

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **08-O-12789-DFM**
)
ROBERT DUANE GEORGE,)
) **DECISION**
)
Member No. 185306,)
)
)
A Member of the State Bar.)

INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Mia R. Ellis (DTC Ellis) appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent **ROBERT DUANE GEORGE** did not appear in person or by counsel.

In the notice of disciplinary charges (NDC), the State Bar charges respondent with five counts of professional misconduct in a single client matter and with one count of failing to cooperate in a State Bar disciplinary investigation. As set forth *post*, the court finds that respondent is culpable on all six counts and concludes that the appropriate level of discipline includes a ninety-day actual suspension continuing until (1) respondent makes restitution of \$5,000 (plus interest) to the former client and (2) respondent makes and the State Bar Court grants a motion to terminate his suspension (Rules Proc. of State Bar, rule 205).

PERTINENT PROCEDURAL HISTORY

On March 26, 2009, the State Bar filed the NDC in this proceeding and properly served a copy of it on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar of California (official address). (Bus. & Prof. Code, § 6002.1, subd. (c);¹ Rules Proc. of State Bar, rule 60(b).)

On March 28, 2009, the State Bar received, from the United States Postal Service (Postal Service), a return receipt (i.e., a green card) for the copy of the NDC that was served on respondent. That return receipt establishes that the copy of the NDC that was served on respondent was actually delivered to respondent's official address where it was signed for by S. Lunsford.

Respondent's response to the NDC was due no later than April 20, 2009. (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time].) Respondent failed to file a response. Accordingly, on June 5, 2009, the State Bar filed a motion for the entry of respondent's default and properly served a copy of that motion on respondent at his official address by certified mail, return receipt requested. Respondent, however, never filed a response to that motion or to the NDC.

The declaration of DTC Ellis, which is an exhibit to the State Bar's June 5, 2009, motion for entry of default, establishes that, in addition to performing its minimum statutory duty to serve a copy of the NDC on respondent by mail to his official address, the State Bar undertook additional measures in an attempt to provide respondent with actual knowledge of this proceeding. It is clear that respondent was given adequate notice of this proceeding. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; see also *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

¹ Unless otherwise noted, all further statutory references are to the Business and Professions Code.

On June 24, 2009, this court entered respondent's default and ordered that he be involuntarily enrolled as an inactive member of the State Bar of California effective June 27, 2009). (Section 6007, subd.(e)(1).) On July 14, 2009, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on (1) the allegations contained in the NDC, which have been deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)) and (2) the facts in this court's official file in this matter (Rules Proc. of State Bar, rule 585).

Jurisdiction

Respondent was admitted to the practice of law in this state on December 10, 1996, and has been a member of the State Bar of California since that time.

Gutman Client Matter

On about September 5, 2007, Georgia Gutman employed respondent to help her administer her deceased husband's trust. At about that same time, Gutman paid respondent \$5,000 as an advance for legal fees.

On about October 22, 2007, Mary Rempola, who was Gutman's caregiver, telephoned respondent and left a message for him, notifying him that Gutman and Ruth Harte (Gutman's sister) wanted to make an appointment to meet with him and discuss the trust. Respondent never responded to Rempola's message.

On numerous occasions between late October 2007 and about mid-March 2008, Rempola and Harte telephoned respondent for Gutman and left messages for respondent asking to meet with him about the trust. Respondent, however, never responded to Rempola's or Harte's numerous messages. On about March 11, 2008, Rempola faxed respondent a letter asking him to

call Gutman and schedule a meeting with Gutman and Harte. Even though respondent received Rempola's March 11 letter, he never responded to it.

In March or April 2008, Gutman terminated respondent's employment and hired attorney Richard Glasner to replace him and to assist her with the trust. Respondent never completed any legal service that advanced the trust's administration. Nor did respondent earn any portion of the \$5,000 advanced fee.

On about April 9, 2008, Gutman sent respondent a letter requesting that respondent account for the \$5,000 advanced fee, that he refund the unearned portion of the fee, and that he send her client file to attorney Glasner. Even though respondent received Gutman's April 9 letter, he never responded to it. Moreover, respondent did not otherwise account for the advanced fee, refund any portion of it, or send Gutman's file to Attorney Glasner (or to Gutman).

On April 10, 2008, attorney Glasner sent respondent, by certified mail, return receipt requested, a letter requesting that respondent refund the unearned portion of the \$5,000 advance fee and send Gutman's file to him (i.e., Glasner). On about April 11, 2008, the United States Postal Service returned attorney Glasner's April 10 letter to him because respondent refused to accept delivery of it. Then, on April 16, 2008, attorney Glasner faxed his April 10 letter to respondent. Respondent, however, never responded to attorney Glasner's request for a refund of the unearned advanced fee and for Gutman's file. Nor did respondent otherwise ever refund any portion of the unearned \$5,000 advanced fee or send Gutman's file to Glasner (or Gutman).

On July 24, 2008, a State Bar investigator sent respondent a letter asking respondent to respond in writing, no later than August 7, 2008, to specific allegations of misconduct that Gutman had made against him. Respondent received the letter and, on August 6, 2008, faxed the investigator a letter requesting an extension to August 21, 2008 to respond. That same day, the

investigator sent respondent a letter granting respondent's requested extension. Respondent received that letter.

Respondent did not respond to the investigator's July 24, 2008, letter by August 21, 2008. Accordingly, on August 29, 2008, the investigator telephoned respondent, but respondent's telephone was disconnected. Thus, on August 29, 2008, the investigator also sent respondent an email notifying respondent that his response to the investigator's July 24, 2008, letter was past due and asking respondent to contact the investigator immediately. Respondent did not respond to that email. Nor did respondent otherwise contact the investigator.

On September 16, 2008, the investigator telephoned respondent multiple times, but respondent's telephone number rang busy. The investigator again telephoned respondent on October 9, 2008, but respondent's telephone was again disconnected.

Count 1 – Failure to Communicate (§ 6068, subd. (m))

In count 1, the State Bar charges that respondent willfully violated his duty, under section 6068, subdivision (m), "To respond promptly to reasonable status inquiries of clients. . . ." The record clearly establishes that respondent willfully violated section 6068, subdivision (m) when he failed to respond to (1) Rempola's October 22, 2007, message; (2) the numerous messages that Rempola and Harte left for respondent between late October 2007 and about mid-March 2008; and (3) Rempola's March 11, 2008, faxed letter.

Count 2 – Failure to Perform Competently (Rule 3-110(A))

In count 2, the State Bar charges that respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California,² which provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

² Unless otherwise indicated, all further references to rules are to these Rules of Professional Conduct of the State Bar of California.

Specifically, the State Bar charges respondent with willfully violating rule 3-110(A) “By not completing any legal services to advance the administration of the trust for Gutman.” The record clearly establishes this charged violation of rule 3-110(A). Respondent’s failure to perform any legal services of value to Gutman or the trust was, at a minimum, clearly repeated.

Count 3 – Failure to Account (Rule 4-100(B)(3))

In count 3, the State Bar charges that respondent willfully violated rule 4-100(B)(3), which provides, in part, that attorneys must “Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the [attorney] or law firm and render appropriate accounts to the client regarding them. . . .” Specifically, the State Bar charges that respondent willfully violated rule 4-100(B)(3) “By not providing an accounting for the \$5,000 [advanced fee] to Gutman.” The record clearly establishes this charged violation. Even though respondent did not earn any portion of the \$5,000 advanced fee, he had duty to notify his client of that fact when the client requested an accounting.

Count 4 – Failure to Refund Unearned Fee (Rule 3-700(D)(2))

In count 4, the State Bar charges that respondent willfully violated rule 3-700(D)(2), which provides, in part, that, upon termination of their employment, attorneys must “Promptly refund any part of a fee paid in advance that has not been earned.” Specifically, the State Bar charges that respondent willfully violated rule 3-700(D)(2) “By not providing any refund of the \$5,000 advance fee to Gutman. . . .” The record clearly establishes this charged violation.

Count 5 – Failure to Release Client File (Rule 3-700(D)(1))

In count 5, the State Bar charges that respondent willfully violated rule 3-700(D)(1), which provides, in part, that, upon termination of their employment, attorneys must, “Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property.” Specifically, the State Bar charges that respondent

willfully violated rule 3-700(D)(1) by not providing Gutman's file to either Gutman or Attorney Glasner in response to their requests that he do so. Again, the record clearly establishes this charged violation.

Count 6 -- Failure to Cooperate with State Bar (§ 6068, subd. (i))

In count 6, the State Bar charges that respondent willfully violated section 6068, subdivision (i), which requires that an attorney "cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." The record clearly establishes that respondent willfully violated section 6068, subdivision (i) by deliberately failing to respond to the State Bar investigator's July 24, 2008, letter regarding the Gutman client matter. Such a deliberate failure to cooperate is serious misconduct.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

Aggravation

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)³

Multiple Acts of Misconduct

Respondent's misconduct in the present proceeding involves multiple acts of misconduct. (Std 1.2(b)(ii).)

Significant Client Harm

Respondent's misconduct caused significant client harm. (Std. 1.2(b)(iv).) Respondent has wrongfully deprived Gutman of her \$5,000 since March or April 2008.

³ All further references to standards are to this source.

Failure to File a Response to the NDC

Respondent's failure to file a response to the NDC in the present proceeding, which allowed his default to be entered, is an aggravating circumstance. (See *Conroy v. State Bar* (1990) 51 Cal.3d 799, 805.) However, its weight in aggravation is limited because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

Mitigation

The State Bar of California's official membership records, of which this court takes judicial notice, show that respondent has no prior record of discipline and that, except for a six-day period in 1998 when he was suspended for failing to timely pay his Bar membership fees, respondent was continuously an active member of the State Bar from his admission in December 1996 through June 27, 2009, when he was suspended for not filing a response to the NDC in this proceeding. Accordingly, respondent is entitled to mitigation for his almost 11 years (from December 1996 to October 2007) of discipline-free practice. (Std 1.2(e)(i).)

DISCUSSION

Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this 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.) Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review

Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the review department noted more than 18 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not do so. (Accord, *In re Silvertown* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides that, 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. The most severe of the applicable sanctions in the present proceeding is found in standard 2.2(b), which applies to respondent's violation of rule 4-100(B)(3) (failure to account for the \$5,000 advanced fee). Standard 2.2(b) provides, in part, that a violation of rule 4-100 that does not involve the willful misappropriation of entrusted funds or property is to result in at least a three-month actual suspension irrespective of mitigating circumstances.

Standard 2.2(b)'s imposition of a three-month minimum suspension stems from the danger inherent in every violation of rule 4-100. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 371.) Moreover, the Supreme Court views an attorney's failure to refund an unearned fee very seriously. As the court stated in *Hulland v. State Bar* (1972) 8 Cal.3d 440, 449, "Surely the legal profession is more than a mere 'money getting trade' [citation]; it at least requires the rendition of services for any payment received. 'Taking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses. . . .' [Citations.]"

In the present proceeding, the court views the minimum three-month actual suspension called for under standard 2.2(b) is appropriate. Moreover, after carefully considering the found misconduct, the aggravating and mitigating circumstances, the standards, and case law, the court concludes that the appropriate level of discipline to recommend in this proceeding is a three-year

stayed suspension and a ninety-day actual suspension continuing until (1) respondent makes full restitution to Gutman and (2) respondent makes and the State Bar Court grants a motion to terminate his actual suspension (Rules Proc. of State Bar, rule 205).

DISCIPLINE RECOMMENDATION

Suspension Recommended

It is hereby recommended that respondent **ROBERT DUANE GEORGE**, State Bar number 185306, be suspended from the practice of law in California for three years; that execution of that period of suspension be stayed; and that respondent be actually suspended from the practice of law for ninety days and until the following conditions are satisfied:

- A. Respondent makes restitution to Georgia Gutman in the amount of \$5,000 plus 10 percent interest per annum from May 9, 2008 (or reimburses the Client Security Fund to the extent of any payment from the fund to Gutman, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).
- B. The State Bar Court has granted a motion to terminate respondent's actual suspension under rule 205 of the Rules of Procedure of the State Bar.
- C. If respondent remains suspended for two years or more as a result of not satisfying the preceding conditions, he must show proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law in accordance with standard 1.4(c)(ii).

Future Probation

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

Multistate Professional Responsibility Examination

It is further recommended that respondent be required to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order in this matter or during the period of his suspension, whichever is longer, and to provide satisfactory proof of his passage to the State Bar's Office of Probation in Los Angeles within that same time period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Rule 9.20

It is further recommended 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.⁴

Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as

⁴ Respondent must file a rule 9.20(c) affidavit even if he has no clients on the date that the Supreme Court files its order in this matter. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d); see also *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)

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

Dated: October ____, 2009.

DONALD F. MILES
Judge of the State Bar Court