FILED SEPTEMBER 27, 2010

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **THOMAS FRANCIS POESCHL, JR.,** **Member No. 127012,** A Member of the State Bar.	)))))))	Case No.: **09-O-11346-PEM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. Introduction and Pertinent Procedural History

This default matter was submitted for decision on July 23, 2010. Respondent **Thomas Francis Poeschl, Jr.,** is charged with six counts of misconduct including an allegation that he misappropriated client funds. The State Bar of California, Office of the Chief Trial Counsel (State Bar) was represented by Deputy Trial Counsel Treva Stewart (DTC Stewart). Respondent did not participate in these proceedings either in person or through counsel.

The State Bar filed the notice of disciplinary charges (NDC) in this proceeding on January 4, 2010. On that same day, a copy of the NDC was properly served on respondent in the manner set forth in rule 60 of the Rules of Procedure of the State Bar of California (Rules of Procedure).[1] The service copy of the NDC was not returned by the United States Postal Service (Postal Service), but the Postal Service did not provide the State Bar with a return receipt (i.e., a

[1] Unless otherwise indicated, all documents were properly served pursuant to the Rules of Procedure.

"green card") for the service copy of the NDC. Nonetheless, the service of the NDC on respondent was deemed complete when mailed even if respondent never received it. (Bus. & Prof. Code, § 6002.1, subd. (c);[2] *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; but see also *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

On February 2, 2010, a courtesy copy of the NDC, along with a cover letter, was sent to respondent at his official membership records address by first class mail, regular delivery. The cover letter informed respondent that a NDC was filed on January 4, 2010, and that a response to the NDC was due on or before January 25, 2010. The letter informed respondent that, as of February 2, 2010, the State Bar had not received respondent's response. The letter advised respondent that the State Bar Court had scheduled a status conference in this matter for February 8, 2010, at 9:30 a.m., and that respondent's physical appearance was required. This courtesy copy of NDC was *not* returned by the Postal Service.

Also, on February 2, 2010, DTC Stewart attempted to reach respondent by telephone at respondent's official membership records telephone number. The receptionist stated that respondent was there, but he was " 'not picking up' " and connected DTC Stewart to respondent's voicemail. DTC Stewart left respondent a detailed voicemail message informing respondent that the NDC had been filed; that his response was past due; and that the initial status conference was scheduled for February 8, 2010, at 9:30 a.m. in the State Bar Court.

On February 8, 2010, respondent failed to appear at the in-person status conference even though the court had previously served him with notice of the conference and even though he received additional notice of it in the State Bar's February 2, 2010 letter and in DTC Stewart's February 2, 2010 voicemail message.

[2] Unless otherwise indicated, all further references to sections are to the Business and Professions Code.

As of February 24, 2010, respondent had not returned DTC Stewart's call or filed a response to the NDC. Thus, on February 24, 2010, the State Bar filed and properly served on respondent a motion for the entry of respondent's default.[3]

When respondent failed to file a written response after service of the motion for the entry of his default, on June 14, 2010, the court filed an order entering respondent's default and ordering that respondent be involuntary enrolled as an inactive member of the State Bar of California.[4] A copy of that order was properly served on respondent by mail at his official membership records address. The copy of the order served on respondent was not returned to the State Bar Court by the Postal Service as undeliverable or for any other reason.

Thereafter, the State Bar waived a hearing in this matter, and the matter was submitted for decision.[5]

II. Findings of Fact and Conclusions of Law

Under section 6088 and Rules of Procedure, rules 200(d)(1)(A) and 201(c), upon the entry of respondent's default, the factual allegations (but not the charges or conclusions) set forth in the NDC were deemed admitted and no further proof was required to establish the truth of those facts. [6] Accordingly, the court adopts the facts alleged (but not the charges or the conclusions) in the NDC as its factual findings.

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[3] The motion also contains a request that the court take judicial notice of all of respondent's official membership addresses. The court grants this request.

[4] Respondent's involuntary inactive enrollment under section 6007, subdivision (e) was effective three days after service of the June 14, 2010 order by mail.

[5] Exhibits 1 and 2, as well as the declaration of DTC Stewart, which are attached to the motion for entry of respondent's default, are admitted into evidence.

[6] Notwithstanding the entry of respondent's default, "All reasonable doubts must [still] be resolved in [his] favor . . . , and if equally reasonable inferences may be drawn from a proven fact, the inference which leads to a conclusion of innocence rather than guilt [must] be accepted [by the court]. [Citation.]" (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.)

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 11, 1986, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

B. The Holmon Matter

1. Findings of Fact

a. Counts One and Two

At all relevant times, respondent maintained, at Wells Fargo Bank, an attorney-client trust account (attorney-client trust account).

In about March 2006, Rejeana Holmon (Holmon) employed respondent to represent her regarding the probate of her deceased father's estate (Estate). Holmon was the administrator of the Estate.

On about March 28, 2006, respondent filed a petition for probate in the San Francisco Superior Court on behalf of the Estate. On about July 9, 2007, the probate court issued letters of administration. The letters of administration allowed for the sale of the father's residence, which was the Estate's only asset.

In November 2007, the residence sold for $525,000. The Estate was owed $396,435.61 from the proceeds of the sale. At the time escrow closed on the residence, the title company retained $45,000 in an escrow account to pay past due income taxes. On about November 26, 2007, respondent deposited the proceeds of $396,435.61 into the attorney-client trust account.

Between about December 19, 2007, and February 26, 2008, respondent properly distributed $350,000 from the attorney-client trust account to the Estate's beneficiaries. Thus, as of about February 26, 2008, respondent was obligated to maintain the remaining $46,435.61 in the attorney-client trust account for the benefit of the Estate. However, as of about February 26,

2008, the balance in the attorney-client trust account was only $10,311.39. And, by about June 30, 2008, the balance in the attorney-client trust account fell to a *negative* $906.71.

Between about November 26, 2007, and June 30, 2008, respondent withdrew from the attorney-client trust account the entire $46,435.61 belonging to the Estate and then misappropriated those funds for his own use and benefit and not for the use and benefit of the Estate. Moreover, respondent withdrew (and misappropriated) the $46,435.61 without the knowledge or permission of the probate court or Holmon.

On about June 16, 2008, respondent sent Holmon an email apologizing for his failure to communicate with her. Respondent indicated in the email that he had prepared the necessary documentation to complete the probate and would send it to Holmon. On about June 22, 2008, Holmon replied to the email and informed respondent that she had received the documentation. Respondent thereafter failed to file any documentation with the probate court, to complete the probate of the Estate, or to take any further action on behalf of Holmon.

On about July 21, 2008, respondent received from the title company the $45,000 that the title company retained to pay past due income taxes. On about July 21, 2008, respondent deposited that $45,000 into the attorney-client trust account.

As of about July 21, 2008, respondent was obligated to maintain a total of $91,435.61 ($46,435.61 plus $45,000) in the attorney-client trust account for the benefit of the Estate until properly paid out for the benefit of the Estate in accordance with the Probate Code. However, as of about September 30, 2009, the balance in the attorney-client trust account fell to only $22,593.29.

Between about July 21, 2008, and September 30, 2009, respondent withdrew from the attorney-client trust account an additional $22,406.71 ($45,000 less $22,593.29) belonging to the Estate and then misappropriated that $22,406.71 from the Estate for his own use and benefit and

not for the use and benefit of the Estate. Moreover, respondent withdrew (and misappropriated) this additional $22,406.71 without the knowledge or permission of the probate court or Holmon.

In sum, between about November 26, 2007, and December 19, 2008, respondent misappropriated a total of $68,842.32 ($46,435.61 plus $22,406.71) from the Estate. During that same time period, Holmon repeatedly requested that respondent provide her with the Estate's funds. Respondent received the requests. But, at least as of the date the State Bar filed the NDC in this proceeding, respondent had not responded to them or provided Holmon with any additional funds.

b. Count Three

On about November 26, 2007, and July 21, 2008, respondent received funds on behalf of the Estate. Between about February 2008 and November 2008, Holmon sent respondent three letters requesting that respondent provide her with a status update on her matter and that respondent distribute the Estate funds in respondent's possession.

On about December 19, 2008, Attorney Noel Obiora sent respondent a letter on behalf of Holmon requesting that respondent distribute the remaining Estate funds immediately.

Although respondent received the letters from Holmon and Attorney Obiora, respondent failed to respond to them or to distribute the remaining Estate funds.

c. Count Four

Respondent was employed to complete the probate of the Estate. After making the initial distributions of $350,000, respondent failed to take any further meaningful action on behalf of the Estate or Holmon. On about February 26, 2008, respondent ceased performing services on behalf of the Estate and Holmon.

Respondent failed to finalize the probate of the Estate and failed to distribute the remaining Estate funds.

d. Count Five

Holmon and Attorney Obiora sent respondent letters requesting that respondent provide Holmon with a status update on the probate and the distribution of the Estate's assets. Although respondent received the letters, respondent failed to respond to them and failed to provide Holmon with a status update.

e. Count Six

On about February 27, 2009, the State Bar opened an investigation in this matter. Thereafter, on about May 4, 2009, State Bar Investigator Ysabel Naetzel mailed respondent a letter regarding respondent's conduct in this matter. Respondent received the letter. (Evid. Code, § 641 [mailbox rule].) The May 4, 2009 letter requested that respondent respond in writing by May 18, 2009.

On about August 28, 2009, investigator Naetzel mailed respondent another letter regarding his conduct in this matter. Respondent received the letter. (Evid. Code, § 641 [mailbox rule].) The August 28, 2009 letter enclosed a copy of the May 4, 2009 letter and requested that respondent respond in writing by September 11, 2009. At no time did respondent provide a written response to the allegations of misconduct in this matter.

2. Conclusions of Law

a. Count One – Moral Turpitude (§ 6106.)

Section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for suspension or disbarment. " 'There is no doubt that the willful misappropriation of a client's funds involves moral turpitude. [Citations.]' [Citations.]" (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) The State Bar charges that respondent misappropriated a total of $91,435.61 from the Estate. The record, however, clearly establishes that respondent misappropriated a total of only $68,842.32. Resolving all

reasonable doubts in respondent's favor (*Bushman v. State Bar, supra*, 11 Cal.3d at p. 563), the court must presume that the remaining $22,593.29 ($91,435.61 less $68,842.32) remains in the client-trust account.[7] By misappropriating a total of $68,842.32 from the Estate, respondent committed acts of moral turpitude, dishonesty and corruption in willful violation of section 6106.

b. Count Two – Failure to Maintain Funds in Trust Account (Rules Prof. Conduct, Rule 4-100(A))[8]

Rule 4-100(A) requires that all funds received or held for the benefit of clients, including advances for costs and expenses, must be deposited and maintained in an identifiable bank account which is properly labeled as a client trust account, and no funds belonging to the attorney or law firm may be deposited therein or otherwise commingled with such client funds. Respondent willfully violated rule 4-100(A) by withdrawing a total of $68,842.32 of Estate's funds from the attorney-client trust account without the knowledge or permission of the probate court or Holmon.

c. Count Three –Failure to Pay Client Funds (Rule 4-100(B)(4))

Rule 4-100(B)(4) provides that an attorney must promptly pay or deliver, as requested by a client, the funds, securities or other properties in the attorney's possession which the client is entitled to receive. In count three, the State Bar charges that respondent violated rule 4-100(B)(4) because he failed to distribute, to Holmon, the $91,435.61 he was to have held in trust for the Estate in accordance with Holmon's and Attorney Obiora's requests. The court cannot agree. First, the record fail to establish, by clear and convincing evidence, that Holmon was entitled to receive the $91,435.61 or that respondent was authorized (either by a probate

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[7] As noted *ante*, the balance in the attorney-client trust account was $22,593.29 on September 30, 2009.

[8] Unless otherwise indicated, all further references to rules are to the State Bar Rules of Professional Conduct.

court order or under the Probate Code) to distribute the $91,435.61 to Holmon when she requested that respondent give it to her.

Second, the State Bar charges respondent's failure to distribute the $91,435.61 as an element of the rule 3-110(A) violation charged (and found) in count four, *post*. The appropriate level of discipline for an act of misconduct does not depend on how many rules or statues proscribe the misconduct; therefore, it is unnecessary, if not inappropriate, to find redundant/duplicative violations. (*In the Matter of Van Sickle* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 980, 992; *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Accordingly, count three is dismissed with prejudice because it is duplicative of count 4.

d. Count Four – Failure to Perform with Competence (Rule 3-110(A))

Rule 3-110(A) provides that a member must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Respondent willfully violated rule 3-110(A) by ceasing to perform services on behalf of the Estate and Holmon, failing to finalize the probate of the Estate, and upon that finalization or other probate court order, failing to distribute the $91,435.61 he was to have held in trust for the Estate.

e. Count Five – Failure to Respond to Client Inquiries (§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. By failing to respond to requests from Holmon and Obiora for a status update, respondent failed to respond promptly to the reasonable status inquiries of a client in a matter in which respondent agreed to provide legal services in willful violation of section 6068, subdivision (m).

f. Count Six – Failure to Cooperate in Investigation (§ 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. By failing to provide a written response to the allegations regarding respondent's conduct in this matter or otherwise cooperating in the investigation of this matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

III. Mitigating and Aggravating Circumstances

A. Mitigation

As respondent's default was entered in this matter, respondent failed to introduce any mitigating evidence on his behalf. However, pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's official membership records maintained by the State Bar of California, which establish that respondent has no prior record of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)[9] Respondent therefore practiced law for more than 21 years prior to his first act of misconduct in this matter. This is very strong mitigation.

B. Aggravation

The court finds four factors in aggravation. (Std. 1.2(b).) First, respondent's misconduct involves multiple acts of misconduct. (Std. 1.2(b)(ii).) Second, respondent's misappropriations totaling $68,842.32 significantly harmed the Estate and its beneficiaries. (Std. 1.2(b)(iv).) Third, respondent failed to participate in this disciplinary proceeding prior to the entry of his default. (Std. 1.2(b)(vi).) Fourth, respondent's failure to make any restitution of the misappropriated monies establishes his indifference towards the consequences of his misconduct. (Std. 1.2(b)(v).)

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[9] All further references to standards are to this source.

IV. Discussion

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.) Second, the court looks to caselaw for guidance. (*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.)

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. In the present proceeding, the most severe sanction for respondent 's misconduct is found in standard 2.2(a), which applies to respondent's misappropriations involving moral turpitude totaling $68,842.32. Standard 2.2(a) provides:

> Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.

The Supreme Court has repeatedly held that misappropriation of trust funds is a grievous violation. Moreover, the Supreme Court has made clear that even an isolated instance of misappropriation by an attorney without a prior record of discipline may result in disbarment in the absence of compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071-1073.) As noted *ante*, respondent is entitled to very substantial mitigation for his 26 years of misconduct-free practice. But that mitigation, even though very substantial, is not compelling particularly in light of all the found misconduct and the fact that, even at this late date, there is no evidence that respondent has paid a single dollar in restitution.

The Supreme Court has made clear that the misappropriation of a client's funds harms not only "the individual client whose money has been taken, it also endangers the confidence of the public at large in the legal profession. In all but the most exceptional of cases, we must impose the harshest discipline for such a breach in order to safeguard the citizenry from unethical practitioners. [Citations.]" (*Chang v. State Bar, supra*, 49 Cal.3d at p. 128.)

In sum, both the standards and the caselaw strongly support a disbarment recommendation in this proceeding. Moreover, the court independently concludes that respondent should be ordered to make restitution with interest for his misappropriations totaling $68,842.32 and for the $22,593.29 in undistributed Estate funds he holds or should be holding in the attorney-client trust account, which totals $91,435.61.

V. Recommended Discipline

The court recommends that respondent **THOMAS FRANCIS POESCHL, JR.,** 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.

The court further recommends that Thomas Francis Poeschl, Jr., be ordered (1) to make restitution to Rejeana Holmon as the Administrator of the Estate of George Holmon, Deceased the amounts of $46,435.61 plus 10 percent interest thereon per annum from February 26, 2008, and $45,000 plus 10 percent interest thereon per annum from July 21, 2008, and (2) to reimburse the Client Security Fund for any payment from the fund to Rejeana Holmon as the Administrator of the Estate of George Holmon, Deceased; to the Estate of George Holmon, Deceased; and any beneficiary of the Estate of George Holmon, Deceased, resulting from Poeschl's misconduct together with interest and costs in accordance with Business and Professions Code section 6140.5. The court further recommends that any reimbursement, interest, and costs owed to the

Client Security Fund be enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

VI. Rule 9.20 & Costs

The court further recommends that Thomas Francis Poeschl, Jr., 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.[10]

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Thomas Francis Poeschl, Jr., be involuntary enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: September 27, 2010.

PAT McELROY
Judge of the State Bar Court

[10] Poeschl is required to file a rule 9.20(c) compliance affidavit even if he has no clients to notify *on the date the Supreme Court files its order in this proceeding*. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)