

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 05-O-02769-RAH
)	
DENNIS RICHARD WATT,)	
)	
Member No. 38883,)	DECISION
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Robin Brune appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent Dennis Richard Watt did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with four counts of misconduct in a single client matter. The State Bar recommends that respondent be actually suspended from the practice of law for one year and until he makes restitution for certain tax penalties and interest assessed against his client; provides an accounting and returns all client records and property; and he makes and the State Bar Court grants, a motion to terminate his actual suspension under Rules of Procedure of the State Bar, rule 205. In addition, the State Bar recommends that respondent be ordered to comply with California Rules of Court, rule 955 and that, if the period of his actual suspension extends for

two or more years, respondent's actual suspension continue until he makes a showing of rehabilitation, fitness to practice, and legal learning in accordance with Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii) (all further references to standards are to this source).

The court agrees with the State Bar's recommendation except the court concludes that respondent should be placed on only six months' actual suspension and, even though not addressed by the State Bar, that respondent should be placed on three years' stayed suspension (Rules Proc. of State Bar, rule 205(a)(2); *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 227-229; see also *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110-111) and that respondent should be required to make restitution for any shortage in client funds disclosed by the required accounting.

II. PROCEDURAL HISTORY

On July 27, 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.)

Thereafter, on July 31, 2006, the State Bar received, from the United States Postal Service (hereafter Postal Service), a return receipt (i.e., green card) for that copy of NDC. That return receipt establishes that the copy of the NDC served on respondent was actually delivered to respondent's official address and signed for by "Gah" or "gaw" as agent for respondent.

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

Respondent's response to the NDC was due no later than August 21, 2006. (Rules Proc. of State Bar, rules 63(a), 103(a).) Respondent, however, failed to file a response.

On August 29, 2006, the State Bar filed a motion for entry of respondent's default² 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 September 20, 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.

Also, on September 20, 2006, a State Bar Court case administrator properly served a copy of the court's order of entry of default on respondent at his official address by certified mail, return receipt requested. Thereafter, case administrator received, from the Postal Service, a return receipt (i.e., green card) which establishes that a copy of the court's order entering default was actually delivered to respondent's official address on September 26, 2006, where it was signed for by respondent. Even though respondent personally accepted delivery of the court's order entering default, respondent never filed a motion seeking relief from default.

On November 29, 2006, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline (hereafter the State Bar's waiver of hearing and discipline brief). That same day, the court took the case under submission for decision without a hearing.

² The declaration of Deputy Trial Counsel Brune, which is attached to this motion, establishes that she telephoned respondent on August 25, 2006; received a recording that stated the recipient of the call was respondent; and left a voicemail message for respondent stating that the matter was "ripe for default" and noting that a status conference was set for August 28, 2006. Respondent never returned Brune's telephone call. Nor did he appear at the August 28 status conference.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings 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)); (2) the declarations of Donnia Crocker and State Bar Investigator Lisa Edwards, which are attached to the State Bar's waiver of hearing and discipline brief (Rules Proc. of State Bar, rule 202);³ and (3) the facts in this court's official file in this matter.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 28, 1966, and has been a member of the State Bar since that time.

B. Misconduct

At all relevant times, respondent represented Donnia Crocker in her capacity as Administrator with Will Annexed of the Estate of Lurana Berry, Decedent, in the Alameda County Superior Court (hereafter the estate). Respondent, not Crocker, maintained custody and control over the estate's assets and assumed the responsibility for pay the estate's debts and distributing the estate's assets to the beneficiaries named in Berry's will.

While representing Crocker, respondent received the proceeds from the sales of the estate's properties. On October 17, 2000, respondent deposited \$35,145.83 in sales proceeds into

³ The court must disregard much of Edwards' and Crocker's declarations because they contain primarily uncharged facts. Even though the State Bar is entitled to present declarations with its request for waiver of default hearing (Rules Proc. of State Bar, rule 202), the declarations should not contain statements of uncharged facts (even if the statements were allegedly made by the respondent). It is well established that the State Bar cannot rely on any uncharged fact to establish either charged misconduct or aggravation in a default proceeding. (*In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589-590; *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606.) To do so would violate the attorney's right to due process because the attorney has never been fairly apprised that the uncharged facts would be used against him or her. (*Ibid.*)

a "Prima Account" at Bank of America. On October 17, 2000; December 15, 2000; and March 20, 2001; respondent deposited, respectively, \$51,000.00; \$99,705.73; and \$3,579.75 in sales proceeds into an "Interest Maximizer Account" at Bank of America. Both of these accounts were in only respondent's name. In other words, these two accounts were not trust accounts. Respondent used the funds in these two accounts to pay various estate debts and expenses.

Since February 2002, Crocker repeatedly asked respondent for information about the estate funds in his possession. For example, on about June 3, June 11, August 23, September 4, September 20, and December 16, 2004, respondent received letters from Crocker in which Crocker asked him for copies of pertinent bank records. In addition, in the letter respondent received on about December 16, 2004, Crocker asked respondent for "a letter of what you are doing to or with the estate I am still waiting for the letters, showing you have credit [sic] back the estate, of interest and penalty charges because you didn't pay."

In addition, since at least late 2003, Crocker has left and respondent has received many telephone messages in which Crocker asked respondent for the estate's bank records and for a status update. In telephone conversations on about December 18, 2003; January 21, 2005; and February 3, 2005; respondent promised to send Crocker copies of pertinent bank statements. But despite Crocker's repeated requests and respondent's repeated promises, respondent never provided Crocker with the records and information she requested. Nor did respondent otherwise provided Crocker with an accounting of the estate's assets.

On or about March 25, 2002, the superior court issued an order closing the estate and authorizing Crocker to distribute the estate's assets to the named beneficiaries and to withhold \$45,000 of the estate funds to pay the estate's federal and state taxes. Respondent withheld far more than the authorized \$45,000 (and far more than necessary to pay the estate's taxes).

Between February 25, 2002, and May 20, 2003, respondent performed some of the necessary services with respect to the estate's tax returns and made partial payments towards the taxes the estate owed totaling \$28,693.88. At the end of May 2003, respondent held about \$90,274.50 in estate funds.

Beginning on or about July 14, 2003, and continuing until January 2004, both the Internal Revenue Service and the California Franchise Tax Board sent many notices to Crocker informing her that the estate still owed taxes. Some of the notices warned Crocker that tax liens could be placed on her personal property if the estate's taxes were not paid. Crocker promptly gave each of these notices to respondent, and he repeatedly promised Crocker that he would resolve the matters, but he never did. Nor did respondent take any steps to pay the remaining tax obligations or to otherwise avoid the accrual of interest and penalties and the imposition of tax liens on Crocker's property.

In June 2004, when she refinanced her home loan, Crocker learned that the IRS lien had \$15,565.50 lien against her home. Only after respondent received several telephone calls from Crocker and her loan officer, did he satisfy all but \$100 that lien on July 8, 2004. Crocker paid the \$100 deficiency with her personal funds.

As of July 2004, the estate still owed \$17,832.04 in taxes. In a telephone conversation on about October 28, 2004, respondent again promised Crocker that he would resolve the matter. However, on about November 28, 2005, respondent told Crocker that he had been too busy to complete the matter. Even though respondent still holds about \$37,699.24 in estate funds, he has never paid the remaining taxes due. Nor has respondent ever made all the distributions to the beneficiaries in Berry will even though Crocker has repeatedly requested that he do so since about February 2002. In fact, two of the three beneficiaries died without ever receiving their bequests.

Count 1: Failure to Perform (Rules of Prof. Conduct, Rule 3-110(A))⁴

In count 1, the State Bar charges that respondent willfully violated rule 3-110(A), which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. The record establishes, by clear and convincing evidence, that respondent willfully violated that rule by failing to properly pay the estate's taxes, allowing tax penalties and interest to accrue against the estate, allowing the IRS to place a lien on Crocker's home, and failing to distribute the estate's remaining corpus to the beneficiaries. Without question, Crocker's repeated requests for performance and respondent's repeated promises to perform, establish that respondent's failure to competently perform was not just reckless and repeated, but intentional.

Count 2: Failure to Promptly Pay Funds (Rule 4-100(B)(4))

In count 2, the State Bar charges that respondent willfully violated rule 4-100(B)(4), which requires that an attorney "Promptly pay or deliver, as requested by the client, any funds . . . in the possession of the member which the client is entitled to receive." The State Bar charges that respondent violated that rule by failing to distribute the estate's remaining corpus to the beneficiaries in accordance with Crocker's repeated requests that he do so.

The court, however, must decline to find respondent culpable of willfully violating rule 4-100(B)(4) because the State Bar charged and the court relied on respondent's failure to distribute the estate's remaining corpus to the beneficiaries as a basis for finding respondent culpable for violating rule 3-110(A) under count 1 above. To rely on that same failure again as a basis for holding that respondent is also culpable of violating rule 4-100(B)(4) under count 2 would be duplicative. It is generally 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

⁴ Unless otherwise noted, all further rule references are to these Rules of Professional Conduct of the State Bar.

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 2 is dismissed with prejudice.

Count 3: Failure to Account (Rule 4-100(B)(3))

In count 3, the State Bar charges that respondent willfully violated rule 4-100(B)(3), which requires that an attorney “Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the [attorney] or law firm and render appropriate accounts to the client regarding them. . . .” The record establishes, by clear and convincing evidence, that respondent willfully violated that rule by failing to provide Crocker with a complete accounting of the estate assets he received and disbursed.

Even though Crocker may not have specifically used the term “accounting,” a request for an accounting was clearly implicit in her repeated requests for bank records and information regarding the estate and its assets and tax debts. Respondent, however, repeatedly failed to provide Crocker with an account for years.⁵ The “failure to provide a proper accounting for entrusted funds is cause for discipline whether or not financial loss has ultimately occurred. [Citations.]” (*Ridge v. State Bar* (1989) 47 Cal.3d 952, 961.)

⁵ An attorney’s refusal or failure to account for client funds in response to repeated demands that he or she do so supports a finding of willful misappropriation. (*Brody v. State Bar* (1974) 11 Cal.3d 347, 350; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.) Of course, the willful misappropriation of client funds often results in disbarment unless the most compelling mitigating circumstances predominate. (See std. 2.3(a).) However, the State Bar did not charge respondent with misappropriation. Thus, because this is a default proceeding, the court cannot find respondent culpable of misappropriation. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 465, fn. 9; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 217-218; see also *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36, fn. 6.) Nor may the court consider it for purposes of aggravation. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 316, fn. 32.)

Count 4: Trust Account Violations (Rule 4-100(A))

In count 4, the State Bar charges that respondent willfully violated rule 4-100(A), which 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

“An attorney violates [rule 4-100] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]” (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.) The record establishes, by clear and convincing evidence, that respondent willfully violated rule 4-100(A) by failing to deposit and maintain the estate’s funds he received in bank accounts that are clearly labeled as trust accounts.

Respondent’s failure to properly deposit and maintain the estate’s funds in a trust account is an extremely serious professional lapse. Respondent’s actions exposed and continue to expose the estate’s funds to attachment by respondent’s creditors. Such a result is contrary to the very purpose of rule 4-100. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.) That no actual loss has apparently occurred to date does not excuse respondent’s conduct. (*Ridge v. State Bar, supra*, 47 Cal.3d at p. 962.)

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

1. Multiple Acts

The fact that respondent has been found culpable of three counts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

2. Failure to Cooperate

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is a serious aggravating factor because it establishes that he fails to understand and appreciate his duty as an officer of the court to participate in disciplinary proceedings. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 109-110.)

3. Significant Harm

Respondent's failure to properly pay the estate's taxes and distribute the estate's remaining corpus to the beneficiaries under Berry's will has caused significant harm. As noted above, two of three beneficiaries died without ever receiving their testamentary bequests. (Std. 1.2(b)(iv).)

4. Indifference

Respondent's continuing failures to pay the estate's taxes, to account for the estate's assets, to distribute the remaining corpus clearly demonstrate an indifference towards and a disregard for the rights of Crocker and the other beneficiaries. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) In fact, an attorney's wrongful retention of funds for such an extremely long time is a particularly aggravating circumstance because it approaches a practical appropriation of the funds. (*In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 465.)

B. Mitigating Circumstances

Respondent does not have a prior record of discipline in at least 36 years of practice. This, of course, is very substantial mitigation. (Std. 1.2(e)(i).)

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 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In this case, the most severe sanction for respondent's misconduct is found in standard 2.2(b), which provides: "Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of Professional Conduct, none of which offenses result in the wilful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances." The Supreme Court has, albeit only once, declined to strictly apply the minimum three months' actual suspension. (See, e.g., *Dudjian v. State Bar* (1991) 52 Cal.3d 1092, 1100.) However, that case is distinguishable from the present proceeding. In that case, there was more mitigation and no aggravation.

Turning to case law, the State Bar cites, in its waiver of hearing and discipline brief, six cases that involve abandonment in a probate or trust setting. The court concludes that the cited cases of *Ridge v. State Bar, supra*, 47 Cal.3d 952 and *Butler v. State Bar* (1986) 42 Cal.3d 323 are instructive.

In *Ridge*, the attorney was placed on three years' stayed suspension, three years' probation, and one year's actual suspension⁶ for misconduct involving three matters. In the first matter, the attorney was intoxicated when he appeared in court on behalf of a criminal defendant and then lied to the judge in the criminal proceeding about how much alcohol he had consumed

⁶ In its request for waiver of hearing and discipline brief, the State Bar incorrectly asserts that the attorney in *Ridge* was placed on two years' actual suspension.

before appearing in court. In the second matter, the attorney, who was the executor of his deceased father's estate, delayed distributing all of the estate's assets for almost ten years, failed to keep accurate records of the estate's assets, commingled estate funds, and refused to provide an accurate accounting of the estate's assets despite his brother's repeated requests over a six year period. However, no misappropriation of estate funds was found, and the attorney's conduct as executor did not involve dishonesty or moral turpitude. In the third matter, the attorney failed to use reasonable diligence and skill in representing his client, who was the plaintiff in two lawsuits over the destruction of the client's rented residence, failed to communicate with the client, and deliberately misrepresented, to the client, the status of the client's case. In mitigation, the attorney did not have a prior record of discipline and had paid all the penalties assessed against the estate with his own funds.

In *Butler*, the attorney was placed on two years' stayed suspension, two years' probation, and sixty days' actual suspension for misconduct in connection with a single probate matter. In the probate matter, the attorney failed to adequately inquire to obtain information about the estate, failed to communicate with the executor named in the will and his attorney, knowingly misrepresented that the estate was proceeding satisfactorily in probate, and improperly prolonged the probate proceeding. In aggravation, the attorney had a prior reproof for failing to take any action in a probate case for five years.

Respondent's misconduct in the present proceeding is less egregious than that in *Ridge*, but more egregious than that in *Butler*. After considering all relevant factors (including standard 2.2(b)), the court concludes that the appropriate level of discipline in the present case is three years' stayed suspension and six months' actual suspension continuing until respondent (1) accounts to Crocker; (2) delivers all of the estate's assets and records to Crocker; (3) makes restitution with interest for any shortages disclosed by the accounting and for all tax penalties

and interest imposed because of respondent's failure to perform; (4) provides, to the State Bar's Probation Office, proof of his accounting, delivery of assets and records, and restitution; and (5) he makes and the State Bar Court grants a motion to terminate his actual suspension. (See also *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615.) In addition, the court concludes that respondent should be required to comply with California Rules of Court, rule 9.20 and to take and pass a professional responsibility examination. Finally, the court concludes that respondent should be required to comply with standard 1.4(c)(ii) if his actual suspension continues for two or more years.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent Dennis Richard Watt 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 Davis be actually suspended from the practice of law for six months and until (1) he accounts to Donnia Crocker, Administrator of the Estate of Laurana Berry, for all of the Berry Estate's assets; (2) he delivers to Crocker (or to her new attorney, if any) all the assets and records of the Berry Estate in his possession; (3) he makes restitution to Crocker and the Berry Estate (or to the Client Security Fund to the extent of any payment from the fund to Crocker or the Berry Estate, plus interest and costs, in accordance with Business and Professions Code section 6140.5)⁷ for any shortages disclosed in the required accounting and all tax penalties and interest they were assessed because of Watt's failure to timely pay the taxes together with interest on any such shortages and other sums at the rate of 10 percent per annum from 30 days after the effective date of the Supreme Court's order in this proceeding until paid; (4) he furnishes, to the State Bar's Office of Probation in Los Angeles, satisfactory proof of such accounting, delivery of assets and records, and restitution; and (5) he makes and the State Bar

⁷ Of course, any restitution payable to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his actual suspension.

The court also recommends that, if Watt's actual suspension in this matter continues for two or more years, he remain actually suspended from the practice of law until he shows proof satisfactory to the State Bar Court of his 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 Watt be ordered to comply with the conditions of probation, if any, hereinafter imposed on him by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

VII. PROFESSIONAL RESPONSIBILITY EXAM, RULE 955 & COSTS

The court recommends that Watt be ordered (1) to take and pass the Multistate Professional Responsibility Examination (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 his actual suspension and (2) to provide satisfactory proof of his passage to the State Bar's Office of Probation in Los Angeles within that same time period. Failure to pass the MPRE within the specified time results, without a hearing, in actual suspension by the review department until passage. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see also Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rules 320, 321(a)(1)&(3).)

The court also recommends that Watt be required 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 60 calendar days, respectively, after the effective date of the Supreme Court order in this matter.⁸

Finally, the court further 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: February 27, 2007.

RICHARD A. HONN
Judge of the State Bar Court

⁸ Watt is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) At least in the absence of compelling mitigating circumstances, an attorney's failure to comply with rule 9.20 almost always results in disbarment. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)