FILED MAY 7, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **LOUIS J. PERKINS,** **Member No. 140056,** A Member of the State Bar.	)	Case Nos. **07-O-14812-PEM; 08-O-11900 (Cons.)** **DECISION**

I. Introduction

In this consolidated default disciplinary matter, respondent **Louis J. Perkins** is charged with multiple acts of professional misconduct in two matters, including (1) commingling; (2) failing to perform competently; (3) failing to return unearned fees of $1,500; (4) improperly withdrawing from employment; (5) failing to communicate with clients; (6) committing an act of moral turpitude; and (7) failing to cooperate with the State Bar.

The court finds, by clear and convincing evidence, that respondent is culpable of most of the alleged counts of misconduct. In view of respondent's misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law in California for two years, that execution of suspension be stayed, and that he be suspended for a minimum of one year and until the State Bar Court grants a motion to terminate his suspension (Rules Proc. of State Bar, rule 205).

II. Pertinent Procedural History

A. First Notice of Disciplinary Charges (Case No. 07-O-14812)

On July 28, 2008, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a first Notice of Disciplinary Charges (NDC)[1] at his official membership records address. Respondent received the NDC but did not file a response.

Respondent's default was entered on October 6, 2008, and respondent was enrolled as an inactive member on October 9, 2008. The matter was submitted on October 27, 2008.

B. Second Notice of Disciplinary Charges (Case No. 08-O-11900)

On October 17, 2008, the State Bar filed and properly served a second NDC on respondent at his official membership records address. Respondent received the NDC but did not file a response.

Respondent's default was entered on January 14, 2009, and respondent was enrolled as an inactive member on January 17, 2009.

Respondent did not participate in the disciplinary proceedings. On January 14, 2009, the court vacated the submission date of the first NDC, consolidated the two cases and submitted the matter for decision on February 9, 2009, following the filing of State Bar's brief on culpability and discipline.[2]

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[1] The format of the first NDC pleading does not conform to rule 1110(a) of the State Bar Court Rules of Practice, which provides that "the lines on each page shall be … numbered consecutively." The lines on pages 3 through 11 are not numbered and the pleading is in a check-the-box-and-fill-in-the-blank format. Other than not meeting the court rule requirements, the pleading seems to follow an illustrative form mindlessly, resulting in facts confusingly pled.

[2] Contrary to the court order that any legal argument re the level of discipline be filed no later than February 3, 2009, the State Bar filed its brief six days after its due date. Although the delay is inconsequential in this matter, the better practice is to adhere to the deadline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDCs 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).) Because of the unusual, poorly pled NDC in case No. 07-O-14812, certain factual allegations were either vague or in conflict with other allegations. Thus, not all factual allegations in that NDC are deemed admitted. (Cf. *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318 [In a default matter, to the extent that evidence negates allegations of NDC, it is evidence and not allegations that controls findings of fact].)

Respondent was admitted to the practice of law in California on June 6, 1989, and has since been a member of the State Bar of California.

A. The Ojingwa Matter (Case No. 07-O-14812)

On September 3, 2007, respondent was hired by Cecilia and Joseph Ojingwa to defend them in a pending lawsuit, *Totari Investments, LLC v. Cecilia N. Ojingwa and Joseph Ojingwa* (Ojingwa matter), Sacramento County Superior Court case No. 07AM08174. The legal services included filing an answer to the complaint. The Ojingwas paid respondent $1,500 as advance fee.

However, respondent did not file an answer, resulting in a default entered against the Ojingwas.[3] And, he did not advise his clients of his failure to file such an answer or of the default that was entered against Joseph on September 25, 2007, and against Cecilia on October 4, 2007. Instead, on September 28, 2007, respondent told Cecilia that he had filed an answer in the Ojingwa matter. He made the statement knowing that it was false and with an intent to deceive.

[3] The NDC listed "9/14/07" under the heading – "Approximate Dates" – and alleged that respondent did not perform the legal services with competence. It did not allege that respondent was required to file an answer by that date, as stated in the State Bar's brief on culpability.

Between October 5 and October 12, 2007, respondent received notice of, but did not respond to, the Ojingwas' reasonable status inquiries, which were made by telephone and by a letter dated October 12, 2007. The Ojingwas left several phone messages with respondent during that week.

Although respondent had not earned any substantial portion of the advance fee, he did not refund any part of the unearned fee.[4]

The State Bar notified respondent of its request for cooperation and participation by means of letters dated January 22 and February 15, 2008. The State Bar requested that respondent provide a written response to the allegations under investigation. The letters were not returned to the State Bar by postal authorities.[5] Respondent did not comply with the State Bar's request for cooperation and participation in the disciplinary investigation.

Conclusions of Law

Count 1: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A)) [6]

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

By failing to file an answer for the Ojingwas, which resulted in a default entered against the clients, respondent intentionally and recklessly failed to perform legal services with competence in willful violation of rule 3-110(A).

[4] The State Bar argued that on October 13, 2007, the Ojingwas requested that the legal fees they paid in advance be returned. But because such fact was not alleged in the NDC, it is not an admitted fact.

[5] Since the NDC did not allege that respondent received these letters, as stated in the State Bar's brief on culpability, it is not an admitted fact.

[6] References to rules are to the Rules of Professional Conduct, unless otherwise indicated.

Count 2: Improper Withdrawal From Employment (Rules Prof. Conduct, Rule 3-700(A)(2))

Rule 3-700(A)(2) states: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

The NDC[7] alleged that respondent effectively withdrew from employment by abandoning the client matter and that he constructively terminated his services by failing to file an answer, by failing to respond to his clients' reasonable status inquiries about their case and by failing to advise his clients of his failure to timely file an answer and the default that was entered against them on September 25, 2007 (Joseph) and October 4, 2007 (Cecilia).

Although respondent's failure to provide services spanned a period of only about one month, time was plainly of the essence to the services requested (timely file an answer to the complaint before the deadline). Under these circumstances, respondent's failure to provide the necessary services constituted an effective withdrawal for purposes of rule 3-700(A)(2), even though his period of inaction was relatively brief. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal.State Bar Ct. Rptr. 631, 641-642.)

Therefore, respondent's failure to take any reasonable steps to avoid foreseeable prejudice to his clients prior to his withdrawal was a willful violation of rule 3-700(A)(2).

[7] Count 2 of the NDC alleged that respondent received actual knowledge that his employment was terminated by effectively withdrawing from employment by abandoning the client matter. But count 3 alleged that respondent received actual knowledge that his employment was terminated by the fact that the client notified respondent that his employment was terminated. Due to the contrary factual allegations, it is unclear whether respondent effectively withdrew from employment before the client terminated his employment.

Count 3: Failure to Return Unearned Fees (Rule 3-700(D)(2))

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund unearned fees.

Upon his termination of employment on October 12, 2007, respondent willfully failed to promptly refund any part of the $1,500 fee paid in advance that had not been earned, in willful violation of rule 3-700(D)(2).

Count 4: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i)) [8]

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

By failing to comply with the State Bar's request for cooperation and participation in the disciplinary investigation, respondent willfully violated section 6068, subdivision (i).

Count 5: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

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

Respondent's failure to return the client's telephone calls during that short period of one week between October 5 and October 12, 2007, and his failure to respond to the October 12, 2007 letter are not clear and convincing evidence that he had failed to respond promptly to reasonable status inquires of a client in willful violation of section 6068, subdivision (m). A one-week period is too short of a time to find that respondent had willfully failed to respond to the clients' reasonable status inquiries.

[8] References to sections are to the provisions of the Business and Professions Code.

The gravamen of respondent's misconduct was his failure to inform the clients of significant developments in their case. By failing to inform the Ojingwas that he did not file a timely answer and by failing to inform them of the default entered against them, respondent failed to keep his clients reasonably informed of significant developments in willful violation of section 6068, subdivision (m).

Count 6: Misrepresentation (Bus. & Prof. Code, § 6106)

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

By misrepresenting to Cecilia on September 28, 2007, that he had filed an answer to the complaint, when he in fact he did not do so and knew that the statement was false, respondent committed an act involving dishonesty in willful violation of section 6106.

B. Client Trust Account (Case No. 08-O-11900)

Respondent maintained a client trust account at U.S. Bank (CTA) from March 2008 to the present. On or about March 10, 2008, U.S. Bank notified respondent, in writing, of two insufficiently funded (NSF) transactions in the CTA, as follows:

Date	*Check No.*	*Amount*	*Balance*	*Payee*
3/06/08	1266	$161.57	$(99.35)	AT & T
3/06/08	1263	$ 29.10	$(99.35)	FedEx

Three days later, U.S. Bank notified the State Bar of the two NSF checks.

U.S. Bank covered the NSF transactions for respondent, but notified respondent of an $8 per day overdraft fee. U.S. Bank sent respondent the NSF transaction notice.

Respondent received the notice and was aware of its contents.

On or about March 7, 2008, respondent deposited a check for $1,338.02 into his CTA. This check was issued to respondent from Jan Johnson, Chapter 13 Trustee, reference Debtor Peter Skillman. The funds from this deposit covered the two March 3, 2006 NSF checks.

The State Bar subpoenaed a portion of respondent's CTA, including statements from January 2 through July 31, 2008, with deposits and withdrawals that included additional records from December 2007. A review of the records subpoenaed revealed that respondent was issuing funds for personal items from his CTA, including, but not limited to, checks to the Laguna Creek 3rd Ward of the Mormon Church; to the Sacramento Municipal Utilities (SMUD); Princeton Business Park; AT & T, and other non-client related expenditures, as follows:

Date	*Check No.*	*Amount*	*Payee*
12/29/07	1229	$ 125.00	Premier Storage
12/11/07	12490[9]	11.94	Pulse TV
12/31/07	1247	1,098.00	Princeton Business Park
12/28/07	1244	173.13	Reliable Office Supplies
01/08/08	1158	101.19	SMUD
01/31/08		300.00	State Bar of CA
02/15/08	1253	1,098.00	Princeton Business Park
03/01/08	1267	260.74	SMUD
03/01/08	1264	187.87	SMUD
03/01/08	1265	379.36	AT & T
03/01/08	1266	161.57	AT & T
03/11/08	1269	1,098.00	Princeton Business Park

[9] The check number, as alleged in the NDC, is a typographical error. Also, there was no check number for the transaction on January 31, 2008.

04/11/08	1270	620.00	Princeton Business Park
04/20/08	1272	600.00	Laguna Creek Third Ward
04/19/08	1275	83.00	DMV
05/11/08	1277	1,098.00	Princeton Business Park
05/13/08	1281	140.00	SMUD
06/10/08	1278	1,098.00	Princeton Business Park
07/06/08	1282	2,045.00	Laguna Creek 3rd

A review of the CTA also revealed that there were disbursements made on behalf of clients from the account, as follows:

Date	*Check No.*	*Amount*	*Notation*
12/31/07	1251	$299.00	Bankruptcy Court (Lunsford)
03/12/07	1257	350.00	Refund client fee
01/28/08	1258	299.00	USBC (Mark)

Respondent knew, or should have known, that there were insufficient funds in his account to cover the NSF transactions.

On or about March 20 and April 11, 2008, the State Bar wrote to respondent about the NSF checks in his CTA and requested that respondent provide a written explanation to the State Bar. The two letters were not returned as undeliverable. Respondent received the two letters and was aware of their contents; but he did not respond or otherwise give the State Bar an explanation for the NSF checks.

On or about June 3 and June 30, 2008, the State Bar again wrote to respondent, requesting discovery and information regarding respondent's CTA, in connection with a State Bar investigation of the NSF transactions. The letters were not returned as undeliverable.

Respondent received the two letters and was aware of their contents; but he did not respond or otherwise give the State Bar the requested discovery or explanation for the NSF checks.

Count 1: Commingling (Rules Prof. Conduct, Rule 4-100(A))

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

"The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit. Because [respondent] used the account while it was ... denominated a trust account, even if he [did not intend] ... to use for trust purposes, rule [4-100(A)] was violated. The rule leaves no room for inquiry into the depositor's intent." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.) Therefore, by using the CTA as his personal and business account and issuing checks for his personal expenses from his CTA, respondent's personal use of the trust account and the commingling of his personal funds in the CTA were clear and convincing evidence of willful violations of rule 4-100(A).

Count 2: Moral Turpitude (Bus. & Prof. Code, § 6106)

The State Bar alleged that respondent violated section 6106 by issuing two checks insufficiently funded for $29.10 and $161.57 when respondent knew or should have known that there were insufficient funds in his account to cover the checks.

It is well settled that the "conduct of issuing numerous checks with insufficient funds 'manifests an abiding disregard of the fundamental rule of ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice.'" (*Bambic v. State Bar* (1985) 40 Cal.3d 314, 324, citing *Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 577.)

In order for the court to conclude that these checks were made to deceive clients beyond the level of suspicion, there must be clear and convincing evidence of respondent's deliberate dishonesty or corruption or an act involving moral turpitude. Here, the alleged facts demonstrate that respondent wrote two bounced checks on the same day and not numerous checks with insufficient funds for a period of time. Moreover, he quickly deposited funds to cover those checks within four days. There is no evidence of deception or dishonesty. Thus, respondent's issuance of two bad checks is not clear and convincing evidence of moral turpitude or dishonesty with an intent to mislead clients. Such an error does not rise to the level of moral turpitude in violation of section 6106.

Count 3: Failure to Cooperate With the State Bar (§ 6068, Subd. (i))

By failing to respond to the State Bar's four letters or otherwise cooperate in the investigation, respondent failed to cooperate and participate in a disciplinary investigation pending against respondent, in willful violation of section 6068, subdivision (i).

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,[10] stds. 1.2(e) and (b).)

A. Mitigation

No mitigation was submitted into evidence. (Std. 1.2(e).)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has a prior record of discipline. (Std. 1.2(b)(i).) On October 11, 1998, the State Bar Court privately reproved respondent for trust account violations and commingling

[10] Future references to standard(s) or std. are to this source.

(Rules Prof. Conduct, rule 4-100), which respondent stipulated to. (State Bar Court case No. 99-O-11091.)

Respondent committed multiple acts of wrongdoing by abandoning the Ojingwa matter and by commingling personal funds with client funds in his CTA. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed significantly his clients. (Std. 1.2(b)(iv).) Not only were his clients deprived of their refund of $1,500, a default was entered against them due to respondent's failure to file a timely answer in their pending lawsuit.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He had not yet refunded the unearned fee.

Respondent's failure to cooperate with the State Bar before the entry of his default, including filing an answer to the NDC, is also a serious aggravating factor. (Std. 1.2(b)(vi).)

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.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.2(b), 2.3, 2.4, 2.6, and 2.10 apply in this matter.

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.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

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

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

Standard 2.4 provides that culpability of a member's willful failure to perform services and willful failure to communicate with a client must result in reproval or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

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

Standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges one year of actual suspension, citing several cases in support of its recommended level of discipline, including *In the Matter of Doran* (Review Dept. 1998) 3 Cal.

State Bar Ct. Rptr. 871 and *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354.

In *Doran*, the Review Department actually suspended the attorney for six months with an 18-month stayed suspension and a three-year probation. He was culpable of using his two client trust accounts for personal business affairs for almost three years, issuing 28 NSF checks, and of abandoning two clients. The Review Department noted that were the trust account violations the only matters before the court, they would have recommended a 90-day actual suspension. The attorney was in practice for only two years at the time of his misconduct. The Review Department did not find the conduct of the attorney to be venal, but rather totally oblivious to his obligations as a lawyer. Unlike respondent, the attorney testified that he opened the account only because he understood that the State Bar required him to do so. He further testified that he had no understanding of the purpose of a trust account, nor did he understand the concept of commingling. Nevertheless, it is well settled that using a client trust account for personal expenses constitutes commingling even where there were no client funds in the trust account. (*Id*. at p. 876.)

While respondent's misconduct is similar to that of *Doran*, it is aggravated by his prior discipline for comparable trust account violations. He was required to attend the State Bar Client Trust Accounting School as a probation condition. As a result, he should have a heightened awareness of his need for strict compliance with his CTA. Respondent obviously had not heed to the teachings and again committed commingling and issuing NSF checks. The fact that his misconduct is closely related to his past disciplinary violations raises concerns about his rehabilitation. Moreover, he had abandoned his clients and caused default to be entered against them. Thus, a substantially greater degree of discipline is needed than would otherwise be necessary.

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.) Failing to appear and participate in the hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) Balancing all relevant factors – respondent's misconduct, the standards, the case law, and the aggravating evidence, the court concludes that placing respondent on a suspension for a minimum of one year would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommendations

A. Discipline

Accordingly, the court hereby recommends that respondent **Louis J. Perkins** be suspended from the practice of law in California for two years, that said suspension be stayed, and that respondent be suspended from the practice of law for a minimum of one year. He is to remain suspended until he files and the State Bar Court grants a motion to terminate his suspension. (Rules Proc. of State Bar, rule 205.)

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

It is also recommended that if respondent remains suspended for two years or more as a result of not satisfying the preceding conditions, he will remain suspended until he has shown proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Standard 1.4(c)(ii) and Rules Proc. of State Bar, rule 205.)

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order, or during the period of his suspension, whichever is longer, and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Willful failure to do so may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.[11]

D. Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: May _____, 2009

PAT McELROY
Judge of the State Bar Court

[11] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)