

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 09-O-12036-RAP (09-O-12981-RAP;
)	09-O-13148-RAP; 09-O-14038-RAP)
RIC A. MILITELLO,)	
)	
Member No. 193675,)	AMENDED DECISION¹
)	
A Member of the State Bar.)	
_____)	

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar) charges respondent **RIC A. MILITELLO²** with five counts of professional misconduct. For the reasons set forth *post*, the court finds that respondent is culpable on only three of the five counts and concludes that the appropriate level of discipline for the found misconduct is one year's stayed suspension together with a six-month suspension continuing until respondent makes and the State Bar Court grants a motion to terminate the suspension (Rules Proc. of State Bar, rule 205).

¹ This Amended Decision supersedes the August 25, 2010 Decision in this matter. (See October 4, 2010 order on motion for reconsideration and order vacating August 25, 2010 Decision.)

² Respondent was admitted to the practice of law in California on December 17, 1997, and has been a member of the State Bar of California since that time. He has no prior record of discipline.

The State Bar was represented by Deputy Trial Counsel Elina Kreditor. Respondent did not appear in person or by counsel.

II. KEY PROCEDURAL HISTORY

The State Bar filed the notice of disciplinary charges (hereafter NDC) in this proceeding on March 24, 2010. And, on that same day, the State Bar properly served a copy of the NDC on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar of California (hereafter official address) in accordance with Business and Professions Code section 6002.1, subdivision (c).³ However, the United States Postal Service (hereafter Postal Service) returned that service copy of the NDC to the State Bar undelivered and stamped “Not Deliverable as Addressed.”

On April 16, 2010, the State Bar mailed another copy of the NDC to respondent at a forwarding address that the Postal Service had previously provided to the State Bar in March 2010. However, the Postal Service also returned that copy of the NDC to the State Bar undelivered and stamped “Undeliverable Commercial Mail Receiving Agent No Authorization to Receive Mail for Addressee.”

Even though respondent never received either of the two copies of the NDC that the State Bar mailed to him, the State Bar's initial service on respondent on March 24, 2010, was complete at the time of the mailing. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.) Moreover, the court finds that regardless of whether respondent has actual knowledge of this disciplinary proceeding, respondent was given adequate notice of this proceeding for purposes of due process. First, the State Bar fulfilled its statutory duty to serve a copy of the NDC on respondent at his official address by certified mail, return receipt requested (§ 6002.1,

³ Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

subd. (c)). Second, the State Bar undertook additional measures in an attempt to provide respondent with actual notice of this proceeding.⁴ (*Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

Respondent's response to the NDC was to have been filed no later than April 19, 2010. (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time].) Respondent, however, did not file a response. And, on April 23, 2010, the State Bar filed a motion for the entry of respondent's default and served a copy of that motion on respondent by certified mail, return receipt requested, at his official address. Thereafter, respondent did not file a response to that motion or to the NDC, and the time in which he had to file each of those responses has run.

Because all of the statutory and rule prerequisites were met, this court filed an order on May 11, 2010, in which it entered respondent's default and, as mandated by section 6007, subdivision (e)(1), ordered that respondent be involuntary enrolled as an inactive member of the State Bar of California effective May 14, 2010.⁵

On May 26, 2010, the State Bar filed a brief on culpability and discipline. And, on June 1, 2010, the court took the matter under submission for decision without a hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under section 6088 and Rules of Procedure of the State Bar, rules 200(d)(1)(A) and 201(c), upon the entry of respondent's default, the factual allegations (but not the charges or

⁴ Those additional measures are set forth in DTC Kreditor's declaration, which is attached to the State Bar's motion for entry of default, filed on April 23, 2010.

⁵ Of course, an inactive member of the State Bar of California cannot lawfully practice law in this state. (§ 6126, subd. (b); see also § 6125.) Moreover, an attorney who has been enrolled inactive cannot lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

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. Briefly, those factual findings establish the following charged disciplinary violations by clear and convincing evidence.

A. The Buss Client Matter (Case Number 09-O-12036-RAP)

On August 9, 2007, Linda Buss employed respondent to represent her in a personal injury matter arising from an automobile accident. Respondent agreed to provide legal services to Buss on a contingency fee basis.

Buss incurred medical charges as a result of the injuries sustained in the accident. The charges were paid by Graybill Medical Group (hereafter Graybill Medical) pursuant to the terms and conditions of a CIGNA Medical and Hospital Subscriber Agreement. A “medical lien” amounted to \$2,428.32.

On March 24, 2008, respondent received a letter from Graybill Medical advising him that Graybill Medical was *asserting* a “medical lien” on any judgment in the case and that payment should be made to Graybill Medical prior to disbursing any settlement funds to Buss. In about March 2008, respondent negotiated the payment of \$1,620 to cover the alleged “medical lien” with Graybill Medical. Respondent indicated to a Graybill Medical representative that he would send payment to Graybill Medical prior to disbursing settlement funds to Buss.

However, on May 16, 2008, respondent sent Buss a settlement disbursement memorandum in which respondent indicated to Buss that he would distribute \$1,620 from the settlement funds to CIGNA (not Graybill Medical) to cover the alleged “medical lien.” Nothing

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.)

in the record suggests that CIGNA ever asserted a lien against Buss much less established, by clear and convincing evidence, that it had some kind of valid lien.

On about May 18, 2008, respondent settled the matter with Mercury Insurance for \$7,100.⁷ Respondent provided Buss with \$2,150.01 as her share of the settlement. And, on May 19, 2008, respondent deposited the \$7,100 in settlement funds into his CTA.

On October 22, 2008, the balance in respondent's CTA fell below the \$1,620 allegedly owed to Graybill Medical, to a balance of \$438.02. At least, as of March 24, 2010, the date on which the State Bar filed the NDC in this proceeding, respondent had not paid any portion of the alleged \$1620 “medical lien” to Buss or Graybill Medical.

Count One – Failing to Pay Client Funds (Rules Prof. Conduct, rule 4-100(B)(4))⁸

In count one, the State Bar charges that respondent willfully violated rule 4-100(B)(4), which provides that an attorney is to promptly pay, as requested by the client, any funds, securities, or other property in the attorney’s possession to which the client is entitled to receive. Specifically, the State Bar charges that “By failing to pay any portion of the outstanding medical lien to Graybill [Medical] after representing to Buss that a portion of the settlement funds owed to Buss would be used to pay the medical lien, respondent willfully failed to promptly pay or deliver to the client funds which the client is entitled to receive” in willful violation of rule 4-100(B)(4). The State Bar failed to establish, by clear and convincing evidence, that respondent willfully violated rule 4-100(B)(4).

⁷ Nothing in the record suggests why Mercury Insurance paid Buss \$7,100 on her personal injury claim. Thus, Mercury Insurance might have been Buss’s insurance company and paid the \$7,100 to Buss under the underinsured/uninsured motorist provision of Buss’s automobile insurance.

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

First, a request by a client to pay or deliver funds, securities, or other properties is an *essential* element of a rule 4-100(B)(4) charge/violation. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 170; *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 188.) In other words, a client demand is a prerequisite for the finding of a willful rule 4-100(B)(4) violation. The record fails to establish that Buss made a demand on respondent for delivery or payment of the \$1,620. (*In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 415-416, citing *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 126-127.)

Second, respondent never represented to Buss that respondent was going to distribute \$1,620 out of the settlement funds to Graybill Medical. As noted *ante*, respondent represented to Buss that he intended to distribute \$1,620 from the settlement funds to CIGNA. Nothing in the record establishes whether respondent paid the \$1,620 to CIGNA. And, resolving all doubts in respondent's favor, this court must presume that respondent properly paid the \$1,620 to CIGNA. (*Bushman v. State Bar, supra*, 11 Cal.3d at p. 563.)

In sum, count one is dismissed with prejudice.

Count Two – Misappropriation (§ 6106)

In count two, the State Bar charges respondent with willfully violating section 6106's proscription of acts involving moral turpitude, dishonesty, or corruption. Specifically, the State Bar charges that "By failing to disburse the medical lien funds to Graybill or Buss, Respondent dishonestly or with gross negligence misappropriated client settlement funds thereby committing acts involving moral turpitude, dishonesty or corruption." The record fails to establish the charged misconduct.

First, the record fails to establish that either Graybill Medical had a valid medical lien on Buss's \$7,100 recovery from Mercury Insurance. (See, e.g., *Farmers Ins. Exchange v. Zerin*

(1997) 53 Cal.App.4th 445, 454-459; *Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660, 664-665.) Second, as noted in count one *ante*, the court must presume that respondent properly paid the \$1,620 to CIGNA. Accordingly, count two is dismissed with prejudice.

B. Misuse of Client Trust Account (Case Numbers 09-O-12981-RAP; 09-O-13148-RAP)

Between July 10, 2008, and December 12, 2008, respondent repeatedly issued checks drawn on his CTA and used them to pay personal expenses, including the following:

1. On July 10, 2008, respondent issued a \$515 CTA check made payable to Card Holder Services.
2. On November 5, 2008, respondent issued a \$2,950 CTA check made payable to Jerry De Carolis for "11/08 rent."
3. On December 12, 2008, respondent issued a \$999.28 CTA check made payable to Pet Hospital of La Mesa.
4. January 15, 2009, respondent made a \$350 electronic payment from his CTA to Verizon Wireless (hereafter Verizon).
5. On February 23, 2009, respondent made a \$113 electronic payment from his CTA to Verizon.

On January 15, 2009, when respondent made the \$350 electronic payment to Verizon, the balance in his CTA was only \$145.80. Nonetheless, respondent's bank made the \$350 payment to Verizon and then reduced the balance in respondent's CTA to a negative \$204.20 (\$145.80 less \$350).

On February 23, 2009, when respondent made the \$113 electronic payment to Verizon, the balance in his CTA was a negative \$229.20. Even though respondent's CTA was already overdrawn by more than \$220, respondent's bank made the \$113 payment to Verizon then further reduced the balance in respondent's CTA to a negative \$342.20 (negative \$229.20 less \$113). At the time respondent made the \$350 and \$113 electronic payments to Verizon from his

CTA, respondent knew or in the absence of gross negligence should have known that there were insufficient funds in the CTA to cover the amount of the check.

Count Three – Commingling (Rule 4-100(A))

In count three, the State Bar charges that respondent willfully violated rule 4-100(A), which proscribes, inter alia, attorney misuse of trust accounts. By issuing checks drawn on and making electronic payments from his CTA for personal expenses or for purposes not related to any client concern, respondent commingled personal funds in a trust account in willful violation of rule 4-100(A) even if there were no client funds on deposit in the account at the time. (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 876.)

Count Four – Moral Turpitude (§ 6106)

In count four, the State Bar charges respondent violated section 6106. The record establishes that respondent committed acts of moral turpitude, dishonesty, or corruption in willful violation of section 6106 on January 15, 2009, and February 23, 2009, when he made electronic payments to Verizon from his CTA with insufficient funds on deposit. (See *Bowles v. State, supra*, 48 Cal.3d at p. 109 [“ ‘continued practice of issuing [numerous] checks which [the attorney knows will] not be honored’ ” involves moral turpitude].)

C. Failure to Update Official Address (Case Numbers 09-O-13148-RAP; 09-O-14038-RAP)

On July 8, 2009, a State Bar investigator sent a letter to respondent regarding a report it received from Wells Fargo Bank regarding insufficiently funded checks that were drawn on respondent’s CTA. Even though the State Bar mailed that letter to respondent at his official address, the Postal Service returned the letter to the State Bar undelivered and stamped “Return to Sender, Not Deliverable as Addressed, Unable to Forward.” On September 11, 2009, a State Bar investigator mailed a second letter about the report from Wells Fargo to respondent at his

official address. Again, the Postal Service returned that second letter to the State Bar undelivered and stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

On August 6, 2009, a State Bar investigator sent a letter to respondent regarding a complaint filed by Raphael Vacco against respondent. Even though the State Bar mailed that letter to respondent at his official address, the Postal Service returned the letter to the State Bar undelivered and stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward." On September 14, 2009, a State Bar investigator mailed a second letter about Vacco's complaint to respondent at his official address. Again, the Postal Service returned that second letter to the State Bar undelivered and stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

In sum, it is clear that respondent changed his official address no later than July, 8, 2009. However, as March 24, 2010, the date on which the State Bar filed the NDC in this proceeding, respondent still had not notified the State Bar's Membership Records Office of the change.

Count Five -- Failure to Update Official Address (§ 6068, subd. (j))

In count five, the State Bar charges that respondent willfully violated section 6068, subdivision (j), which requires that attorneys "comply with the requirements of Section 6002.1." Section 6002.1, subdivision (a)(1) mandates that each attorney maintain, on the official membership records of the State Bar of California, his or her current office address or, if the attorney does not have an office, an address to be used for State Bar purposes. In addition, section 6002.1, subdivision (a), mandates that each attorney notify the State Bar's membership records office of any changes of address within 30 days of the change.

The record clearly establishes the charged violation of section 6068, subdivision (j).

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IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Factors in Mitigation

Respondent does not have a 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 was admitted in December 1997 and did not engage in misconduct until about June 2008. Thus, he is entitled to significant mitigation for his more than 10 years of discipline free practice. (*Ibid.*; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than 10 years of discipline free practice is entitled to significant mitigation].)

B. Factors in Aggravation

1. Multiple Acts

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

2. Failure to File a Response to the NDC

Respondent's failures to file a response to the NDC in this proceeding, which allowed his default to be entered, is an aggravating circumstance. (Std. 1.2(b)(vi).)

V. DISCUSSION ON DISCIPLINE

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 decisional law 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.)

⁹ All further references to standards are to this source.

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(b), which applies to respondent's rule 4-100 violation. Standard 2.2(b) provides:

Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of Professional Conduct, none of which offenses result in the wilful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances.

In the Matter of Koehler (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628, the review department noted that "Frequently our Supreme Court has described the important function of rule [4-100] in serving to protect client's funds and property from the more severe consequences which could accidentally or intentionally result if trust property is attached, lost or misappropriated." Thereafter, the review department applied standard 2.2(b) and recommended that the attorney in *Koehler* be placed on three months' actual suspension irrespective of mitigating circumstances.

In the present case, respondent's not only disregarded his trust account duties and commingled his personal funds in his CTA in willful violation of rule 4-100(A), but respondent also engaged in acts of moral turpitude, dishonesty, or corruption in willful violation of section 6106 when he made the two electronic payments to Verizon from his CTA with insufficient funds on deposit. In light of standard 2.2(b) and the applicable caselaw, including *In the Matter of Koehler, supra*, 1 Cal. State Bar Ct. Rptr. 615, the court concludes that the appropriate level of discipline is one year's stayed suspension together with a six-month suspension that will

continue until respondent makes and the State Bar Court grants a motion to terminate the suspension.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent **RIC A. MILITELLO** be suspended from the practice of law in the State of California for one year and that execution of the one-year suspension be stayed on the condition that he be suspended from the practice of law in this state for six months and until he makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his suspension.

Moreover, if Militello's suspension in this matter continues for two years or more as a result of his failure to satisfy the preceding rule 205 condition, the court recommends that Militello remain suspended until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

The court also recommends that Militello be ordered to comply with the conditions of probation, if any, hereafter imposed on him by the State Bar Court as a condition for terminating his suspension. (Rules Proc. of State Bar, rule 205(g).)

VII. MPRE

It is further recommended that Militello be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and to provide proof of passage to the Office of Probation, within one year after the effective date of the Supreme Court's disciplinary order in this matter or during the period of his suspension, whichever is longer. Failure to pass the MPRE within the specified

time results in actual suspension until passage, without further hearing. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rule 321(a)(1)&(3).)

VIII. RULE 9.20

The court further recommends that Militello 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.

IX. COSTS

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

Dated: October 4, 2010.

RICHARD A. PLATEL
Judge of the State Bar Court