

PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED MARCH 12, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of

RICHARD JOHN PAPST,

A Member of the State Bar.

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06-O-10328; 06-O-13892

OPINION ON REVIEW AND ORDER

BY THE COURT:¹

Respondent, Richard John Papst, appeals the recommendation of a hearing judge that he be disbarred from the practice of law for serious misconduct in two client matters. In the first matter, the hearing judge found that Papst acted incompetently when he delayed filing a client's application for disability retirement benefits for three years and that his actions involved moral turpitude because he repeatedly lied to his client about the status of her disability case. Papst also commingled funds. In the second matter, the hearing judge found Papst culpable of misappropriation involving moral turpitude because he withdrew more than \$125,000 from his client trust account (CTA) that belonged to several clients in order to pay another client, and then created and submitted to the State Bar false financial records to cover up his misconduct.

Papst asserts that disbarment is unwarranted in view of his 25 years of discipline-free practice, and he asks that we impose a one-year actual suspension. He maintains that his delay in filing the disability application did not harm his client and that his misappropriations and commingling "can be attributed to nothing other than his inattention

¹Before Remke, P. J., Epstein, J., and Purcell, J.

and sloppiness in client trust account record-keeping and control.” We disagree with his assessment. Papst’s misconduct, which occurred over a five-year period, involved deceit of his clients and the State Bar, incompetence, and the intentional misappropriation of more than \$125,000.

Having independently reviewed the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we conclude that the hearing judge’s findings of fact and legal conclusions are supported by clear and convincing evidence. Accordingly, we adopt his disbarment recommendation as essential for the protection of the public, the courts and the profession.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Set forth below are the hearing judge’s key factual and legal findings. We note that, after observing Papst’s demeanor at trial, the hearing judge found that he repeatedly made knowingly false statements. We agree with this finding based upon the dearth of evidence to support Papst’s testimony and the substantial evidence to impeach it.

A. ROSANNE PARKS MATTER (Case No. 06-O-10328)

On May 22, 2002, Rosanne Parks retained Papst to represent her in a disability retirement benefit claim against the Kern County Retirement Board (the Board). At the time, Parks was still a clerk/typist for Kern County where she had worked for almost 27 years, but she anticipated that she would soon need to apply for disability retirement benefits. She paid Papst \$3,500, after signing a fee agreement providing that he would receive a “flat rate of \$3,500.00” that was “inclusive of all legal services” for him to represent her before the Board. Papst deposited Parks’ check into his general business account at the San Joaquin Bank, where he also maintained his CTA.

The next month, in June 2002, Parks notified Papst that she could no longer work and she instructed him to file her disability retirement application, which he agreed to do.

Several months later, Parks contacted Papst, who told her that he was working on the application but had not yet filed it. He also informed Parks that he had not received from her physician, Dr. Matuk, an Attending Physician Statement (APS), which was necessary to complete her application. Parks went to Dr. Matuk's office in November 2002, and the doctor completed and signed the APS form in her presence, indicating that she was "permanently incapacitated from the performance of [her] duties."² The doctor then sent the form to Papst for transmittal to the Board.

In December 2002, Parks met with Papst, who told her that he would file her application in January because changes in the law that would become effective in 2003 were more favorable to her. In September 2003, Parks again spoke with Papst by phone and he notified her that her application had been denied. He further advised that he would appeal the matter to the Board. Between 2004 and 2005, Parks repeatedly called Papst to ask about her appeal. Often he would not return her calls, but when he did, he informed her that several hearings on her appeal had been delayed and that the process was slow due to a large backlog. In early August 2005, Papst told Parks that her appeal was successful and that her application had been approved. None of Papst's statements about the filing of her application or the appeal of the denial of her application were true. In fact, Papst did not file her application until *September 14, 2005*, and at the time of the trial in the instant matter, Parks still had not received any disability retirement benefits.

During the time when Parks was represented by Papst, she exhausted her deferred compensation and depended on her mother for financial assistance. On November 7, 2005,

²The doctor also stated on the APS form that it was "not known at this time" if Parks' disability was temporary. Papst maintained throughout these proceedings that this statement caused his delay in filing the application, yet he offered no explanation for failing to take affirmative steps to clarify the information. As Parks testified; "If [Papst] felt he needed further information, he could always contact the doctor. . . ."

she went to Papst's office to complain. To alleviate her frustration with him, Papst prepared a petition for writ of mandate asking the Kern County Superior Court to compel the Board to award benefits to Parks. In the petition, Papst stated that Parks' application had been filed in January 2003, and that he had "been informed, orally, that the Board has approved her application for service-connected disability benefits, retroactive to the date of Petitioner's application for service-connected disability retirement benefits and in a defined and certain amount." He had Parks sign a verification of the petition, under penalty of perjury, attesting to the truth of these statements even though Papst knew they were untrue. (Parks believed them to be true.) Papst told her that the petition for writ of mandate would promptly be filed with the Superior Court, but he never filed it.

In November 2005, Parks contacted the Board's office about the status of her application, only to discover that it had never been approved by the Board. As a result, she sent Papst a letter on December 2, 2005, terminating his services and requesting a full refund of the \$3,500 fee, which Papst paid in January, 2006. The refund was paid by a check drawn against his CTA, even though Papst never held Parks' fee in that account. The money in the CTA came from fees that Papst had earned from another client and left in the account since the beginning of 2005.

Count 1 – Rule 3-110(A) (Failure to Perform with Competence)

The State Bar alleged in Count 1 that Papst failed to represent Parks with competence, in violation of rule 3-110(A) of the Rules of Professional Conduct.³ Although Parks instructed Papst to file her application for disability retirement benefits in June 2002, he did not do so until September 14, 2005. We agree with the hearing judge that this excessive delay of three years constitutes a willful violation of rule 3-110(A). (*In the Matter*

³Unless otherwise noted, all future references to rule(s) are to the State Bar Rules of Professional Conduct.

of Klein (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 7 [delay of six months in filing bankruptcy petition is reckless failure to perform]; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641-642 [delay of over two months in obtaining temporary restraining order to protect client from harassing phone calls was reckless failure to perform].)

Count 2 – Rule 4-100(A) (Commingling)

The State Bar alleged in Count 2 that Papst commingled funds in violation of rule 4-100(A) because he reimbursed Parks with funds from his CTA that were earned fees he had received from another client. (None of Parks’ fee was deposited in the CTA.) Rule 4-100(A)(2) requires that earned fees “must be withdrawn at the earliest reasonable time after the member’s interest in that portion becomes fixed” and the failure to timely withdraw earned fees from a CTA constitutes grounds for discipline. (See, e.g., *Arm v. State Bar* (1990) 50 Cal.3d 763, 776-777; *Silver v. State Bar* (1974) 13 Cal.3d 134, 145, fn. 7 [maintenance of “buffer” funds in CTA to prevent checks being returned for insufficient funds constituted prohibited commingling].) We therefore find Papst culpable of commingling as charged in Count 2.

Count 3 – Section 6106 (Moral Turpitude)

The State Bar alleged in Count 3 that Papst committed acts of moral turpitude, thereby violating Business and Professions Code section 6106,⁴ because he drafted a petition for writ of mandate containing knowingly false statements in order to cover up his misconduct, and he repeatedly lied to Parks for more than three years about the status of her disability case. As the hearing judge correctly observed: “If this statute means anything, it means that an attorney may not intentionally lie to a client about the status of that client’s

⁴Unless otherwise noted, all future references to section(s) are to the Business and Professions Code.

matter.” We agree with the hearing judge who found that these actions constitute moral turpitude in violation of section 6106.

B. IMC DEVELOPMENT, INC. MATTER (Case No. 06-O-13892)

Sometime prior to May 26, 2006, Papst settled a matter for \$170,238.68 for his client, IMC Development, Inc., (“IMC”). Although none of the settlement funds had been paid as of May 26, 2006, Papst wrote three checks from his CTA on that date totaling \$165,238.68, payable to IMC. The first check for \$25,545.30 equaled the total amount that Papst had deposited in the CTA the day before on behalf of three other clients. IMC cashed this check, which cleared on June 6, 2006. The second check to IMC for \$59,693.38 was returned for insufficient funds (NSF) because the balance in the CTA was only \$738.76 when it was presented for payment. The third check to IMC for \$80,000, also written on May 26, 2006, was returned by the bank for NSF. Papst knew that none of the funds in his CTA belonged to IMC, but he testified that he issued the checks to IMC because “they needed the money to make payroll and other things for the company.”

Between May 31, 2006 and June 6, 2006, Papst deposited the following sums into his CTA: \$14,330 from his and his wife’s personal checking accounts; \$638, which he received on behalf of a client not related to IMC; and \$49,661, representing a settlement for yet another client unrelated to IMC. On June 8, 2006, Papst wire-transferred \$39,693.38 from his CTA to a related company of IMC. None of the funds belonged to IMC.

The next day, on June 9, 2006, Papst deposited two more checks into his CTA, one for \$60,000 and the other for \$80,000. These funds belonged to Papst’s client, George Prince, and were to be held in trust for his benefit. Four days later, on June 13, 20096, Papst wire transferred an additional \$40,306.62 from his CTA to IMC. The IMC settlement funds still had not been delivered to Papst by June 13, 2006. At the hearing below, Papst was

unable to state when the IMC funds ultimately were received and into which account they were deposited.

When the bank notified both Papst and the State Bar about the bounced checks, the State Bar sought an explanation from him on July 10, 2006. Papst replied on July 17, 2006, stating that the reason for the NSF checks was that when he signed them, “we had just received a partial payment on the settlement, and were expecting the remainder within the next week to ten days.” He further explained that the balance of the settlement funds “arrived and were deposited on June 9, 2006” and that the payments made to IMC were from the IMC settlement proceeds. These statements were false.

Responding to a follow-up inquiry from the State Bar, Papst provided financial records that he claimed were made contemporaneously with the various financial transactions in question. Papst testified that, in fact, he created the financial records at a later date, using false information, in an effort to cover up his misconduct.⁵ He continued to submit false documents to the State Bar as late as May 2007, when he provided “modified” financial records that again misstated the sources of the payments to IMC.

Count 4 – Rule 4-100(A) (Failure to Maintain Client Funds/Commingling)

Papst was charged in Count 4 with violating rule 4-100(A) for commingling his and his wife’s personal funds in his CTA, for writing checks to IMC when the trust account held insufficient funds and for misappropriating more than \$165,000 from other clients to pay IMC. The hearing judge correctly found that Papst was not culpable of violating rule 4-100(A) by reason of his deposit of personal funds into the CTA to cover the IMC checks. (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 978-979 [attorney’s deposit of personal funds

⁵ The financial records misstated the dates and sources of monies received and paid out to IMC, mislabeled monies received for the benefit of other clients, and included sham entries.

into CTA for purpose of replenishing funds previously improperly withdrawn is not commingling in violation of rule].) The remaining allegations in Count 4 are duplicative of the misconduct alleged in Counts 5 and 6, which involve the more serious charge of moral turpitude. We therefore dismiss Count 4 with prejudice.

Count 5 – Section 6106 (Moral Turpitude/NSF Checks)

The State Bar alleged that Papst committed acts of moral turpitude when he issued two checks to IMC drawn on his CTA knowing there were insufficient funds to cover those checks. Papst testified that he told IMC to hold the two checks for a couple of days before depositing them, but the hearing judge rejected Papst's testimony as not credible. We give great weight to the hearing judge's determination. Furthermore, Papst provided no evidence that he did anything to ensure that IMC would not negotiate the checks, which, in fact, it proceeded to do. His conduct in writing the NSF checks was at best grossly negligent and at worst intentional, either of which establishes moral turpitude. (*In the Matter of Conner* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr 93, 100.)

Count 6 – Section 6106 [Moral Turpitude/Misappropriation]

The State Bar alleged that Papst committed additional acts of moral turpitude in violation of section 6106 when he transferred to IMC funds from his CTA that belonged to other clients without their authorization. Even though his misappropriation of his clients' funds held in the CTA exceeded \$165,000, Papst argues that he is not culpable of moral turpitude because the diversion of these funds was intended to help a client in need of the money. Papst clearly does not understand his fiduciary duties, which he owed not just to IMC, but to all of his clients. Taking money from one client to pay another is still theft. We thus agree with the hearing judge that Papst is culpable of moral turpitude as charged in

Count 6. (*Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 [moral turpitude established without regard to motive or personal gain].)

Count 7 – Section 6106 [Moral Turpitude/Misrepresentation]

The State Bar alleged additional acts of moral turpitude by reason of Papst’s prolonged period of deception to the State Bar during its investigation. He repeatedly made false statements and produced sham financial records in response to inquiries by the Bar. “ ‘[D]eception of the State Bar may constitute an even *more serious offense* than the conduct being investigated.’ [Citation.]” (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282.) We find Papst culpable as charged in Count 7 of acts of moral turpitude.

II. DISCIPLINE DISCUSSION

A. AGGRAVATION

The hearing judge found four factors in aggravation and we agree. First, Papst committed multiple acts of misconduct. (Std. 1.2(b)(ii).)⁶ Second, he significantly harmed Parks. (Std. 1.2(b)(iv).) Parks hired Papst because she needed his representation for “something that had to do with [her] welfare and well being and [her] future.” Yet Papst’s unreasonable three-year delay in filing Parks’ application caused her to deplete her deferred compensation savings and to depend on her mother for support merely to “survive.” The State Bar argues that Papst caused additional harm to those clients whose funds were used to pay IMC, but it failed to provide evidence that they had not been repaid. Third, Papst lacked candor because he was untruthful during trial. (Std. 1.2(b)(vi).) In his decision, the hearing judge detailed the specific incidents of dishonesty in Papst’s testimony, which we adopt.

⁶Unless otherwise noted, all further references to standard(s) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Fourth, Papst fails to understand the serious nature of his misconduct or to accept responsibility for his actions. (Std. 1.2(b)(v).) As the hearing judge noted, while Papst was misleading the State Bar in its investigation of the Parks matter, he was also actively misappropriating funds from other clients' accounts. Moreover, despite being charged with issuing NSF checks in May 2006, he issued yet another NSF check in December 2007 in the amount of \$103,000. We find Papst's propensity to commit fraud to avoid responsibility for his misconduct to be reprehensible.

B. MITIGATION

We find only one factor in mitigation, although the hearing judge found three. Papst is entitled to significant weight in mitigation for nearly 25 years of discipline-free practice prior to the commencement of the misconduct cited here. (Std. 1.2(e)(i); *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49 [more than 17 years of practice with no prior record of discipline is "significant mitigating factor"].) However, we do not adopt the hearing judge's mitigation finding for Papst's cooperation in entering into an extensive stipulation of facts. While this undoubtedly assisted the State Bar in its preparation of trial, it is more than offset by Papst's misleading statements and false evidence submitted during the investigation of this matter. We also do not accept Papst's argument for mitigation credit claiming he did not harm any clients since, as previously discussed, Parks was significantly harmed. Moreover, Papst failed to establish that client funds were returned to the rightful owners.

C. LEVEL OF DISCIPLINE

We start with the standards in determining the appropriate discipline to recommend. Guided by standard 1.6(a), we consider the most severe discipline provided by the various standards applicable to the misconduct. Standard 2.3 provides for actual suspension or

disbarment for an act of moral turpitude, while standard 2.2(a) states: “Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.”

Neither of the exceptions to disbarment in standard 2.2(a) applies in this case. Papst knowingly misappropriated a significant amount of money from several clients. The seriousness of his misconduct, which occurred over a prolonged time period, is of paramount concern, and his mitigation evidence is neither compelling, nor does it clearly predominate. Indeed, his multiple circumstances in aggravation greatly outweigh his single factor in mitigation. Under these circumstances, we find no compelling reason to depart from the application of disbarment as provided in standard 2.2(a). (*In the Matter of Van Sickel* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.)

Finally, comparable case law supports our disbarment recommendation. (*Kennedy v. State Bar* (1989) 48 Cal.3d 610 [disbarment for misappropriation in excess of \$10,000 from multiple clients and failure to return files with no prior misconduct in eight years]; *Kelly v. State Bar* (1988) 45 Cal.3d 649 [disbarment for misappropriation of \$20,000 and failure to account with no prior discipline in seven years].) Although this is Papst’s first disciplinary proceeding, “[i]t is clear that disbarment is not reserved just for attorneys with prior disciplinary records. [Citations omitted.]” (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal State Bar Ct. Rptr. 70, 83.) We find here, as we did in the *Wyshak* case, that “[a] most significant factor . . . is respondent’s complete lack of insight, recognition, or remorse for any of his wrongdoing. To the present time, he accepts no responsibility for what happened

and only seeks to blame others.” (*Ibid.*; accord, *Weber v. State Bar* (1988) 47 Cal.3d 492, 508 [despite absence of prior disciplinary record, disbarment appropriate where attorney committed serious misconduct including misappropriation, exhibited complete failure to appreciate gravity of misconduct, expressed no remorse, denied all responsibility for any wrongdoing, and demonstrated continuing contempt for disciplinary proceedings]).

III. RECOMMENDATION

For the foregoing reasons, we recommend that Richard John Papst be disbarred and his name be stricken from the roll of attorneys.

We further recommend that Richard J. Papst be required to comply with rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order herein.

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.

IV. ORDER

The order of the hearing judge below that Richard John Papst be enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), shall continue in effect pending the consideration and decision of the Supreme Court on this recommendation.