

FILED JULY 1, 2010

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of)	Case No.: 07-O-13629-PEM; 09-N-18672
)	
THEODORE CARL LUEBKEMAN)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 98836)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this consolidated default matter, respondent THEODORE CARL LUEBKEMAN, is found culpable by clear and convincing evidence of misappropriation and failing to comply with California Rules of Court, rule 9.20 as ordered by the Supreme Court on August 11, 2009.

In view of respondent's misconduct and prior record of discipline, the court recommends, that respondent be disbarred and be ordered to make restitution as set forth below.

II. SIGNIFICANT PROCEDURAL HISTORY

A. Case no. 07-O-13629

The Notice of Disciplinary Charges (NDC) was filed on November 12, 2009, and was properly served on respondent on that same date at his official membership records address, by

certified mail, return receipt requested, as provided in Business and Professions Code section¹ 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The return receipt was signed “Theodore C. Luebkehan.”

On November 18, 2009, respondent was properly served at his official address with a notice advising him, among other things, that a telephonic status conference would be held on January 4, 2010. And respondent did not appear at the January 4 status conference. On January 6, 2010, he was properly served with a status conference order at his official address by first-class mail, postage prepaid.

Respondent did not file a responsive pleading to the NDC. On January 13, 2010, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that disbarment would be sought if he was found culpable. Respondent did not respond to the motion.

On February 4, 2010, the court entered respondent’s default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. Pursuant to Evidence Code section 452(d)(1), the court judicially notices its records which indicate that this correspondence was returned by the United States Postal Service marked, among other things, “unclaimed” and “unable to forward.” On the return receipt attached to the back of the envelope, respondent’s official address had been blacked out and a Lakeside, California address was handwritten.

B. Case no. 09-N-18672

The NDC was filed on January 12, 2010, and was properly served on respondent on that

¹ Future references to section are to the Business and Professions Code.

same date at his official membership records address, by certified mail, return receipt requested, at his official address. The return receipt was signed “Theodore Lieberman.”

On February 1, 2010, respondent was properly served at his official address with a notice advising him, among other things, that a telephonic status conference would be held on February 16, 2010. And respondent did not appear at the February 16, 2010 status conference. On that same date, he was properly served with a status conference order at his official address by first-class mail, postage prepaid.

Respondent did not file a responsive pleading to the NDC. On February 19, 2010, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that disbarment would be sought if he was found culpable. Respondent did not respond to the motion.

On March 18, 2010, the court consolidated this matter with case no. 07-O-13629, entered respondent’s default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. A courtesy copy was also sent to respondent by first-class mail to the Lakeside, California address on March 25, 2010.

The State Bar’s and the court’s efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The matter was submitted for decision on April 12, 2010 without hearing after the State Bar filed a brief.²

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

² Respondent filed a resignation on April 15, 2010 and signed a stipulation as to Facts and Conclusions of Law, which was filed June 22, 2010.

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules of Proc. of State Bar³, rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on October 12, 1981, and has been a member of the State Bar at all times since.

B. Case no. 07-O-13629 (The Bettini Matter)

1. Facts

At all relevant times, respondent maintained a client trust account (CTA) with the Bank of the America.

In June 2002, Steve Bettini employed respondent to represent him regarding the settlement of the estate of Bettini's aunt, Emma Cushman. And on July 19, 2006, the Cushman estate settled. One of the settlement terms entitled Bettini to a cash payment of \$95,000.

On September 30, 2006, the balance in the attorney client trust account was zero. On October 16, 2006, respondent deposited Bettini's settlement proceeds of \$95,000 into the CTA. Accordingly, the balance in the CTA consisted entirely of Bettini's settlement proceeds.

Pursuant to respondent's fee agreement, respondent was entitled to collect a payment of \$14,250 in attorney's fees from the settlement proceeds. The amount remaining from the

³ Future references to the Rules of Procedure are to this source.

settlement proceeds of \$80,750 represented Bettini's portion of the settlement proceeds which respondent was obligated to maintain in the CTA until paid out for Bettini's use or benefit.

On December 6, 2006, Bettini requested that respondent provide him with the \$80,750 to which he was entitled. Respondent refused to immediately pay Bettini his portion of the settlement proceeds. Instead, between December 28, 2006 and June 24, 2008, respondent paid Bettini nine installment payments of \$5,000, totaling \$45,000. As of June 24, 2008, respondent owed Bettini \$35,750. Respondent then ceased making any payments to Bettini.

As of September 30, 2008, the balance in the CTA was \$26.79. Between October 16, 2006 and September 30, 2008, respondent withdrew at least \$35,723.21 belonging to Bettini from the CTA and used the funds for his own personal use and benefit and not for Bettini's. He did so without Bettini's knowledge or permission. He was not entitled to receive any of the \$35,723.21 that he withdrew from the CTA. As of November 12, 2009, respondent has still refused and not provided Bettini with any of Bettini's \$35,750.

By withdrawing \$35,723.21 from the CTA and using it for his own personal use and benefit and by refusing to provide Bettini with the remaining settlement proceeds of \$35,750, respondent misappropriated \$35,750 from Bettini.

2. Conclusions of Law

a. Count One –Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by misappropriating Bettini's \$35,750. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

b. Count Two- Rule of Professional Conduct,⁴ Rule 4-100(A)(Maintaining Client Funds in Trust Account)

Rule 4-100(A) requires, in relevant part, that an attorney place all funds held for the benefit of clients, including advances for costs and expenses, in a client trust account.

There is clear and convincing evidence that respondent wilfully violated rule 4-100(A) by not maintaining \$35,723.21 of Bettini's funds in the trust account.

c. Count Three- Rule 4-100(B)(4) (Failure to Promptly Pay)

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

By not paying Bettini his entire settlement proceeds as requested in December 2006 and by continuing to withhold from Bettini the remaining \$35,750 that respondent owes Bettini, respondent failed to promptly pay funds, as requested by the client, which the client is entitled to receive and wilfully violated rule 4-100(B)(4).

B. Case no. 09-N-18672 (The Cal. Rules of Court, Rule 9.20⁵ Matter)

1. Facts

In S173693 (State Bar Court no. 05-0-04973), filed August 11, 2009, respondent was ordered suspended from the practice of law in California for two years, execution of that period of suspension was stayed, and he was placed on probation for two years subject to conditions, including six months' actual suspension. He was also ordered to comply with California Rule of Court 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the order.

⁴ Future references to rule are to this source.

⁵ Future references to rule 9.20 are to this source. This rule was formerly numbered rule 955 of the California Rules of Court.

The order became effective thirty days after it was filed (California Rules of Court, rule 9.18(b)). Accordingly, compliance with rule 9.20(a) and rule 9.20(c) was required no later than October 10 and 20, 2009, respectively.

Notice of the Supreme Court's order was properly served upon respondent in the manner prescribed by California Rule of Court 9.18(b) at the address respondent maintained with the State Bar in accordance with Business and Professions Code section 6002.1 subdivision (a).⁶ And respondent did not file proof of compliance as required by rule 9.20(c) prior to the October 20, 2009 deadline.

On October 22 and November 19, 2009, the Office of Probation of the State Bar sent respondent courtesy letters reminding him of his duty to comply with rule 9.20. The letters were deposited in the United States mail, with first class postage fully prepaid, addressed to the address respondent then maintained with the State Bar in accordance with Business and Professions Code section 6002.1, subdivision (a). The letters were not returned to the State Bar by the postal authorities.

As of January 12, 2010, the date the NDC was filed, respondent had not complied with rule 9.20(c). The court judicially notices its records pursuant to Evidence Code section 452(d)(1) which indicate that he still has not done so.

⁶ Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon respondent, rule 8.532(a) of the California Rules of Court requires the Clerk to promptly transmit a copy of opinions and orders to the parties upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his duty and transmitted a copy of the Supreme Court's order to respondent immediately after its filing.

2. Conclusions of Law

a. Section 6103 (Violation of Court Order)

In relevant part, section 6103 makes it a cause for disbarment or suspension for an attorney to wilfully disobey or violate a court order requiring him to do or to forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear.

By violating the Supreme Court's order requiring respondent to comply with rule It is also recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, respondent wilfully disobeyed a court order in wilful violation of section 6103.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,⁷ std. 1.2(b).)

Respondent has one prior instance of discipline. (Std. 1.2(b)(i).) As previously noted, in S173693 (State Bar Court no. 05-0-04973), filed August 11, 2009, respondent was ordered suspended from the practice of law in California for two years, execution of that period of suspension was stayed, and he was placed on probation for two years subject to conditions, including six months' actual suspension. He was found culpable of commingling funds and of not maintaining funds in a CTA in violation of rule 4-100(A) and of misappropriating \$2,200 of client funds in violation of section 6106. In aggravation, the court considered multiple acts of misconduct and uncharged misconduct consisting of an admitted violation of rule 4-100(B)(3). In mitigation, the court considered the absence of a disciplinary record in 24 years of practice

⁷ Future references to standard or std. are to this source.

and respondent's candor and cooperation.

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) Bettini still has not received full payment of his funds.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) Respondent ignored two letters from the Office of Probation reminding him about compliance with rule 9.20. He still has not complied with that rule.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

C. 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.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of

imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.2(a) and (b) and 2.3 apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension. The one-year “minimum discipline” set forth in the standard “is not faithful to the teachings of [the Supreme] court's decisions” and “should be regarded as a guideline, not an inflexible mandate.” (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.)

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable of not complying with rule 9.20 and, in one client matter, of violating section 6106 and rules 4-100(A) and (B)(4). In aggravation in this default matter, the court considered one prior instance of discipline as well as multiple acts, indifference and client harm. There were no mitigating factors.

The Office of the Chief Trial Counsel of the State Bar recommends disbarment. The court agrees.

Lesser discipline than disbarment is not warranted because the amount misappropriated is

clearly not insignificantly small (in excess of \$35,000) and the most compelling mitigating circumstances do not clearly predominate. (Std. 1.7(b).) The serious and unexplained nature of the misconduct, the lack of participation in these proceedings as well as the self-interest underlying respondent's actions suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Moreover, it is evident that the prior instance of discipline has not served to rehabilitate respondent or to deter him from further misconduct. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent THEODORE CARL LUEBKEMAN be DISBARRED from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is recommended that respondent make restitution to the following 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):

1. to Steve Bettini, in the amount of \$35,750 plus 10% interest per annum from June 24, 2008 (or to the Client Security Fund to the extent of any payment from the fund to Steve Bettini), plus interest and costs, in accordance with Business and Professions Code section 6140.5);

Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VI. 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.

VII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: July 1, 2010

PAT McELROY
Judge of the State Bar Court