

**FILED December 3, 2007**

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of	)	<b>Case No. 05-O-03839</b>
	)	
<b>MOYLAN F. GARTH,</b>	)	
	)	<b>OPINION ON REVIEW</b>
Member of the State Bar.	)	
_____	)	

THE COURT<sup>1</sup>

This appeal from a default decision of a State Bar Court hearing judge raises two issues: one culpability issue and the issue of appropriate degree of discipline. The State Bar has appealed, contending that respondent should be deemed culpable of a finding beyond those made by the hearing judge and that the appropriate discipline should be increased from the recommended actual suspension of thirty days and until the State Bar Court grants respondent's motion to terminate his suspension to an actual suspension of not less than three months. On our independent record review (Cal. Rules of Court, rule 9.12; *In re Morse* (1995) 11 Cal.4th 184, 207), we shall recommend a ninety-day actual suspension as part of a one-year stayed suspension and one-year probation.

**I. STATEMENT OF THE CASE**

In March 2006, the State Bar served a formal notice of disciplinary charges (NDC) on respondent. He failed to file an answer to the charges and his default was entered in May 2006.

---

<sup>1</sup>Before Watai, Acting P. J., Epstein, J. and Stovitz, J., pro tem. (Hon. Ronald W. Stovitz, retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.)

(See Rules Proc. of State Bar, rule 200, et seq.).<sup>2</sup> Although the State Bar Court learned in June that respondent was preparing a motion to set aside his default, he never filed it. In June 2006, the State Bar requested waiver of a default hearing and filed a brief on culpability and degree of discipline. The Hearing Department submitted the matter without a hearing, and, in September 2006, issued its findings and suspension recommendation. Pursuant to the procedural rules in default cases, the Hearing Department based its findings on the factual allegations contained in the formal charges deemed admitted by the default (Rules Proc. of State Bar, rule 200(d)(1)(A)), and the facts in the official State Bar Court file.

Those findings show respondent's misconduct in the operation of his trust account and in his failure to participate or cooperate in the subsequent State Bar investigation into this matter.

As a background fact, the hearing judge found, as do we, that respondent was admitted to practice law in California in December 1990 and has no prior record of discipline in this state.

The charges deemed admitted by respondent's default show that he misused his client trust account at the Bank of America over a five-week period in spring 2005. On April 28, 2005, respondent issued a \$156 check from this trust account payable to the Superior Court on behalf of his client, Caroline Thompson. Two business days later, respondent withdrew \$800 in cash from that account,<sup>3</sup> which brought its balance to \$74.50. The same day as his cash withdrawal, respondent's \$156 check to the Superior Court was returned for insufficient funds. After respondent deposited another \$100 in cash into the account the next business day, the bank paid the \$156 check to the Superior Court. Three days later, on the second presentment, the \$156 check was paid.

---

<sup>2</sup>Pursuant to Business and Professions Code section 6007, subdivision (e), respondent was also placed on involuntary inactive enrollment because of his default. (See also Rules Proc. of State Bar, rule 500.)

<sup>3</sup>The record contains no evidence of the purpose of this withdrawal.

On May 24, 2005, respondent issued a \$420 trust account check to a storage company also on behalf of his client Thompson. Between May 6 and 27, 2005, the balance in respondent's trust account was only \$2.50. On May 27, respondent deposited to this account a \$3,000 cashier's check made payable to Thompson and respondent. The bank paid respondent's trust account check to the storage company on June 1, 2005, although the account balance was only \$251 at the time.

The hearing judge concluded that respondent wilfully violated the charged ethical rule regarding an attorney's operation of trust accounts, rule 4-100(A) of the Rules of Professional Conduct, by failing on two occasions to maintain the balance in the trust account necessary to preserve the funds for the benefit of his client, Thompson. We agree with this conclusion. As part of the charge that respondent failed to comply with rule 4-100(A) of the Rules of Professional Conduct, the NDC alleged that respondent issued the two checks on his trust account when he knew or should have known that there were insufficient funds in his trust account to pay them. As to this allegation, the hearing judge simply observed in footnote two of his decision that "the factual allegations fail to establish the[se] charges" and offered no explanation of this conclusion. As the State Bar takes issue with this conclusion, we shall discuss this issue *post*.

As to the charges that respondent failed to cooperate and participate in the State Bar investigation of his trust account operation, *ante*, the hearing judge found, and we adopt, the following facts: Between June 24, 2005, and January 14, 2006, a State Bar paralegal and investigator successively sent respondent a total of four mailed letters and one letter by fax, each asking respondent to reply to certain questions or concerns regarding the conduct of his trust account. Although respondent received the four letters and the fax that was sent to his number maintained on State Bar records, respondent never replied to these communications.

The hearing judge concluded that respondent wilfully violated his duty under Business and Professions Code section 6068, subdivision (i), to cooperate and participate in a disciplinary investigation. We adopt this conclusion.

In aggravation, the hearing judge found that respondent was culpable of multiple acts of misconduct. Another aggravating factor found was respondent's failure to cooperate in the disciplinary proceedings, but the hearing judge weighed this factor minimally as it closely related to his misconduct of failing to participate. The hearing judge found one very substantial mitigating factor, that respondent practiced law for 14 years without discipline. We agree with the hearing judge's assessment of aggravating and mitigating factors.

## **II. DISCUSSION**

### **A. Culpability**

On review, the State Bar contends that the hearing judge erred by failing to find, as charged, that respondent knew or should have known that the two checks he issued on behalf of his client were on insufficient funds. Although we agree with the State Bar that the hearing judge should have made that finding in this default proceeding, we stress that, because of the way in which the issuance of the checks was charged, there is little practical import whether the requested finding is made or not. The NDC, as drafted by the State Bar, charged the manner of the issuance of the two checks as one of the ways that respondent allegedly violated rule 4-100(A) of the Rules of Professional Conduct. The charged conduct of respondent issuing the two checks was not the subject of a separate charge of another rule or of a statutory violation. Moreover, the hearing judge adopted findings and conclusions that respondent wilfully violated rule 4-100(A) in two instances. Although the hearing judge failed to agree with the admission of

the charge that this rule was also violated by the manner in which the checks were issued,<sup>4</sup> we do not understand the significance placed by the State Bar on the judge's failure to make this precise finding, given his findings and conclusion that respondent did in fact willfully violate rule 4-100(A), which was the very rule violation charged.

### **B. Degree of Discipline**

The principal contention before us is degree of discipline. The State Bar opens its argument on this issue with a lengthy and passionate plea that the hearing judge erred in giving significant mitigating credit to respondent's years of practice without a prior record of discipline by considering the official records of the State Bar which showed no such record of prior discipline since respondent was admitted to practice in this state in 1990. In so arguing, the State Bar admits that this court has followed a long-standing practice of judicially noticing the official records of the State Bar in considering the presence or lack of prior discipline. Although the State Bar cites several decisions, it correctly notes that we have not previously addressed the issue in a judicial holding. We hold that the State Bar's claim of error is not well taken. The official records of the State Bar are appropriately considered by court and counsel in several aspects of default matters to assure that proper procedures are followed (e.g., that the respondent is a member of the State Bar at the relevant times (Bus. & Prof. Code, § 6002, et seq., § 6075), that service of the NDC was on the member's appropriate address (*id.* at § 6002.1), the date of the member's licensure in California (*id.* at § 6064), that – as happened here – a fax sent by a State Bar investigator was transmitted to an appropriate address listed on the member's State Bar

---

<sup>4</sup>We do not understand the very simple explanation of the hearing judge for not having made the finding in view of rule 200(d)(1)(A) of the Rules of Procedure of the State Bar. Under this rule, the hearing judge may decline to deem admitted charged factual allegations on entry of a respondent's default if the judge orders otherwise "based on contrary evidence." (*Ibid.*) Here, the judge cited no contrary evidence and we are unaware of any.

record (cf. Bus. & Prof. Code, § 6002.1) and that this respondent has not suffered prior discipline since admission). Indeed, the State Bar should anticipate that, if a respondent defaults and therefore, culpability is conceded by the respondent's consequent admission of the disciplinary charges, then as to the issue of degree of discipline, this court will take judicial notice of the official records of the State Bar, given the importance of this issue as recognized by our Supreme Court. (Cf. *In Re Mostman* (1989) 47 Cal.3d 725, 741.) We see no inconsistency between this principle and the important tenet that the burden rests on the respondent to present mitigating evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)

Although not briefed at oral argument before us, the State Bar raised the procedural question that, prior to the filing of the hearing judge's decision in this default matter, it did not have formal notice that the State Bar Court would take judicial notice of the State Bar's records showing respondent's years of admission to practice and lack of prior discipline. The State Bar also argues that if it had had this notice, it would have been able to make the decision whether or not to offer evidence in this case potentially rebutting the evidence of respondent's lack of a prior record.

Before discussing this claim, we note that the State Bar never sought leave to present additional evidence after the filing of the hearing judge's decision and the State Bar concedes in its brief that it has no evidence as to whether respondent left the practice of law or whether he was disciplined in another jurisdiction. We conclude, therefore, that no legal reason exists to remand this case for further proceedings.

Turning to the merits of the recommendation of discipline, we start with the Standards for Attorney Sanctions for Professional Misconduct (all further references to standards are to this source). Although guidelines, we give them great weight whenever appropriate. (*In re Brown*

(1995) 12 Cal.4th 205, 220.) The two substantive standards which apply are 2.2(b) for respondent's rule 4-100(A) violations and 2.6 for respondent's section 6068, subdivision (i), violation. Standard 2.2(b) provides for at least a three-month actual suspension, irrespective of mitigating circumstances, and standard 2.6 provides for either disbarment or suspension, depending, as pertinent here, on the gravity of the offense.

Previous decisions of the Supreme Court and of our court, after the State Bar's adoption of the Standards, have imposed less than a three-month actual suspension for trust account violations without evidence of willful misappropriation of funds. (E.g., *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 333 [30-day actual suspension]; *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1100 [public reproof]; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 732, 736 [private reproof]; and *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 402 [entirely stayed suspension]. As the State Bar correctly observes, none of these decisions involved defaulting attorneys or failure to participate in or cooperate with disciplinary proceedings as is present here.

The State Bar relies on our decision in *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, in which a 90-day actual suspension was imposed. The hearing judge distinguished this case as one showing significantly more serious misconduct than the record here. Solely as to the extent of the found trust account misconduct, we agree with the hearing judge. McKiernan's inattention to his trust account spanned a prolonged period of time contrasted to the few weeks of respondent's misdeeds, was of substantially greater magnitude than respondent's, and resulted in about 30 dishonored trust account checks. Moreover, the nature and extent of McKiernan's trust account supervision failures led us to conclude that he had engaged in moral turpitude by gross neglect, a more serious conclusion than we have made here. Because we concluded that McKiernan's protracted inattention to the supervision of his

trust account jeopardized his clients, we held that the mitigating weight of his 21 years of law practice was diminished. Nevertheless, McKiernan had participated in these proceedings and had introduced evidence of cooperation, recognition of his offenses and reform of his trust account mismanagement. (*Id.* at pp. 426-427.)

One important factor cited by the hearing judge in support of his recommendation of actual suspension is the prophylactic nature of rule 4-100, recognized in many of the decisions. In other words, rule 4-100, in requiring an attorney holding trust funds to adhere to the rule's requirements, is designed to prevent the more serious harm and misconduct occurring when trust funds are actually lost through willful or negligent misappropriation. (*In the Matter of McKiernan, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 424-425, citing *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 876; see also *Silver v. State Bar* (1974) 13 Cal.3d 134, 144-145.) Respondent's default makes it impossible for us to know whether he understands his obligation to handle trust funds properly and has put reforms in place to prevent future trust account mismanagement or is indifferent to these vital concerns. This risk of uncertainty does bear on our recommendation of discipline, the purposes of which include the protection of the public and the maintenance of confidence in the legal profession. (Std. 1.3; e.g., *Conroy v. State Bar* (1990) 51 Cal.3d 799, 804-805; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221.)

Another important factor here is that respondent's trust account violations are combined with his failure to participate in the investigation or proceedings, leading ultimately to his default. In the context of this case, respondent's failure to participate in the State Bar investigation is perhaps more serious than his trust account mismanagement and more protracted in time than his trust account violations. Clearly, a period of actual suspension would be warranted for it alone. (See std. 2.6.) Finding no basis in this record to deviate from the minimum discipline recommended by standard 2.2(b), we hold that the appropriate discipline is

90 days of actual suspension and until a motion is granted to relieve him from actual suspension under rule 205, Rules of Procedure of the State Bar, as part of a larger stayed and probationary suspension.

### **III. FORMAL RECOMMENDATION**

For all the reasons cited, we recommend that respondent, Moylan F. Garth, be suspended for one year, that execution of that suspension be stayed and that respondent be placed on probation for one year on the conditions recommended by the hearing judge in his decision, except that we recommend that respondent must be actually suspended for the first three months of his period of probation, which suspension shall continue until a motion is granted to terminate respondent's actual suspension, pursuant to rule 205, Rules of Procedure of the State Bar.

We further recommend that if respondent is actually suspended for two years or more, he shall remain actually suspended 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, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

We further recommend that respondent be ordered to comply with rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein.

Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.