

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **05-O-03839-RAH**
)
MOYLAN FEILD GARTH,)
)
Member No. 149639,) **DECISION**
)
A Member of the State Bar.)

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Shari Sveningson appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent Moylan Field Garth did not appear in person or by counsel even though he had actual knowledge of the proceeding.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with two counts of misconduct. In count 1, the State Bar charges respondent with violating the rule regulating client trust accounts by failing to maintain sufficient funds on deposit to cover two relatively small checks when they were presented for payment. In count 2, the State Bar charges respondent with violating his statutory duty to cooperate in the State Bar's disciplinary investigation into his failure to maintain adequate funds to cover these two checks. With only nominal legal analysis, the State Bar contends that the appropriate level of discipline is 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 Rules of Procedure of the State Bar, rule 205. The court, however, concludes that the appropriate level of discipline is one year's stayed suspension and thirty days' actual suspension continuing until respondent makes and the State Bar Court grants a motion to terminate his suspension under rule 205.

II. PROCEDURAL HISTORY

On March 29, 2006, the State Bar filed the NDC 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.)

On April 3, 2006, the State Bar received, from the United States Postal Service (hereafter Postal Service), a return receipt (i.e., green card) for the copy of the NDC that was served on respondent at his official address. That receipt establishes that the copy of the NDC was actually delivered to respondent's official address, where it was accepted and signed for by "L.K. Dayton" as agent of addressee (i.e., respondent).

Respondent's response to the NDC was due no later than April 18, 2006. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, failed to timely file a response.

On May 3, 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

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

May 23, 2006, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment.

On June 1, 2006, the court received, by fax, the declaration of Caroline Thompson supporting Attorney Moylan F. Garth. On June 5, 2006, the court's clerk telephoned respondent and notified him that, even though the court received Thompson's declaration, it could not be filed because respondent's default was entered on May 23, 2006. During that telephone conversation, respondent acknowledged receipt of his copy of the court's May 23, 2006, order entering his default and stated that he was preparing a motion for relief from default, which he would be filing in the next few days. Respondent, however, never filed such a motion. Nor has respondent contacted the court since May 23, 2006.

On June 14, 2006, the State Bar filed a request for waiver of default hearing and a 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

The court's findings are based on: (1) the well-pleaded factual allegations (not the legal contentions or 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)); and (2) 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 December 5, 1990, and has been a member of the State Bar since that time.

B. Misconduct

From April through June 2005, respondent maintained his client trust account at Bank of America, account number 16649-08008.

On Thursday, April 28, 2005, respondent issued check number 1015 on his client trust account in the amount of \$156 payable to the Superior Court of California on behalf of his client Caroline L. Thompson. On the following Monday, May 2, 2005, respondent withdrew \$800 in cash from the trust account for some “unpleaded” reason, after which the balance in respondent’s trust account was only \$74.50. Also, on May 2, 2005, Bank of America returned check number 1015 due to insufficient funds. The next day, on May 3, 2005, respondent deposited \$100 in cash into his trust account. Then, on Friday, May 6, 2005, check 1015 was presented for payment a second time and paid.

Between May 6, 2005, and May 27, 2005, the balance in respondent’s client trust account was \$2.50. On May 24, 2005, respondent issued check 1019 on his trust account in the amount of \$420 payable to Sorrento Valley Self Storage again on half of Thompson. On May 27, 2005, respondent deposited into his trust account a \$3,000 cashier’s check that was made payable both to Thompson and respondent. On June 1, 2005, Bank of America paid check 1019 even though there was only \$251 in respondent’s trust account at the time.

On June 24, 2005, and again on July 19, 2005, a State Bar paralegal mailed, to respondent at his official address, a letter regarding the insufficient fund activity in his client trust account at Bank of America. In those two letters, the paralegal asked respondent to provide the State Bar with a written explanation of the insufficient fund activity in his trust account no later than July 11, 2005, and August 2, 2005, respectively. Even though respondent actually received those two letters, he failed to respond to either of them in writing or otherwise.

On December 14, 2005, and then again on January 14, 2006, a State Bar investigator mailed, to respondent at his official address, a letter regarding the State Bar investigation into his client trust account. In those two letters, the investigator asked respondent to provide the State Bar with a written response to specific allegations of misconduct involving his trust account no

later than December 29, 2005, and January 18, 2006, respectively. Even though respondent actually received those two letters, he failed to respond to either of them in writing or otherwise.

In addition, on December 14, 2005, the State Bar investigator faxed a letter to respondent at (858) 272-3777, the fax number respondent maintained on the official membership records of the State Bar. In that letter, the investigator asked respondent to contact him as soon as possible. Respondent, however, never did.

Count 1: Failure to Comply with Trust Account Rule (Rule 4-100(A))

In count 1, the State Bar charges that respondent willfully violated rule 4-100(A) of the State Bar Rules of Professional Conduct. Rule 4-1200(A) (as well as its virtually identical predecessor -- former rule 8-101 of the Rules of Professional Conduct (effective from January 1, 1975, to May 26, 1989) (hereafter former rule 8-101)) requires, inter alia, that all funds received or held for the benefit of a client by an attorney must be deposited into one or more identifiable bank accounts labeled “ ‘Trust Account,’ ‘Client’s Funds Account’ or words of similar import.”

“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 rule leaves no room for inquiry into an attorney’s intent, and good faith is not a defense to rule 4-100 violation. (Cf. *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 976 [applying former rule 8-101, which is virtually identical to rule 4-100].)

It has long been established that an attorney has a “personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.” (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) In fact, an attorney’s duty to comply with rule 4-100 is nondelegable. (Cf. *Coppock v. State Bar* (1988) 44 Cal.3d 665, 680 [applying former rule 8-101].)

A violation of rule 4-100(A) is established whenever the actual balance of the bank account in which the client or other trust funds were deposited drops below the amount credited to the client or beneficiary. (Cf. *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 123.) Accordingly, the record clearly establishes that respondent violated rule 4-100(A): (1) on May 2, 2005, when he permitted the balance in his client trust account to drop to \$74.50 when it should have had a minimum balance of \$156 for the benefit of his client Thompson; and (2) on June 1, 2005, when he permitted the balance in his trust account to drop to \$251 when it should have had a minimum balance of \$420 for the benefit of Thompson.²

Count 2: Failure to Cooperate with State Bar (§ 6068, subd. (i))

Section 6068, subdivision (i) requires an attorney "To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." The record clearly establishes that, as charged, respondent willfully violated section 6068, subdivision (i) when he failed to respond (1) to the State Bar paralegal's June 24, 2005, and July 19, 2005, letters; (2) to the State Bar investigator's December 14, 2005, mailed letter, December 14, 2005, faxed letter, and January 2, 2006, letter; and (3) to otherwise participate with the State Bar's investigations.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

1. Multiple Acts of Misconduct

The fact that respondent has been found culpable on two counts of misconduct is an aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof.

² Even though the State Bar charges that respondent issued check numbers 1015 and 1019 when he knew or should have known that there were insufficient funds in his trust account to pay them, the factual allegations fail to establish the charges.

Misconduct (standards), 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 an aggravating factor. (Std. 1.2(b)(vi).) However, contrary to the State Bar's contention, 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

The State Bar has not proffered any evidence indicating that respondent has a prior record of discipline, which would be an aggravating circumstance under standard 1.2(b)(i). As noted above, respondent was admitted to practice on December 5, 1990. Furthermore, the State Bar's official membership records show that respondent has continually been an active member of the State Bar since that time. The misconduct found in this proceeding began sometime in June 2005. Thus, the record establishes that respondent has practiced law discipline-free for 14 years, which is a very substantial mitigating circumstance (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.) However, as noted below, the standards provide little guidance in the present case. (See, e.g., *In re Brown* (1995) 12 Cal.4th 205, 220.) 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 applies to respondent's trust account violations. That standard 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."

With only minimal analysis, the State Bar first asserts that standard 2.2(b) and *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 support three months' actual suspension. Next, the State Bar asserts, again with only nominal analysis, that six months' actual suspension is necessary in the present proceeding "because respondent Garth has allowed a default to be entered in the disciplinary proceeding." The court cannot agree with either of the State Bar assertions.

Clearly, the State Bar's reliance on *McKiernan* is misplaced. The misconduct in that case is significantly more serious than that in the present proceeding and involved the extensive improper use of Attorney McKiernan's client trust account. In addition, Attorney McKiernan's client trust account showed a negative balance or was overdrawn at least 11 times over an 11-month period. (*In the Matter of McKiernan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 423.) One month it was overdrawn by more than \$11,600 and another time by more than \$10,900; another month it was over drawn once by more than \$540 and another time by more \$860. (*Id.* at p. 423, fn. 4.) Moreover, Attorney McKiernan's misconduct in that case involved moral turpitude, if not dishonesty. (*Id.* at pp. 426-427.) Respondent's misconduct involved neither.

Furthermore, notwithstanding the mandatory language in standard 2.2(b), the minimum three-month actual suspension has almost always been regarded “as a guideline, not an inflexible mandate.” (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38 [construing similar mandatory language in standard 2.2(a)].) For example, in *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1097, 1098, 1100-1101 the Supreme Court rejected the review department’s recommendation that Attorney Dudugjian be placed on two years’ stayed suspension, two years’ probation, and ninety days’ actual suspension under standard 2.2(b) based on his willful violations of former rule 8-101(A) by commingling client funds in his general office bank account and of former rule 8-101(B)(4) by failing to promptly payout client funds as requested. Even though Dudugjian’s misconduct arose in the context of a fee dispute with a client in which the attorneys were found to have lied about their intentions to return the money and thereafter refused to return the funds as requested, the Supreme Court publicly reprovved the attorneys and ordered them to pay restitution with no actual suspension -- “standard 2.2(b) notwithstanding.” (52 Cal.3d at p. 1100.)

What is more, willful violations of former rule 8-101 and rule 4-100 “have not always resulted in actual or even stayed suspension.” (*In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 401-402 and cases there cited; see also *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 732, 736 [private reprovval (and not three months’ actual suspension) was imposed for violating former rule 8-101(A) by failing to deposit \$1,754 in client funds in a trust account].) Nonetheless, the court is aware that the Supreme Court has placed an attorney on one year’s probation and thirty days’ actual suspension for willfully violating former rule 8-101(A) by mishandling client funds even though the attorney produced extensive evidence in mitigation and established that she was not a current threat to the public. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 333.)

Even though there is no evidence that respondent is venial or grossly negligent with respect to his trust account duties,³ the record clearly indicates that respondent fails to appreciate his nondelegable duty to strictly comply with rule 4-100. Also, respondent repeatedly violated his statutory duty to cooperate in State Bar disciplinary investigations.

Moreover, standard 2.2(b)'s general imposition of a three-month minimum actual suspension stems from the danger inherent in every violation of rule 4-100(A). (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 371.) Standard 2.2 reflects "the probability in some cases, the possibility in many cases, and the danger in all cases" that the failure to comply with rule 4-100(A) will result in the loss of client money. (*Peck v. State Bar* (1932) 217 Cal. 47, 51.) Accordingly, even though a public reproof and attendance at the State Bar's client trust account record keeping course might have been appropriate had respondent appeared and participated in this proceeding (e.g., *Dudugjian v. State Bar, supra*, 52 Cal.3d 1092; *In the Matter of Respondent E, supra*, 1 Cal. State Bar Ct. Rptr. 732), the court concludes that a period of actual suspension is necessary to insure that respondent conforms his conduct to those required of attorneys. In short, the court concludes that the appropriate level of discipline in this proceeding is one year's stayed suspension and thirty days' actual suspension continuing until respondent makes and the State Bar Court grants a motion to terminate his actual suspension. (*In the Matter of Whitehead, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 371-372; *Sternlieb v. State Bar, supra*, 52 Cal.3d at p. 333.)

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent Moylan Field Garth be suspended from the practice of law in the State of California for one year, that execution of the one-year suspension be stayed, and that Garth be actually suspended from the practice of law for thirty days and until

³ Notably, the State Bar has not charged respondent with misappropriating client funds or otherwise alleged that respondent's misconduct caused any client harm whatsoever.

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

The court also recommends that, if Garth'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, in accordance with rule 205(g) of the Rules of Procedure of the State Bar, that Garth be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

VII. PROFESSIONAL RESPONSIBILITY EXAM, RULE 955 & COSTS

The court also recommends that Garth 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 951(b); Rules Proc. of State Bar, rules 320, 321(a)(1)& (3).)

Further, the court recommends that, if the period of his actual suspension in this proceeding extends for 90 or more days, Garth be required to comply with California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within

120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this matter.⁴

Finally, the court 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: September 12, 2006.

RICHARD A. HONN
Judge of the State Bar Court

⁴Garth 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.) Moreover, an attorney's failure to comply with rule 955 almost always results in disbarment in the absence of compelling mitigating circumstances. (See, 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.)