FILED AUGUST 9, 2007

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **SPENCER POSTAL McGREW**, **Member No. 57763**, A Member of the State Bar.	)	**Case No. 06-O-13177-PEM** **DECISION**

I. Introduction

In this default disciplinary matter, respondent **Spencer Postal Mcgrew** is charged with five counts of misconduct in one client matter. The court finds, by clear and convincing evidence, that respondent is culpable of most of the charges, including (1) failure to pay client funds promptly; (2) failure to maintain funds in a client trust account; (3) misappropriation of $292; and (4) failure to communicate.

In view of respondent's misconduct, his lack of a prior record of discipline in 33 years of practice of law and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of suspension be stayed, and that he be actually suspended from the practice of law for six months and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on January 30, 2007. The NDC was returned as undeliverable.

Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On March 14, 2007, State Bar Investigator William D. Stephens spoke with respondent and informed him of the pending proceeding against him. He told Stephens that he was at a "sober house" and that he did not want to practice law anymore.

On the State Bar's motion, respondent's default was entered on April 26, 2007, and respondent was enrolled as an inactive member on April 29, 2007, under Business and Professions Code section 6007, subdivision (e).[1] An order of entry of default was sent to respondent's official address by certified mail. It was returned as undeliverable.

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on May 16, 2007, following the filing of the State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on December 19, 1973, and has been a member of the State Bar of California at all times since that date.

The Evans Matter

At all times relevant herein, respondent maintained a client trust account (CTA) at Bank of the West, account number 125-007930.

On June 25, 2005, Filoumen Evans employed respondent to represent her in an automobile accident that occurred on June 21, 2005. Evans and respondent agreed that respondent would receive 33 1/3 percent of the gross recovery as fees.

On January 10, 2006, the case settled for $7,322.92. On February 26, 2006, respondent mailed the check to Evans for her to sign and return, which she did immediately. After endorsing

[1]All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

and returning the settlement check to respondent, Evans did not hear from respondent. He did not immediately disburse any funds to Evans.

In April 2006, Evans filed a small claims action against respondent to recover the settlement funds she was entitled to. Evans was informed by the sheriff who attempted to serve the claim that respondent's office in Modesto was closed and that respondent was no longer in business as of March 31, 2006.

Respondent did not inform Evans that he was closing his office prior to completing her case or provide her with any contact information.

Respondent did not deposit the $7,322.92 check into his CTA until June 12, 2006.

On June 29, 2006, Evans filed a complaint against respondent with the State Bar of California regarding the settlement funds. On July 17, 2006, investigator John Matney wrote to respondent regarding Evans's complaint. Respondent received the letter.

Finally, on July 25, 2006, respondent sent Evans a check drawn on his CTA in the entire amount of $7,322.92. Although the NDC alleged that the sum of $7,322.92 was Evans's share of the proceeds, it also alleged that the settlement amount was $7,322.92. The court finds these allegations to be inconsistent. Under their fee agreement, based on the settlement of $7,322.92, respondent was entitled to receive 33 1/3 percent of the gross recovery as fees or the sum of $2,440.73 (33 1/3% of $7,322.92), leaving a balance due Evans of $4,882.19 ($7,322.92 - $2,440.73), not $7,322.92.

Thus, in light of the contrary evidence, there is no clear and convincing evidence that Evans was entitled to the full settlement amount of $7,322.92. Rather, the client's share of the proceeds should have been $4,882.19.

Nevertheless, on August 1, 2006, after Evans deposited the $7,322.92 check into her bank account, it was returned for insufficient funds. At the time, the balance in the CTA was $4,590.16. More than two months later, on October 19, 2006, respondent reissued another check to Evans in the entire amount of $7,322.92.

Count 1A: Failure to Promptly Pay Client Funds (Rules Prof. Conduct, Rule 4-100(B)(4))[2]

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver any funds or properties in the possession of the attorney which the client is entitled to receive.

By disbursing the settlement funds to Evans in October, more than eight months after he received them in late February or early March, respondent failed to pay *promptly*, as requested by a client, any funds in respondent's possession which the client is entitled to receive, in wilful violation of rule 4-100(B)(4).

Count 1B: Failure to Deposit Client Funds in Trust Account (Rule 4-100(A))

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith.

The State Bar alleged that respondent, by not depositing the settlement check into his CTA for more than three months after Evans endorsed and returned the check, respondent failed to deposit funds received for the benefit of a client in a CTA in count 1B.

However, the rule does not specify a time frame in which respondent must deposit the check. The fact that respondent deposited the settlement proceeds in his CTA three months after the client's endorsement is not clear and convincing evidence that he violated rule 4-100(A) in count 1B. Rather, more importantly, he failed to promptly disburse the funds to his client, as previously found in count 1A.

Count 1C: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

Respondent had a fiduciary duty to hold in trust at least $4,882.19 of entrusted funds belonging to Evans in his CTA. In August 2006, the balance in the CTA fell to $4,590.16. As a result, the bank returned the entire settlement check of $7,322.92 to Evans for insufficient funds. Thus, between August 1 and October 19, 2006, respondent's failure to hold in trust Evans's share of the settlement proceeds ($4,882.19) in the CTA was clearly and convincingly in violation of rule 4-100(A) in count 1C.

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[2]References to rule are to the current Rules of Professional Conduct.

Count 1D: Misappropriation (Bus. & Prof. Code, § 6106)[3]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

In their March 14, 2007, telephone conversation, respondent told State Bar investigator Stephens:

> "that he did not convert funds from complaining witness Filoumen Evans or anyone else. Evans was given a settlement check, and against respondent's express instructions tried to cash it before the settlement check cleared. Respondent said that his mistake was in issuing the settlement check before the deposit was credited but that was not an ethical lapse. Respondent said eventually Evans got the money after the check cleared."

However, the knowing issuance of a check drawn on insufficient funds is a proper basis for finding an act of moral turpitude. Where such check was immediately negotiable on its face, respondent was culpable regardless of whether or not he orally instructed the client to delay cashing it. (See *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 315.)

Moreover, the mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent. (See *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113.)

The State Bar argued that respondent had misappropriated $2,732.76 for about two months, based on the client's share of the settlement as $7,322.92 ($7,322.92 - $4,590.16).

However, because there is no clear and convincing evidence that Evans was entitled to the full settlement amount of $7,322.92, the court finds that her portion of the settlement proceeds should have been $4,882.19. Thus, respondent did not misappropriate $2,732.76.

But rather, he misappropriated the sum of $292.03. He had received $4,882.19 for the benefit of his client. After he had deposited the funds into his CTA, the balance in his CTA fell to $4,590.16, which was below the amount of entrusted funds of $4,882.19, and the check of $7,322.92 was returned for insufficient funds. Thus, respondent misappropriated the sum of $292.03 between

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[3]References to section are to the provisions of the Business and Professions Code.

August and October ($4,882.19 - $4,590.16) before reissuing a replacement check.

Therefore, because respondent knowingly issued a check drawn on insufficient funds and the balance in his CTA fell below the amount of entrusted funds, respondent committed an act of moral turpitude in wilful violation of section 6106.

Count 1E: Failure to Communicate (§ 6068, Subd. (m))

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By not informing Evans that he was closing his office prior to completing her case, respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in wilful violation of section 6068, subdivision (m).

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was offered or received into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[4]

However, respondent's lack of a prior record of discipline in 33 years of practice of law at the time of his misconduct in 2006 is a significant mitigating factor. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

B. Aggravation

Respondent committed multiple acts of wrongdoing, including failing to maintain and promptly pay client funds, misappropriating client funds, and failing to inform his client that he had moved. (Std. 1.2(b)(ii).)

Respondent's failure to participate in this disciplinary matter before the entry of his default is a serious aggravating factor. (Std. 1.2(b)(vi).)

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[4]All further references to standards are to this source.

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent's misconduct involved one client matter. The standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 2.2, 2.3, 2.4 and 2.6.)

Standard 2.2(a) provides that wilful misappropriation of entrusted funds must result in disbarment absent compelling mitigation or except if the amount of funds misappropriated is insignificantly small. Here, respondent's misappropriation of less than $300 is small and was only temporary. Two months later, the client received the full amount of the gross settlement funds.

Standard 2.2(b) provides that the commission of a violation of rule 4-100 must result in at least a three month actual suspension, irrespective of mitigating circumstances.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

Standard 2.4 provides that culpability of failing to communicate with a client must result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id*. at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges disbarment, citing several cases in support of its recommendation,

including *Baca v. State Bar* (1990) 52 Cal.3d 294 [disbarment for misappropriation of $2,320 in two client matters, failure to perform, failure to communicate, failure to return unearned fees, failure to promptly pay client funds, failure to obey a court order, failure to respect the law and failure to cooperate with the State Bar; no prior record of discipline in nine years of practice]; *Bate v. State Bar* (1983) 34 Cal.3d 920 [three years of actual suspension and until restitution for misappropriation of $2,221.15 in one client matter; no prior record of discipline in 10 years of practice]; and *Bates v. State Bar* (1990) 51 Cal.3d 105 [six months of actual suspension for misappropriation of $1,229.75 in one client matter; no prior record of discipline in 14 years and alcoholism was a significant mitigating factor].

Baca and *Bate* are clearly distinguishable from this matter because they involved more serious misconduct than that of respondent. However, the court finds *Bates* to be instructive. There, the attorney misappropriated $1,229.75 from his client trust account and made misrepresentations to the client's new attorney regarding the status of the trust account. The attorney did not make restitution until after the State Bar referee issued his decision, reflecting his lack of appreciation of his moral and ethical obligations to his client and his lack of remorse for his wrongdoing. The Supreme Court noted that the attorney's misconduct was especially harmful to his client because the misappropriated funds were significant in amount and were meant to reimburse the client for personal injuries.

Here, respondent misappropriated $292.03 for about two months and repaid the client the full amount of the settlement without deducting any fees for his services. While alcoholism was not offered as mitigating evidence, respondent's lack of a prior record of discipline in 33 years of practiced is a significant factor.

The court also looks to these cases as guidance.

In *Heavey v. State Bar* (1976) 17 Cal.3d 553, the Supreme Court imposed a two-year stayed suspension, two years probation and 30 days actual suspension for the attorney's misappropriation of $350 (client trust account was overdrawn 13 times in one year) and commingling of client funds. The attorney was in practice for 30 years with no prior discipline.

In *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, the attorney was actually suspended for

three months with a stayed suspension of four years for misappropriating and commingling his client funds of $11,000. In particular, he appropriated $6,000 of client funds to his own use, treating it as a loan from his client without his client's authority. His misconduct was not excused in any way merely because his client ultimately suffered no loss as he had repaid the client. (*Id.* at p. 903.) The attorney remained unrepentant and maintained that he was justified in using his client's funds and taking out the loan.

In *Porter v. State Bar* (1990) 52 Cal.3d 518, the Supreme Court imposed a two-year actual suspension for an attorney who committed serious misconduct in nine client matters, including misappropriation of settlement funds, writing a bad check, forgery, lying to clients, and unlawfully practice law while suspended. In one matter, he settled the case for $5,000 without the client's consent or knowledge, forged the client's name to a release and her endorsement on the check, and kept the money. He had strong mitigating factors, such as extreme emotional difficulties and rehabilitation evidenced by community and professional activities. Here, respondent's misconduct is less egregious than that of *Porter* in that it did not involve nine clients or deceit.

Moreover, the Supreme Court has recognized that not every misappropriation which is technically wilful is equally culpable. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367.) Elements of dishonesty, concealment or deceit are often found in misappropriation cases in which the attorney has been disbarred for serious misconduct or received a lengthy suspension for less serious misconduct. (See, i.e., *Chang v. State Bar* (1989) 49 Cal.3d 114; *Hitchcock v. State Bar* (1989) 48 Cal.3d 690; *Rimel v. State Bar* (1983) 34 Cal.3d 128 [disbarment cases]; *Lawhorn v. State Bar, supra,* 43 Cal.3d 1357 [explained further in *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627-628]; *Mack v. State Bar* (1970) 2 Cal.3d 440 [suspension cases].) Those elements are not present in the instant case. Respondent was definitely wrong in issuing an insufficiently funded check and misappropriating the funds from his client for two months, but the court is not convinced that he was venal. Respondent's misappropriation was an isolated instance of misconduct and was aberrational; and he made full restitution within two months.

Disbarment will not be recommended where there is no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public. (*In the Matter of Hertz*

(Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 472.)

Nevertheless, failing to appear and participate in this hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) Respondent may have indicated to the State Bar that he was undergoing substance abuse rehabilitation treatment at a "sober house" and that he did not want to practice law anymore. Yet, he did not want to resign from the practice of law. While respondent may be experiencing personal difficulties, his failure to participate in this proceeding leaves the court without information about the underlying cause of respondent's misconduct or of any mitigating circumstances surrounding his misconduct.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) However, the State Bar's recommendation of disbarment is excessive. In view of respondent's misconduct, the case law, the aggravating evidence, the compelling mitigating factor that he had no prior record of discipline in his 33 years of practice, and the amount of misappropriation did not involve a significant sum of money ($292), the court concludes that, like *Bates*, placing respondent on an actual suspension for six months would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Spencer Postal Mcgrew** be suspended from the practice of law for two years, that said suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205.)

It is also recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

It is also recommended that if respondent is actually suspended for two years or more, he will remain actually suspended until he has shown proof satisfactory to the State Bar Court of his

rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order or during the period of his actual suspension, whichever is longer. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

The court recommends that respondent be ordered 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 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Wilful 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.[5]

VII. Costs

It is further recommended 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: August ___, 2007

PAT McELROY
Judge of the State Bar Court

[5]Respondent 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.)