its burden of proof in a default proceeding, the State Bar is entitled to rely on the factual allegations in the NDC because those factual allegations (but not legal contentions or charges) are deemed admitted by the entry of respondent's default (hereafter factual allegations admitted by default) (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)).[2] In addition, the State Bar is entitled to present evidence at a default hearing or to submit written evidence with a request for waiver of default hearing. (Rules of Procedure of the State Bar, rule 202.)

[2] (See, generally, *Ellis v. Rademacher* (1899) 125 Cal. 556, 557 ["A default admits *the material allegations of the complaint*, and no more. . . . [T]he relief given to the plaintiff cannot exceed that which the law awards as the legal conclusion *from the facts alleged* [in the complaint]." (Italics added.)]; see also *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387-388.)

In the present proceeding, the State Bar has elected to proceed on only (1) the factual allegations admitted by default and (2) two documents (i.e., written evidence) that it submitted with its October 19, 2006, request for waiver of default hearing. However, those two documents are certified copies of the NDC and of this court's August 30, 2006, decision in *In the Matter of David T. Harney*, State Bar Court case number 05-O-03054-RAH (hereafter *Harney* I),[3] and those two documents are relevant only on the issue of aggravation (i.e., they establish respondent's prior record of discipline). The State Bar did not submit any written evidence to support the charged misconduct. Therefore, the court can find respondent culpable on only those counts in which the charged misconduct is established by the factual allegations admitted by default under the clear and convincing evidentiary standard.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 11, 1989, and has been a member of the State Bar since that time.

B. Misconduct

From about March 21, 1995, through about November 5, 2004, respondent represented 84 clients in the Del Amo toxic tort litigation in the United States District Court for the Central District of California. In about 1999, that case settled with respect to 77 of respondent's 84 Del Amo clients.[4] In May 2000, respondent received a total of $18,000 in settlement proceeds in that case, which he deposited into his client trust account at Mellon 1st Business Bank (hereafter respondent's Mellon Bank trust account). In about June 2000, respondent received an additional

[3] Even though the State Bar failed to notify the court (either in a supplemental pleading or letter brief), the court notes that, on January 18, 2007, the Supreme Court filed an order in case number S147880 imposing, on respondent, the discipline recommended in this court's August 30, 2006, decision in *Harney* I.

[4] Respondent designated his remaining seven clients as non-settling parties.

$25,000 in settlement proceeds, which he also deposited into his Mellon Bank client trust account. At that point, there should have been a total of $43,000 ($18,000 plus $25,000) in Del Amo settlement proceeds in respondent's Mellon Bank client trust account.

In about May 2001, respondent paid out $306.83 in settlement proceeds to one of his Del Amo clients. Thereafter, from about June 2002 through about May 2004, respondent paid out a combined total of $17,148.84 in settlement proceeds to 48 of his Del Amo clients. Then, in about November 2004, respondent paid out $350.46 in settlement proceeds to another one of his Del Amo clients. In sum, as of November 2004, respondent paid out a total of $17,806.13 ($306.83 plus $17,148.84 plus $350.46) in settlement proceeds[5] to 50 (1 plus 48 plus 1) of his Del Amo clients. Furthermore, at that point, there should have been, in Del Amo settlement proceeds, a total of $25,193.87 ($43,000 less $17,806.13) *less respondent's reasonable attorney's fees* in respondent's Mellon Bank client trust account.[6] Respondent did not thereafter disburse any additional settlement proceeds to his remaining 27 (84 clients less 7 non-settling clients less 50 paid clients) Del Amo Clients.[7]

In early November 2004, respondent transferred $7,000 from his personal account into his Mellon Bank client trust account, and Mellon Bank credited respondent's Mellon Bank client trust account with 28 cents in interest. On about November 5, 2004, respondent closed his Mellon Bank client trust account when it had a balance of $9,308.70. Because $7,000 of that

[5] The State Bar incorrectly alleges, in the NDC, that respondent paid out a total of only $17,499.30. Of course, this court must use the correct figure.

[6] The State Bar also incorrectly alleges, in the NDC, that respondent should have had a total of $25,500.70 less his reasonable attorney's fees on deposit. Again, the court must use the correct figure.

[7] The State Bar also incorrectly alleges, in the NDC, that respondent had 29 remaining Del Amo clients. Moreover, when it listed, in the NDC, the names of those remaining clients, the State Bar listed 30 names (not 29).

amount came from respondent's personal account, there was, at most, a total of $2,308.70 ($9,308.70 less $7,000) in Del Amo settlement proceeds in respondent's Mellon Bank client trust account when it was closed. At that time, there should have been, in Del Amo settlement proceeds, a total of $25,193.87 ($43,000 less $17,806.13) *less respondent's reasonable attorney's fees* in respondent's Mellon Bank client trust account.

On June 3, 2005, and then again on June 27, 2005, a State Bar investigator wrote to respondent regarding the State Bar investigation into the complaints that some of his Del Amo clients filed against him. In those two letters, the investigator asked respondent to provide the State Bar with a written response and to include therewith documentation to confirm that each of his Del Amo clients had received his or her share of the settlement proceeds. Even though respondent actually received those two letters, he failed to respond to either of them. In addition, respondent failed to otherwise communicate with the State Bar investigator.

Counts 1 & 2: Trust Account Violations (Rules of Prof. Conduct, Rule 4-100(A))& Moral Turpitude (§ 6106)

In counts 1[8] and 2, the State Bar charges that respondent willfully violated Rules of Professional Conduct, rule 4-100(A) (hereafter rule 4-100(A)) and section 6106, respectively. Rule 4-100(A) provides, in relevant part, as follows:

> All funds received or held for the benefit of clients by [an attorney] shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import. . . . No funds belonging to the [attorney] shall be deposited therein or otherwise commingled therewith except as follows:
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> (1) Funds reasonably sufficient to pay bank charges.
>
> (2) In the case of funds belonging in part to a client and in part presently or potentially to the [attorney], the portion belonging to the [attorney] must be withdrawn at the earliest reasonable time after the [attorney's] interest in that portion becomes fixed. However, when the right of the

[8] The State Bar incorrectly designated count 1 as count 2 in the NDC.

> [attorney] to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

Section 6106 provides that "The commission of 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, constitutes a cause for disbarment or suspension."

In count 1, the State Bar charges that "By failing to maintain at least $25,500.70, less reasonable attorneys fees, on behalf of Respondent's remaining Del Amo clients in his Mellon [Bank client trust account], Respondent wilfully failed to maintain client funds in [a client trust account]."[9] In count 2, the State Bar charges that "By misappropriating at least $25,500.70, less reasonable attorneys fees, of the remaining Del Amo client funds from his Mellon [Bank client trust account], Respondent committed an act or acts involving moral turpitude, dishonesty or corruption."

Notably, however, the State Bar did not allege, in the NDC, the amount of respondent's reasonable attorney's fees.[10] Because the State Bar did not establish the amount of respondent's reasonable attorney's fees, the record does not establish the amount of Del Amo settlement

[9] Again, as noted above in footnote number 6, even though the State Bar incorrectly alleged that respondent failed to maintain at least $25,500.70, the court uses the correct figure of $25,193.87.

[10] As noted above, the State Bar did not submit any evidence with its request for waiver of a default hearing to establish the charged misconduct, but elected to rely only on the factual allegations admitted by default. In that regard, it is relevant to note that the State Bar did not allege, in the NDC, that respondent's remaining Del Amo clients (whether they number 27, 29, or 30) were entitled to receive any of the settlement proceeds; that respondent's Del Amo clients were entitled to more than the $17,806.13 that respondent disbursed to them between May 2001 and November 2004; or that respondent improperly withdrew (whether from his Mellon Bank client trust account or from a client trust account at some other bank) a portion of the settlement proceeds that belonged to his Del Amo clients or that he otherwise used a portion of the proceeds for an improper purpose (as opposed to a proper purpose such as using it to pay client medical liens or properly transferring it to another client trust account).

proceeds, *if any*, that respondent held or should have held for the benefit of his Del Amo clients after he disbursed a total of $17,806.13 to them. Thus, the record does not establish, by clear and convincing evidence, that respondent failed "to maintain at least $25,500.70, less reasonable attorneys fees, on behalf of Respondent's remaining Del Amo clients in his Mellon [Bank client trust account]" as charged in count 1. Nor does the record establish, by clear and convincing evidence, that respondent misappropriated "at least $25,500.70, less reasonable attorneys fees, of the remaining Del Amo client funds from his Mellon [Bank client trust account]" as charged in count 2.[11]

It is clear that, when the State Bar fails to meet its burden of proof, this court's duty is to find against the State Bar and to recommend only that degree of discipline which is warranted by the evidence presented. (Cf. *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr.888, 892.) Therefore, counts 1 and 2 are dismissed with prejudice for want of proof.[12]

Count 3: Failure to Cooperate with State Bar (§ 6068, subd. (i))

In count 3, the State Bar charges that respondent willfully violated section 6068, subdivision (i), which requires that an attorney "cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." The record clearly establishes that respondent willfully violated section 6068,

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[11] Nor does the record even establish that the actual balance of respondent's Mellor Bank client trust account ever dropped below the amount credited to respondent's Del Amo clients. (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.)

[12] The court notes that the factual allegations in the NDC which establish that respondent transferred $7,000 of his personal funds into his Mellon Bank client trust account in early 2004 appear to prove that respondent is culpable of commingling his personal funds with client funds in violation of rule 4-100(A). However, the court need not and does not resolve that issue because the State Bar did not charge respondent with commingling. Uncharged misconduct cannot be relied on in a default proceeding for purposes of culpability or aggravation. (*In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589-590; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 217-218.)

subdivision (i) by failing to respond to the State Bar investigator's June 3, 2005, and June 27, 2005, letters and by failing to otherwise communicate with the investigator.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

1. Prior Record of Discipline

Respondent has a prior record of discipline. (Std. 1.2(b)(i).) That prior record is *Harney* I. As noted above in footnote 3, in a January 18, 2007, order in case number S147880, the Supreme Court imposed, on respondent, the discipline that this court recommended in *Harney* I, which was one year's stayed suspension and six months' actual suspension continuing until respondent makes and the State Bar Court grants a motion to terminate his actual suspension under Rules of Procedure of the State Bar, rule 205.

The misconduct found in *Harney* I was failure to competently perform legal services in a single client matter (Rules Prof. Conduct, rule 3-110(A)); failure to obey multiple court orders to appear at a judgment debtor examination in that same client matter (§ 6103); and failure to cooperate in the State Bar's disciplinary investigation of that client matter (§ 6068, subd. (i)).

2. Failure to Cooperate

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

There is no clear and convincing evidence of any mitigating circumstances, and none are apparent from the record.

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.)

The applicable standard for the only proved misconduct is standard 2.6(a), which provides, among other things, that a violation 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." Of course, according to standard 1.3, the primary purposes of imposing discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Accord, C*hadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) Thus, the generalized language of standard 2.6 provides little guidance. (*In re Morse* (1995) 11 Cal.4th 184, 206.)

Another applicable standard is standard 1.7(a), which provides that, when an attorney has one prior record of discipline, the discipline imposed in the current proceeding shall be greater than that imposed in the prior. However, standard 1.7(a) is not to be strictly applied in the present proceeding because the misconduct found herein was committed during the same time period as the misconduct found in *Harney* I. (*In the Matter of* Sklar (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State

Bar Ct. Rptr. 343, 351.) Instead, the correct analysis is to "consider the totality of the findings in the two cases to determine what the discipline would have been had all the charged misconduct been brought as one case." (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) The court concludes that, if respondent's failure to cooperate in the State Bar's disciplinary investigation in the Del Amo client matter (§ 6068, subd. (i)) had been brought in *Harney* I, it would not have substantially increased the recommended periods of the stayed suspension and actual suspension.

Turning to case law, the court is unaware of any case in which the only misconduct found is the failure to cooperate in a State Bar disciplinary investigation (§ 6068, subd. (i)). The court is, however, aware that in *Middleton v. State* Bar (1990) 51 Cal.3d 548, 560, the Supreme Court noted that the "wilful failure to cooperate or participate in disciplinary investigations or proceedings itself supports discipline, even severe discipline." Accordingly, the court concludes that additional discipline should be imposed on respondent in the present proceeding and that the appropriate level of discipline in the present proceeding is a public reproval without conditions.

VI. PUBLIC REPROVAL

It is ORDERED that respondent David Turner Harney be and is hereby PUBLICLY REPROVED effective upon the finality of this decision. (Cal. Rules of Court, rule 9.19 [formerly rule 956]; Bus. & Prof. Code, § 6078; Rules Proc. of State Bar, rule 270(a), (b).)

VII. COSTS

Costs are 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: January 29, 2007.

RICHARD A. HONN
Judge of the State Bar Court