

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

In the Matter of)	Case No. 06-O-13856-RAH
FRANK DENNIS SCHWERTFEGER,)	DECISION
Member No. 128041,)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

The above-entitled matter was submitted for decision on January 16, 2008, after the State Bar of California, Office of the Chief Trial Counsel (State Bar) waived the hearing in this matter and submitted a brief on the issues of culpability and discipline. Since the time of the filing of the First Amended Notice of Disciplinary Charges, the State Bar has been represented by Deputy Trial Counsel Melanie J. Lawrence (DTC Lawrence). Respondent Frank Dennis Schwertfeger (respondent) failed to appear or participate in this matter either in person or through counsel and allowed his default to be entered.

In light of respondent's culpability in this proceeding, and after considering all aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends that respondent 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 he makes and provides satisfactory proof of restitution of an unearned fee, and until the State Bar Court grants a motion to terminate respondent's actual suspension under Rules of Procedure of the State Bar, rule 205.

PERTINENT PROCEDURAL HISTORY

On December 11, 2006, a 20-day letter was mailed to respondent at his official membership records address and was not returned.¹

On October 24, 2007, the State Bar initiated this proceeding by filing and serving a Notice of Disciplinary Charges (NDC) against respondent. This NDC was served on respondent by certified mail, return receipt requested, at his official membership records address. The record does not reflect whether or not this document was returned by the United States Postal Service (USPS).

On October 25, 2007, a Notice of Assignment and Notice of Initial Status Conference was filed and served on respondent by first-class mail, postage fully prepaid, at his official membership records address. The copy of this notice was not returned to the State Bar Court.

On November 1, 2007, the State Bar filed and served a First Amended NDC. This document was served on respondent by certified mail, return receipt requested, at his official membership records address. The First Amended NDC was returned by the USPS bearing the stamp “return to sender.”

On November 19, 2007, a courtesy copy of the First Amended NDC was sent to respondent by regular first-class mail to his official membership records address. This copy of the First Amended NDC was not returned by the USPS.

On November 26, 2007, DTC Lawrence attempted to reach respondent by telephone three times at respondent’s official membership records telephone number. Each time, DTC Lawrence

¹Attached to the State Bar’s 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 October 30, 2007. This exhibit is admitted into evidence. The court also notes that DTC Lawrence “checked the respondent’s address and telephone number as noted in the case file and confirmed its accuracy against the official membership records address for the respondent on the AS/400 computer records maintained by the State Bar.” (Para. 3 of Decl. of DTC Lawrence attached to Notice of Motion and Motion for Entry of Default.) In view of the evidence presented by the State Bar of respondent’s official membership records addresses, the court grants the request to take judicial notice of all respondent’s official membership addresses to the date of the filing of this decision.

heard a busy signal. She tried to call the same number on November 27, 2007, at 7:30 a.m. and again heard a busy signal.

On November 27, 2007, DTC Lawrence sent respondent a note via electronic mail at the electronic mail address listed for him in the State Bar's official membership records. The electronic mail was not returned. On the same date, DTC Lawrence called directory assistance for the area which includes respondent's official membership records address and asked for all telephone listings for respondent. Directory assistance had no such listings.

Also on November 27, 2007, DTC Lawrence searched www.whitepages.com, an internet directory assistance service, for a listing for respondent in the area that includes respondent's official membership records address. DTC Lawrence found a listing for him, called the number found, and was connected to a voice mail system. The recording identified the number as belonging to someone named Ian Forest. DTC Lawrence left a message. Later the same day, she received a telephone call from Ian Forest, who told her that the telephone number was an internal line for a law office, that he had in the past received telephone calls for respondent, that he did not know respondent, and that respondent did not work at that law office.

On December 4, 2007, an initial status conference was held in this matter. DTC Lawrence appeared for the State Bar; respondent did not appear in person or through counsel. On December 10, 2007, the State Bar Court filed and served an Order Pursuant to In Person Status Conference. This order specified, among other things, that respondent had not filed a response to the NDC; that the court would entertain a motion for the entry of respondent's default; and that the motion was to be filed by December 11, 2007. This order was properly served on respondent by first-class mail, postage fully prepaid, at his official membership records address. This order was not returned to the State Bar.

As respondent did not file a response to the First Amended NDC as required by Rules of Procedure of the State Bar, rule 103, on December 7, 2007, the State Bar filed and served a motion for entry of respondent's default. Attached to the motion is a declaration of DTC Lawrence and Exhibit 1. A copy of this motion was properly served on respondent by certified

mail, return receipt requested, at respondent's official membership records address. The record does not reflect whether or not this document was returned by the USPS.

Because respondent failed to file a response to the motion, on January 4, 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.² A copy of this order was properly served on respondent by certified mail, return receipt requested, at his official membership records address. The copy served on respondent was returned to the State Bar Court bearing the stamp "return to sender."

On January 16, 2008, the State Bar filed a request for waiver of default hearing and a brief on culpability and discipline. The matter was submitted for decision on that date.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 17, 1987, and has been a member of the bar since that time.

Facts - Counts One and Two - The Mower Matter

On August 8, 2004, Thomas Mower (Mower) employed respondent to represent Mower in a mergers and acquisition transaction. Respondent gave Mower an Engagement Agreement to sign. On August 9, 2004, in a meeting with respondent, Mower paid respondent \$10,000 in advanced fees for respondent's services to represent Mower in the mergers and acquisition matter. The parties did not sign a retainer agreement.

Shortly after the meeting on August 9, 2004, and before respondent performed any services on behalf of Mower, Mower informed respondent that his services were terminated and that he expected a refund of the legal fees he had advanced.

In November 2004, Mower again informed respondent that he would not be using respondent's services and that he expected a refund of the fees he had advanced. During that

²Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e) was effective three days after service of this order by mail.

same month, Mower sent a letter to respondent that asked for a detailed accounting of any services provided by respondent, and again instructed respondent to refund the advanced fees.

On February 10, 2006, Mower sent a registered letter to respondent at an address respondent provided to Mower. This letter requested a statement of any fees, costs, and disbursements paid from the advanced fees and for a refund of the balance. The letter was returned to Mower by the USPS marked “unclaimed.”

Respondent performed no services in the mergers and acquisition matter and never sent Mower an accounting or a refund.

Conclusions of Law - Count One - Rule 3-700(D)(2) of the Rules of Professional Conduct³

The State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-700(D)(2). This rule requires an attorney to promptly refund unearned fees upon termination of employment. Respondent performed no services on Mower’s behalf and therefore earned no fees. Mower was forced to request a refund of the advanced fees numerous times after he terminated respondent’s employment, yet respondent never refunded any part of the \$10,000 advanced fees. By failing to refund Mower’s advanced fee after Mower terminated respondent’s employment, respondent failed to promptly refund unearned fees in willful violation of rule 3-700(D)(2).

Conclusions of Law - Count Two - Rule 4-100(B)(3)

The State Bar proved by clear and convincing evidence that respondent willfully violated rule 4-100(B)(3). That rule requires an attorney, among other things, to maintain complete records of all funds or other property of a client coming into the attorney’s possession and to render appropriate accounts to the client regarding them. Despite Mower’s repeated requests for his funds and for an accounting for these funds, respondent never provided an accounting. By failing to render an accounting for Mower’s advanced fees despite Mower’s requests for an accounting, respondent failed to render appropriate accounts to his client regarding the client’s

³Unless otherwise indicated, all further references to rules refer to the Rules of Professional Conduct of the State Bar of California.

funds in willful violation of rule 4-100(B)(3).

Facts - Count Three - Business and Professions Code Section 6068, Subdivision (i)⁴

On June 6, 2006, the State Bar opened an investigation, case number 06-O-13856, concerning the Mower matter. On September 7, 2006, a State Bar investigator sent a letter to respondent regarding the allegations in the Mower matter. The investigator's letter warned respondent that his written response and the documents requested by the investigator must be received by the State Bar by September 21, 2006, or the State Bar would consider it a failure to cooperate with a State Bar investigation and respondent would be in violation of section 6068, subdivision (i). Respondent received the letter but failed to respond.

On September 21, 2006, a State Bar investigator sent another letter to respondent regarding the allegations in the Mower matter. The investigator included the State Bar investigation letter dated September 7, 2006. The investigator's letter warned respondent that his written response and the documents requested by the investigator must be received by October 5, 2006, or the State Bar would consider it a failure to cooperate with a State Bar investigation and respondent would be in violation of section 6068, subdivision (i). Respondent received the letter but again failed to respond.

On October 23, 2006, a State Bar investigator attempted to communicate with respondent by visiting respondent's residence. Respondent did not answer his door. However, an individual on the property informed the investigator that respondent was in Boston at that time and offered to reach respondent via telephone. The individual reached a party on his cellular telephone who identified himself to the investigator as respondent. The investigator proceeded to talk with respondent, who acknowledged the State Bar's attempts to reach him. Respondent agreed to contact the lead State Bar investigator upon his return to Los Angeles within a few days. Respondent did not contact the investigator.

⁴Unless otherwise indicated, all further references to section(s) refer to provisions of the California Business and Professions Code.

Conclusions of Law - Count Three - Business and Professions Code Section 6068,

Subdivision (i)

The State Bar proved by clear and convincing evidence that respondent violated section 6068, subdivision (i). That section requires an attorney to cooperate and participate in any disciplinary investigation or proceeding. Respondent willfully violated this section by failing to provide a written response to the allegations from the investigator as requested in the investigator's letters of September 7 and 27, 2006, or otherwise cooperate in the State Bar investigation of the Mower matter.

MITIGATING/AGGRAVATING CIRCUMSTANCES

As respondent's default was entered in this matter, respondent failed to introduce any evidence in mitigation. However, the court takes judicial notice of respondent's prior record of discipline. This record establishes that respondent has no prior record of discipline from the time of his admission on June 17, 1987. Respondent's misconduct in this matter commenced in August 2004. The court therefore gives respondent mitigating credit for 17 years of discipline-free practice. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)⁵

In aggravation, respondent engaged in multiple acts of misconduct in this matter. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed Mower, as he has been deprived of his \$10,000 in advanced fees. (Std. 1.2(b)(iv).)

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by his failure to participate in these State Bar Court proceedings prior to the entry of his default. Importantly, this failure to participate occurred notwithstanding respondent's acknowledgment to the State Bar investigator over a cellular telephone of the State Bar's attempts to reach him and notwithstanding respondent's agreement to contact the

⁵Unless otherwise indicated, all further references to standards refer to provisions of these Standards for Attorney Sanctions for Professional Misconduct.

investigator upon respondent's return to Los Angeles from Boston.

DISCUSSION

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as “the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”

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 Silvertown* (2005) 36 Cal.4th 81, 92.) Even though the standards are merely guidelines for the imposition of discipline, there is “no reason to depart from them in the absence of a compelling reason to do so. [Citation.]” (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides in part that if more than one act of professional misconduct is found in a particular disciplinary matter, “the sanction imposed shall be the more or most severe of the different applicable sanctions.” In addition, standard 1.6(b) provides 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 disciplinary sanctions.

In this case, the standards provide for the imposition of sanctions ranging from reproof to disbarment. (Stds. 2.2(b), 2.6(a), 2.10.) Standard 2.2(b) specifies that an attorney's violation of rule 4-100 which does not result in willful misappropriation “shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances.”

The State Bar recommends, among other things, a two-year stayed suspension and a 90-day actual suspension, citing *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703 (*Hanson*), *In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668 (*Lindmark*), and *Bach v. State Bar* (1991) 52 Cal.3d 1201 (*Bach*).

In *Hanson*, a case involving a single client matter, the review department imposed a public reproof for the failure to refund unearned fees of \$769 and withdrawal from employment without taking reasonable steps to avoid reasonably foreseeable prejudice to a client. In *Lindmark*, the review department imposed a public reproof in a case involving a single client matter for the failure to refund unearned fees of \$5,000. *Lindmark* involved minimal mitigation, given Lindmark's eight years of practice without misconduct and four good character witnesses, and in aggravation Lindmark impeded his client's efforts to collect on a final judgment to recover the unearned fees. The court finds that these cases involved less serious misconduct than that found in the present case. In addition, both Hanson and Lindmark participated in the disciplinary proceedings in the State Bar Court.

In *Bach*, the Supreme Court imposed a 30-day actual suspension in a case involving failure to perform for over two and one-half years in an uncontested marital dissolution case, failure to communicate with a client, withdrawal from representation without client consent or court approval, failure to refund unearned advanced fees of \$2,000, and failure to cooperate in a disciplinary investigation. In aggravation, Bach demonstrated a "lack of insight into the deficiencies of his professional behavior" (*Bach, supra*, 52 Cal.3d at p. 1208), but he had no prior misconduct in 20 years of practice. Also, although Bach did not fully cooperate with the State Bar's investigation of client allegations against him, his case was not a default matter. The gravity of the misconduct in *Bach* appears to be more similar to that in the present case, as is the mitigation in *Bach*. However, more aggravation is present in this case, particularly in view of respondent's failure to participate at any stage of the State Bar Court proceedings despite having actual knowledge of the State Bar's attempts to contact him. (See *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 581 [an attorney's lack of participation in State Bar disciplinary proceedings can indicate that more severe discipline is necessary to achieve the goals of attorney discipline].)

Respondent has been found culpable of failing to refund \$10,000 in advanced fees, failing to render an accounting for these fees, and failure to cooperate in a State Bar investigation.

Notwithstanding respondent's strong mitigation of 17 years of practice without misconduct, the evidence contains equally strong evidence of aggravation. In short, the court sees no justification in this case for deviating from the three-month minimum sanction provided for in standard 2.2(b) and agrees with the State Bar that this sanction is warranted in order to fulfill the goals of attorney discipline.

RECOMMENDED DISCIPLINE

Accordingly, it is recommended that respondent Frank Dennis Schwertfeger be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be actually suspended from the practice of law for 90 days and until: (1) he makes restitution to Thomas Mower in the amount of \$10,000 plus 10 percent interest per annum from December 1, 2004⁶ (or to the Client Security Fund to the extent of any payment from the fund to Thomas Mower, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation; and (2) he makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his actual suspension. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). The court also recommends that respondent be ordered to comply with the conditions of probation, if any, hereinafter imposed on him by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme

⁶The NDC states that Mower informed respondent that his services were terminated and that he expected a refund of advanced fees "shortly after" the August 9, 2004, meeting and that Mower repeated these statements to respondent in November 2004. Absent a specific earlier date on which respondent knew that he was required to refund the advanced fees, the court orders interest on restitution commencing on December 1, 2004.

Court's order.⁷

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent 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) 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 his actual suspension, whichever is later, and furnish satisfactory proof of such passage to the State Bar's Office of Probation within the same period.

COSTS

It is 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: March ___, 2008

RICHARD A. HONN
Judge of the State Bar Court

⁷Failure 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 he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)