

**STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of	)	Case No. 06-O-13658-RAH
	)	
<b>CONCETTA JOAN SCIMECA</b>	)	<b>DECISION</b>
	)	
<b>Member No. 96147,</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

The above-entitled matter was submitted for decision on May 1, 2008, after the State Bar of California, Office of the Chief Trial Counsel (State Bar) submitted a brief on the issues of culpability and discipline.<sup>1</sup> Since shortly after the Notice of Disciplinary Charges (NDC) was filed in this matter, the State Bar has been represented by Deputy Trial Counsel Christine Souhrada (DTC Souhrada). Respondent Concetta Joan Scimeca (respondent) failed to appear or participate in this matter either in person or through counsel and allowed her default to be entered.

In this proceeding, respondent is found culpable, by clear and convincing evidence, of misusing a client trust account, committing acts involving moral turpitude, and failing to cooperate with a State Bar investigation.

In light of respondent's culpability, and after considering all aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends, among other things, that respondent be actually suspended for 90 days.

---

<sup>1</sup>Although the State Bar did not explicitly waive the hearing in this matter, no request for a hearing was submitted after the court notified the State Bar, in its order entering respondent's default, that no default hearing would be held unless the State Bar requested one.

## **II. Pertinent Procedural History**

On October 26, 2007, the State Bar mailed a 20-day letter to respondent at her official membership records address (official address)<sup>2</sup> maintained by respondent pursuant to Business and Professions Code section 6002.1, subdivision (a).<sup>3</sup> The record does not reflect whether or not this letter was returned by the United States Postal Service (USPS).

On January 18, 2008, the State Bar filed and served a three-count NDC against respondent with the State Bar Court.<sup>4</sup>

On January 24, 2008, the State Bar Court filed and served a Notice of Assignment and Notice of Initial Status Conference, setting an in-person status conference for February 26, 2008.<sup>5</sup>

On February 25, 2008, DTC Souhrada attempted to reach respondent by telephone at the telephone number listed in respondent's official membership record. There was no answer, but the voice mail greeting stated that it was the telephone number of Joan Scimeca. DTC Souhrada left a voice mail message that included her name and informed respondent that she was calling from the State Bar, that an NDC had been filed against respondent, that no response to the NDC had been received, and that there was an initial status conference scheduled for the following day

---

<sup>2</sup>Attached to the State Bar's April 9, 2008, motion for entry of respondent's default as exhibit 1 is a certified copy of respondent's address history on file in the State Bar's Membership Records Department as of April 7, 2008. This exhibit is admitted into evidence. In view of the evidence presented by the State Bar of respondent's official membership records addresses, the court takes judicial notice, under Evidence Code section 452, subdivision (h), of all respondent's official membership records addresses to the date of the filing of this decision.

<sup>3</sup>All further statutory references are to the Business and Professions Code unless otherwise indicated.

<sup>4</sup>Although the copy served on respondent was sent to an incorrect address, the State Bar later discovered and remedied the error, as discussed below.

<sup>5</sup>This notice and all other documents served on respondent by the State Bar Court, except for the order entering respondent's default, were sent to respondent at her official address by first-class mail, postage prepaid. The order entering respondent's default was sent to respondent at her official address by certified mail, return receipt requested. None of the document sent by first-class mail to respondent were returned to the court; however, the ordering entering respondent's default was returned to the court marked "unclaimed."

in the matter. DTC Souhrada also left her telephone number and requested that respondent return her call.

The status conference was held as scheduled on February 26, 2008; respondent did not appear in person or through counsel. The State Bar Court filed and served an Order Pursuant to Telephonic Status Conference on February 29, 2008.

Also on February 26, 2008, DTC Souhrada again attempted to contact respondent by telephone at the number listed on respondent's official membership records. Once again, respondent did not answer, and DTC Souhrada left a message that included her name and telephone number. DTC Souhrada informed respondent in the message that she was calling from the State Bar; that disciplinary charges had been filed against her; and that if DTC Souhrada did not receive a response from respondent, DTC Souhrada would file a request for the entry of respondent's default. DTC Souhrada also requested that respondent return her call.

That day, DTC Souhrada attempted to reach respondent at additional telephone listings found on [www.zabasearch.com](http://www.zabasearch.com). Although DTC Souhrada found listings for respondent, either: they were disconnected; there was no answer and no voice mail service; there was no response to the voice mail message left by DTC Souhrada; or the person who answered was not respondent and stated that that person did not know respondent. DTC Souhrada subsequently telephoned respondent at her official membership records number on March 3, March 7, and April 7, 2008, leaving messages giving her name and telephone number, stating that she was calling from the State Bar, informing her that disciplinary charges had been filed against her and that she would be requesting the entry of respondent's default, and requesting that respondent return her calls.

On March 4, 2008, the State Bar sent courtesy copies of the NDC to respondent by first-class mail at respondent's official address and two additional addresses listed for respondent on [www.zabasearch.com](http://www.zabasearch.com).<sup>6</sup> The copies of the NDC sent to the additional addresses were returned by

---

<sup>6</sup>The court admits into evidence exhibits two and three attached to the State Bar's motion for entry of respondent's default, (1) a copy of the NDC sent to various addresses on March 4, 2008, and (2) a copy of the electronic mail sent to respondent on the same date.

the USPS.

Also on March 4, DTC Souhrada sent an electronic mail to respondent at the electronic mail address listed for respondent on the State Bar's AS400 system. A copy of the NDC was sent as an attachment to the electronic mail.

On March 7, 2008, after realizing that the original NDC was not served on respondent at her correct official address, the State Bar re-served the NDC and filed an amended declaration of service by certified mail, return receipt requested. This time the NDC was served on respondent at her correct official address. The record does not reflect, however, whether this document was returned by the USPS or whether the return receipt was returned to the State Bar.

As of April 9, 2008, DTC Souhrada had received no response from respondent to any of her communications, and to the knowledge of DTC Souhrada, the State Bar had had no contact with respondent.

The State Bar filed and served a motion to enter respondent's default on April 9, 2008. This motion was served on respondent by certified mail, return receipt requested, at respondent's official address. The record does not reflect whether or not the State Bar's motion for entry of default was returned by the USPS.

Because respondent failed to file a response to the motion, on April 30, 2008, the court filed and served an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders.<sup>7</sup>

On May 1, 2008, the State Bar filed a brief on the issues of culpability and discipline. The matter was submitted for decision on that date.

### **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).) These findings of fact are based on these deemed admissions and the exhibits

---

<sup>7</sup>Respondent's involuntary inactive enrollment pursuant to section 6007, subdivision (e) was effective three days after the service of the order by mail.

admitted into evidence as stated in this decision.

**A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on December 16, 1980, and has been a member of the bar since that time.

**B. Facts and Culpability**

**Facts: Counts One and Two**

During the time period encompassing respondent's misconduct herein, respondent maintained a client trust account (CTA) at Union Bank of California. Between March 28 and May 26, 2006, respondent issued checks drawn on her CTA to pay personal and business expenses, including the following:

<u>Check No:</u>	<u>Date Issued:</u>	<u>Amount:</u>	<u>Payee:</u>
1535	03/28/06	\$234.51	San Diego Gas and Electric
1539	04/20/06	\$1,550	Lou Brockman
1538	04/23/06	\$18.55	WalMart
1540	05/26/06	\$20	Postal Depot

In addition, between March 24, 2006, and March 28, 2006, respondent repeatedly issued checks drawn upon her CTA against insufficient funds, including:

<u>Check No:</u>	<u>Date Issued:</u>	<u>Amount:</u>	<u>Date Presented:</u>	<u>Account Balance:</u>
1533	03/24/06	\$80	03/24/06	-\$759.44
1534	03/28/06	\$200	03/28/06	-\$913.44
1535	03/28/06	\$234.51	03/29/06	-\$984.95

Respondent issued the checks set forth above when she knew, or was grossly negligent in not knowing, that there were insufficient funds in her CTA to pay them.

**Count One: Rules of Professional Conduct, Rule 4-100(A)**<sup>8</sup>

Rule 4-100(A) provides as relevant here that State Bar members must deposit into a client trust account all funds received or held for the benefit of clients and that the member must not deposit the member's funds into that account or otherwise commingle the member's funds with

---

<sup>8</sup>All further references to rules are to these Rules of Professional Conduct unless otherwise indicated.

client funds in the trust account. The State Bar has proved by clear and convincing evidence that respondent willfully violated this rule by issuing checks drawn on her CTA to pay personal and business expenses between March 28 and May 26, 2006. By issuing these checks to pay personal and business expenses from her CTA, respondent either failed to maintain client funds in trust or deposited nontrust funds into the CTA (and issued the checks to withdraw these nontrust funds), either of which actions constitutes a willful violation of rule 4-100(A).

**Count Two: Section 6106**

Section 6106 provides that an attorney's commission of an act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension. The State Bar proved by clear and convincing evidence that respondent violated this section by repeatedly issuing checks drawn upon her CTA against insufficient funds when she knew, or was grossly negligent in not knowing, that there were insufficient funds in her CTA to pay them. (See *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 426.)

**Facts: Count Three**

On August 7, 2006, the State Bar opened an investigation in case number 06-O-13658 pursuant to a report from Union Bank of California regarding insufficient funds in respondent's CTA (the reportable action). On August 18 and September 22, 2006, a State Bar investigator wrote to respondent regarding the reportable action. Both of these letters were placed in sealed envelopes addressed to respondent at her official address and sent by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business on the date of each letter. The USPS did not return the letters as undeliverable or for any other reason, and respondent received the letters.

These letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the reportable action. Respondent did not respond to the letters or otherwise communicate with the investigator.

**Count Three: Section 6068, Subdivision (i)**

Section 6068, subdivision (i) provides that it is an attorney's duty to cooperate and

participate in a State Bar disciplinary investigation or proceeding. By failing to respond to the State Bar investigator's letters of August 18 and September 22, 2006, or to communicate with the investigator in any way notwithstanding respondent's receipt of the letters, respondent willfully violated section 6068, subdivision (i).

#### **IV. Mitigating and Aggravating Circumstances**

##### **A. Mitigation**

Because respondent's default was entered, no evidence in mitigation was offered in this proceeding. (Std. 1.2(e).)<sup>9</sup> The court takes judicial notice, however, that respondent had no prior discipline from the time she was admitted to practice in California to the time her misconduct commenced in the instant case, a period of just over 25 years. Although the State Bar argues, citing no authority, that respondent is required to prove that she was in practice during that time, the court notes that an attorney may be disciplined for misconduct occurring outside the practice of law (see *In re Kelley* (1990) 52 Cal.3d 487), and the court therefore views the lack of prior discipline since the time of respondent's admission to the Bar as evidence in respondent's favor. The court also notes that the case on which the State Bar relies for its discipline recommendation, *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, was a default case in which the court gave mitigating credit for a lack of prior discipline since the time of admission.

##### **B. Aggravation**

Respondent's multiple acts of misconduct in this case constitute a factor in aggravation. (Standard 1.2(b)(ii).)

Respondent's failure to participate in this disciplinary proceeding prior to the entry of her default is a further aggravating circumstance. (Standard 1.2(b)(vi).)

It appears that the State Bar contends that the court should give additional aggravating weight to respondent's failure to participate in the investigation and in the State Bar Court

---

<sup>9</sup>Unless otherwise indicated, this and all further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

proceedings prior to the entry of default on the basis that it shows respondent's indifference. However, because the acts on which the State Bar bases its contention are the same already used to find culpability and aggravation on other grounds, the court declines to give additional weight in aggravation to these acts under standard 1.2(b)(v). (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76-77.)

## **V. Discussion**

The purpose of 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; std. 1.3.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) While the standards are not binding, they are entitled to significant weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 2.3 provides that culpability of an act of moral turpitude shall result in actual suspension or disbarment depending on the extent the victim is harmed or misled and on the magnitude of the act and the degree to which it relates to the member's acts within the practice of law. Standard 2.6 provides in relevant part that an attorney's violation of section 6068 shall result in disbarment or suspension depending on the gravity of the offense or any harm to the victim. Standard 2.2(b) provides that culpability of a violation of rule 4-100 that does not result in misappropriation of entrusted funds shall result in at least a three-month actual suspension irrespective of mitigating circumstances. Standard 1.6(b) adds that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

Respondent's misconduct involved misusing her trust account during a two-month period by issuing four checks from that account for personal purposes, committing acts involving moral turpitude during a four-day period based on issuing three checks on an account having insufficient funds to pay them, and failing to cooperate in the State Bar's investigation of her misconduct.



The State Bar argues that an actual suspension of six months is warranted, relying on *In the Matter of Heiser, supra*, 1 Cal. State Bar Ct. Rptr. 47 (*Heiser*). Heiser was found culpable of misusing his client trust account during a five-month period by issuing three checks from that account for personal purposes, committing acts of moral turpitude during a ten-month period by issuing seven checks on accounts having insufficient funds to pay them, failing to maintain his current office address with the State Bar, and failing to cooperate in the State Bar's investigation of his misconduct. Heiser was found to have committed multiple acts of misconduct, to have demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, and to have displayed a lack of cooperation with his victims. As in the present case, Heiser failed to participate in the State Bar Court proceedings. In mitigation, Heiser had no prior record of discipline in his 16 years since his admission to the Bar.

While the court agrees with the State Bar that *Heiser* is somewhat similar to the present case, Heiser's misconduct spanned a greater period of time and was slightly more extensive than the misconduct here. In addition, Heiser had more aggravation than is present in the instant case, and respondent has more mitigation due to the greater number of years without discipline between her admission to practice law and the time of the misconduct in this matter. Under these circumstances, the court determines that a 90-day actual suspension is appropriate here.

#### **VI. Recommended Discipline**

Accordingly, the court hereby recommends that respondent Concetta Joan Scimeca be suspended from the practice of law for two years, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for 90 days and until she files and the State Bar Court grants a motion to terminate her actual suspension. (Rules Proc. of State Bar, rule 205.) The court also recommends that respondent be ordered to comply with the conditions of probation, if any, hereinafter imposed on her by the State Bar Court as a condition for terminating her actual suspension. (Rules Proc. of State Bar, rule 205(g).)

The court further recommends that respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20 and to perform the acts specified in paragraphs (a) and (c)

of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order.<sup>10</sup>

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until she has shown proof satisfactory to the State Bar Court of her 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. (See also Rules Proc. of State Bar, rule 205(b).)

It is also recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year after the effective date of the discipline imposed herein or during the period of her actual suspension, whichever period is longer, and to furnish satisfactory proof of such passage to the State Bar's Office of Probation within the same period.

## **VII. Costs**

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 section 6140.7 and as a money judgment.

Dated: June 18, 2008

---

RICHARD A. HONN  
Judge of the State Bar Court

---

<sup>10</sup>Failure to comply with rule 9.20 of the California Rules of Court could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a California Rules of Court, rule 9.20(c) affidavit even if she has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)