

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.	07-O-11272-PEM
BENNIE C. FERMA, Member No. 141592, A Member of the State Bar.		DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT	

I. Introduction

In this default disciplinary matter, respondent **Bennie C. Ferma** is charged with eight acts of misconduct in one client matter. The court finds, by clear and convincing evidence, that respondent is culpable of all of the charges, which include: (1) failure to deposit client funds in a trust account; (2) failure to maintain client funds in a trust account; (3) misappropriation of \$15,029.54; (4) failure to render accounts of client funds; (5) misrepresentation; (6) failure to pay client funds promptly; (7) failure to update membership address; and (8) failure to cooperate with the State Bar.

In view of respondent's serious misconduct and the evidence in aggravation, the court recommends that respondent be disbarred from the practice of law in California and be ordered to make restitution.

II. Pertinent Procedural History

This proceeding was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar). The Notice of Disciplinary Charges (NDC) was filed and properly served via certified mail, return receipt requested, on respondent at his official membership records address on March 11, 2008. The NDC was returned by the United States Postal Service bearing the stamp, “Return to Sender - Forwarding Order Expired.” A courtesy copy was also served on

respondent at an alternate address for respondent. Service was by regular mail. The courtesy copy was not returned.

On March 21, 2008, Deputy Trial Counsel (DTC) Susan Chan telephoned and left a message requesting that respondent confirm his mailing address, inquiring whether he had received the NDC, and informing him that a response to the NDC was due on or before April 7, 2008. Respondent telephoned DTC Chan on that same date and stated that he had received the NDC.

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

On the State Bar's motion, respondent's default was entered on May 5, 2008, and respondent was enrolled as an inactive member on May 8, 2008, 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 stamped, "Forwarding Order Expired." A courtesy copy, which was sent to respondent by U. S. regular mail at his alternative address, was not returned.

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on May 26, 2008, 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).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on August 14, 1989, and has been a member of the State Bar of California at all times since that date.

B. The Smith Matter

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

On January 21, 2004, Emma Smith hired respondent to represent her in a marriage dissolution matter.

On December 22, 2005, respondent received a check in the amount of \$217,318.18 from Alliance Title Company (the Alliance check). Respondent agreed to hold the proceeds of the Alliance check in trust for Emma Smith, until paid to her, or for her benefit, including payments to her estranged husband Larry Smith in division of the Smith marital property. Respondent was not entitled to receive any portion of the proceeds of the Alliance check.

On January 3, 2006, respondent deposited the Alliance check into Bank of America checking account No. 00338-43365 (account No. 00338-43365). Account No. 00338-43365 is not a trust account. After deposit, on January 3, 2006, Bank of America reversed the deposit and returned the check to respondent because “all payees on the check were not on the account.”

On January 12, 2006, respondent opened trust account No. 25653-40176 at the Bank of America (the Smith trust account) for the benefit of Emma Smith and Larry Smith, and deposited the Alliance check therein. The \$217,318.18 proceeds of the Alliance check should have remained in the Smith trust account until paid to Emma Smith or for her benefit, or to Larry Smith or for his benefit.

Subsequent to the January 12, 2006, respondent made three disbursements from the proceeds of the Alliance check totaling \$202,228.64. The disbursements made were, as follows:

<u>Date</u>	<u>Amount</u>	<u>Disbursed to/for</u>
4/17/06	\$28,578.00	UnitedStates Treasury (IRS)
4/17/06	\$17,534.00	Franchise Tax Board
12/7/06	\$156,176.64	Cashier's Check Payable to Emma Smith and Larry Smith

Total of Entrusted Proceeds Disbursed = \$202,288.64

Entrusted Proceeds Never Disbursed = \$ 15,029.54

Respondent made no other disbursements to Emma Smith or for her benefit, or to Larry Smith or for his benefit from the proceeds of the Alliance check, or otherwise from the Smith trust account.

On October 2, 2006, Emma Smith sent a letter to respondent requesting an accounting and complete disbursement of the proceeds of the Alliance check. Respondent received Emma Smith's letter shortly after October 2, 2006. However, as of the date of the filing of the NDC (i.e., March 11, 2008), respondent had not provided an accounting of the proceeds of the Alliance check to Emma Smith.

On October 31, 2006, respondent signed a substitution of attorney in which Mary Gubatina (Gubatina) replaced respondent as counsel for Emma Smith in the Smith marriage dissolution matter. Emma Smith incurred at least \$3,600 in legal fees for Gubatina's services in attempting to track down and force disbursement of the proceeds of the Alliance check. These expenses would not have been necessary had respondent paid the proceeds of the Alliance check to Emma Smith, or for her benefit, including payments to her estranged husband Larry Smith in division of the Smith marital property. Moreover, respondent's actions significantly delayed conclusion of the Smith dissolution.

Additionally, as a holder of funds, a portion of which Larry Smith was entitled to receive, respondent owed Larry Smith a fiduciary duty. Larry Smith incurred at least \$3,000 in legal fees incurred for services rendered by his attorney, Esther Moore (Moore), in attempting to track down and force disbursement of the proceeds of the Alliance check.

On November 7, 2006, Moore, with the knowledge and consent of Gubatina, spoke with respondent. Moore asked respondent to make available the remaining proceeds of the Alliance check, which after the April 17, 2006 disbursements should have totaled \$171,206.18. ($\$217,318.18 - 46,112^2 = \$171,206.18$.)

² On April 17, 2006, respondent made a disbursement of \$28,578 and a disbursement \$17,534, which totaled \$46,112. (See page 3, *supra*.)

On November 9, 2006, in response to Moore's request, respondent signed and provided a declaration to Moore in which he stated in relevant part: "I am presently out of the country due to a family emergency and cannot be present in turning over the account to Ms. Moore." But, in fact, when respondent signed the declaration on November 9, 2006, he was not "out of the country." Rather, at all relevant times, respondent was physically present at various locations in the San Francisco Bay Area. Respondent had falsely represented that he was "out of the county" in an effort to delay discovery of his misappropriation of a portion of the Alliance check proceeds and to delay distribution of the remaining funds.

As a holder of the proceeds from the Alliance check, a portion of which Larry Smith was ultimately entitled to receive, respondent owed Larry Smith a fiduciary duty. Larry Smith incurred at least \$3,000 in legal fees for Moore's services. The \$3,000 legal fees paid by Larry Smith for Moore's legal services would not have been necessary had respondent paid the proceeds of the Alliance check to Larry Smith or for his benefit, as respondent had agreed to do.

On December 7, 2006, respondent purchased a \$156,176.64 cashier's check, which he made available to Emma Smith and Larry Smith on that same date. But, other than the December 7, 2006 disbursement of \$156,176.64, the only other disbursements that respondent had made to Emma Smith or for her benefit, or to Larry Smith or for his benefit were the two April 17, 2006 payments. All disbursements from the proceeds of the Alliance check totaled \$202,228.64. Thus, \$15,029.54, the balance of the proceeds of the Alliance Check, after all disbursements were made, should have been maintained in the Smith trust account (i.e., $\$217,318.18 - \$202,288.64 = \$15,029.54$). However, the balance of the Smith trust account was zero after respondent purchased the cashier's check made payable to Emma Smith and Larry Smith.

On October 24, 2006, the State Bar opened an investigation, following receipt of a complaint filed by Emma Smith (the Smith complaint). At all times relevant to the matters in the Smith complaint, respondent's current office address as maintained on the official membership records of the State Bar of California was 220 Montgomery St. #935, San Francisco, CA 94104

(the Montgomery Street address).

On May 16, 2007, a State Bar Investigator received a telephone message from respondent indicating that he received mail at: 1 Mono St., San Francisco, CA 94114 (the Mono Street address).

By May 16, 2007, respondent had vacated the premises at the Montgomery Street address and had ceased receiving mail there. Yet, at no time did respondent change or attempt to change his current office address as maintained on the official membership records of the State Bar of California from the Montgomery Street address. As of the date of the filing of the NDC in this matter, the Montgomery Street address remained respondent's current office address as maintained on the official membership records of the State Bar of California.

On May 18, 2007, the State Bar investigator wrote respondent regarding the Smith complaint and requested that respondent respond in writing to the specified allegations of misconduct being investigated by the State Bar. The May 18, 2007 letter was mailed to respondent at both the Montgomery Street address and the Mono street address. Although respondent received the letter mailed to the Mono Street address, he did not respond to the May 18, 2007 letter.

On June 6, 2007, the State Bar again wrote respondent regarding the Smith complaint and again requested that respondent respond in writing to the specified allegations of misconduct being investigated by the State Bar. The June 6, 2007 letter was mailed to respondent at both the Montgomery Street address and the Mono Street address. Respondent received the June 6, 2007 letter mailed to the Mono Street address; but, he did not reply to the letter or otherwise communicate with the State Bar regarding the allegations of the Smith complaint.

Count 1: Failure to Deposit Client Funds in Trust Account (Rule 4-100(A))³

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

³References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

otherwise commingled therewith.

On December 22, 2005, respondent received the Alliance check, the proceeds of which he had agreed to hold in trust for his client until paid to her or for her benefit, including payments to her estranged husband. On January 3, 2006, respondent deposited the Alliance check into account No. 00338-43365, a non-trust account. By depositing the funds he received for the benefit of a client in a non-trust account, respondent willfully violated rule 4-100(A).

Count 2: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

Subsequent to January 12, 2006, respondent made only three disbursements totaling \$202,228.64, from the proceeds of the Alliance check. On December 7, 2006, after purchase of a cashier's check payable to Emma Smith and Larry Smith, respondent had a fiduciary duty to hold in trust at least \$15,029.54 (\$217,318.18 - \$202,288.64). The remaining portion of the proceeds of the Alliance check that should have been held in the Smith trust account until paid to Emma Smith or for her benefit, or to Larry Smith or for his benefit. But, after respondent purchased the cashier's check payable to Emma Smith and Larry Smith, the Smith account balance was zero.

Therefore, by allowing the balance of the Smith trust account to drop below \$15,029.54, the amount that should have been maintained for Emma Smith or for her benefit, including payments to Larry Smith or for his benefit, respondent willfully failed to maintain client funds in a trust account in willful violation of rule 4-100(A).

Count 3: Misappropriation (Bus. & Prof. Code, § 6106)

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

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 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.)

On December 22, 2005, respondent received the Alliance check in the amount of \$217,318.18, the proceeds of which he agreed to hold in trust for Emma Smith, until paid to her, or for her benefit, including payments to her estranged husband Larry Smith. On January 12, 2006, respondent opened the Smith trust account into which he deposited the Alliance check for the benefit of Emma Smith and Larry Smith. The \$217,318.18, proceeds of the Alliance check should have remained in the Smith trust account until paid to Emma Smith or for her benefit, or to Larry Smith or for his benefit.

Respondent made a total of three disbursements to Emma Smith or for her benefit, or Larry Smith or for his benefit, totaling \$202,288.64. Thus, the remaining balance of \$15,029.54 of the Smith trust account should have been maintained in the Smith trust account until disbursed to Emma Smith or for her benefit, or to Larry Smith or for his benefit. But, on December 7, 2006, after respondent purchased the \$156,176.64 cashier's check, which he made available to Emma Smith and Larry Smith, the balance in the Smith trust account was zero.

Thus, because the balance in the Smith trust account fell below the amount of entrusted funds, respondent willfully misappropriated \$15,029.54, an act involving moral turpitude in willful violation of section 6106.

Count 4: Failure to Render Accounts (Rule 4-100(B)(3))

Rule 4-100(B)(3) provides that an attorney must maintain records of all funds of a client in his possession and render appropriate accounts to the client.

By failing to provide an accounting of the proceeds of the Alliance check, as requested by Emma Smith, respondent failed to render appropriate accounts to a client regarding all funds coming into his possession, in willful violation of rule 4-100(B)(3).

Count 5: Misrepresentations and Dishonesty (Bus. & Prof. Code, §6106)

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

Respondent made a misrepresentation in the November 9, 2006 signed

declaration that he provided to Larry Smith's attorney, Esther Moore. By falsely representing in that declaration that he was "out of the country," in an effort to delay discovery of his misappropriation of a portion of the Alliance check proceeds and to delay distribution of the remaining check funds, respondent committed an act of moral turpitude and dishonesty in willful violation of section 6106.

Count 6: Failure to Promptly Pay Client Funds (Rules Prof. Conduct, Rule 4-100(B)(4))

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.

Shortly after October 2, 2006, respondent received a letter from Emma Smith in which she requested an accounting and complete disbursement of the proceeds of the Alliance check. On December 7, 2006, respondent purchased a \$156,176.64 cashier's check, which he made available to Emma Smith and Larry Smith on that same date. By delaying two months to disburse the \$156,176.64 proceeds of the Alliance check, respondent failed to pay *promptly*, as requested by a client, any funds in respondent's possession which the client is entitled to receive, in willful violation of rule 4-100(B)(4).

Count 7: Failure to Update Membership Address (§ 6068, Subd. (j))

Section 6068, subdivision (j), states that a member must comply with the requirements of section 6002.1, which provides that respondent must maintain on the official membership records of the State Bar a current address and telephone number to be used for State Bar purposes.

By clear and convincing evidence, respondent willfully violated section 6068, subdivision (j), when he failed to maintain a current official membership records address to be used for State Bar purposes. At no time after vacating the Montgomery Street address on May 16, 2007, until and including the filing date of the NDC in the instant matter, did respondent change or attempt to change his current official membership address as maintained on the official membership records of the State Bar of California from the Montgomery Street Address.

Count 8: Failure to Cooperate With the State Bar (§ 6068, Subd. (i))

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. Respondent failed to cooperate with the State Bar in willful violation of section 6068, subdivision (i), by failing to respond to the State Bar's May 18 and June 6, 2007 letters or participate in the investigation of the Smith complaint.

IV. Mitigating and Aggravating Circumstances

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 Although respondent has no record of prior discipline in his 15 years of practice when the misconduct began in January 2006, his lack of record is not considered as mitigation because his present misconduct is very serious. (Std. 1.2(e)(i).)

Aggravation

Respondent committed multiple acts of wrongdoing, including failing to deposit client funds in a client trust account, failing to maintain and promptly pay client funds, misappropriating \$15,029.54 from a client, failing to render an appropriate accounting to a client, and engaging in an act of moral turpitude (i.e., misrepresentation). (Std. 1.2(b)(ii).)

Respondent's misconduct caused his client and his client's husband to whom he owed a fiduciary duty substantial harm. (Std. 1.2(b)(iv).) Emma Smith incurred at least \$3,600 in legal fees relating to services for attempting to track down and force disbursement of the proceeds of the Alliance check. Likewise, Larry Smith, to whom respondent owed a fiduciary duty, also incurred at least \$3,000 in legal fees in attempting to track down and force disbursement of the proceeds of the Alliance check. Moreover, respondent's actions significantly delayed conclusion of the Smith dissolution.

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).)

⁴All 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 and trust account violations. The standards provide a range of sanctions from suspension to disbarment, depending upon the gravity of the offenses and the harm to the client. (Std. 1.6, 2.2, 2.3 and 2.6.) Standard 2.2(a) provides that willful misappropriation of entrusted funds must result in disbarment absent compelling mitigation or except if the amount of funds misappropriated is insignificantly small. Respondent's misappropriation of \$15,029.54 is significant and there is no compelling mitigation.

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. As discussed above, respondent's misappropriation was an act of moral turpitude. Moreover, respondent engaged in an act of dishonesty when he falsely represented in his signed declaration that he was "out of the country," in an effort to delay discovery of his misappropriation of a portion of the Alliance check proceeds and to delay distribution of the remaining check funds.

Standard 2.6 provides that culpability of section 6068 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. The court agrees. Not only has respondent exhibited an

inability or unwillingness to uphold his professional obligations and conform his conduct to the requirements of the law, but his acts of moral turpitude and dishonesty are even more egregious since he has failed to participate in this disciplinary proceeding. Respondent's misconduct reflects a disregard of professional responsibilities. He flagrantly breached his fiduciary duties to his client and to her estranged husband, Larry Smith.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Moreover, when an attorney holds funds in trust for a person who is not a client, the attorney is held to the same fiduciary duties to the non-client in dealing with the funds held for that non-client, as if there were an attorney-client relationship. (*In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 185, 191.)

The misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline - disbarment. (*Grim v. State Bar* (1991) 53 Cal.3d 21.)

In *Grim*, the Supreme Court disbarred an attorney for misappropriating \$5,546 from a client. The attorney did not make restitution until after the State Bar had commenced disciplinary proceedings. In aggravation, he was previously disciplined for commingling funds, took advantage of the client residing in another state and mismanaged his trust account. In mitigation, character witnesses testified to his good moral character and the attorney cooperated with the State Bar.

Here, respondent, among other acts of misconduct, misappropriated \$15,029.54, failed to render an appropriate accounting to his client, and made a false representation in order to delay discovery of his misappropriation and to delay distribution of the remaining funds. Respondent failed to participate in this disciplinary proceeding and has not made any restitution. The court has no information about the underlying cause of respondent's offense or of any mitigating circumstances surrounding his misconduct.

Respondent's misappropriation of \$15,029.54 and default in this matter weigh heavily in assessing the appropriate level of discipline. Like the attorney in *Grim*, the "misappropriation in this case. . . was not the result of carelessness or mistake; [respondent] acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that [respondent] intended to permanently deprive his client of her funds." (*Grim v. State Bar, supra*, 53 Cal.3d at p. 30.)

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.) An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.) Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding.

Respondent "is not entitled to be recommended to the public as a person worth of trust, and accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) Therefore, based on the severity of the offenses, the aggravating circumstances, and the lack of compelling mitigating factors, the court recommends disbarment.

The State Bar also requests that respondent be ordered to make restitution. "Restitution is fundamental to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Id.* at p. 1093.) Here, respondent misappropriated funds in the amount of \$15,029.54, which should have been held in trust for his client, until paid to her, including payments to her estranged husband, Larry Smith or for his benefit in division of the marital property.

But, the Supreme Court does not "approve imposition of restitution as a means of compensating the victim of wrongdoing." (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) In the instant matter, the legal fees and costs incurred by Emma Smith in the amount of \$3,600 and Larry Smith in the amount of \$3,000 involved tort damages. And the court can not

recommend extending restitution to cover tort damages.

Therefore, the court recommends that respondent be ordered to make restitution to Emma Smith or for her benefit in the amount of the misappropriated funds as set forth, *infra*.

VI. Recommended Discipline

Accordingly, the court recommends that respondent **Bennie C. Ferma** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

It is recommended that respondent make restitution within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291) to:

Emma Smith or for her benefit in the amount of \$15,029.54 plus 10% interest per annum from December 7, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Emma Smith or for her benefit, plus interest and costs in accordance with Business and Professions Code section 6140.5) and furnish proof thereof to the State Bar's Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20(a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

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 Business and Professions Code section 6140.7 and as a money judgment.

VIII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: August ___, 2008

PAT McELROY
Judge of the State Bar Court