

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

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| In the Matter of |) | Case Nos. 09-O-12351-RAP; |
| |) | 10-N-10356 (Cons.) |
| JAMES ALLEN MACY, |) | |
| |) | DECISION AND ORDER OF |
| Member No. 57677, |) | INVOLUNTARY INACTIVE |
| |) | ENROLLMENT |
| <u>A Member of the State Bar.</u> |) | |

I. Introduction

In this consolidated default matter, respondent James Allen Macy (respondent) is charged with four counts of professional misconduct. The court finds, by clear and convincing evidence, that respondent is culpable of three of the charged acts of misconduct.

Based on the severity of the present charges and respondent’s prior record of discipline, the court recommends that he be disbarred from the practice of law.

II. Significant Procedural History

The State Bar filed a Notice of Disciplinary Charges (NDC) against respondent, in Case No. 09-O-12351, on December 15, 2010. That same day, a copy of the NDC was properly

served on respondent in the manner set forth in rule 60 of the Former Rules of Procedure of the State Bar of California (Former Rules of Procedure).¹

The State Bar filed a second NDC against respondent, in Case No. 10-N-10356, on December 22, 2010. That same day, a copy of the second NDC was properly served on respondent in the manner set forth in rule 60 of the Former Rules of Procedure. Case Nos. 09-O-12351 and 10-N-10356 were subsequently consolidated.

As respondent did not timely file a response to either NDC, on January 26, 2011, the State Bar filed and properly served on respondent a motion for the entry of respondent's default.²

On February 14, 2011, attorney Philip J. Giacinti, Jr. (Giacinti) filed a notice of designation to receive service on behalf of respondent. In this notice, Giacinti stated that he was representing respondent in the present matter.³

When respondent failed to file a written response within ten days after service of the motion for the entry of his default, the court, on February 15, 2011, filed an order of entry of default and involuntary inactive enrollment.⁴ A copy of said order was properly served on Giacinti. This order was not subsequently returned by the U.S. Postal service as undeliverable or for any other reason. Thereafter, the State Bar waived a hearing in this matter, and it was submitted for decision on March 8, 2011.

¹ Effective January 1, 2011, the Rules of Procedure of the State Bar of California were amended. Based on the court's determination that injustice would otherwise result, the court applied the Former Rules of Procedure in this proceeding.

² The State Bar also requested that the court take judicial notice of respondent's official membership records address history. The court grants this request.

³ Giacinti previously represented respondent before the State Bar Court in Case No. 07-O-13002.

⁴ Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e), was effective three days after the service of this order by mail.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Former Rules Procedure, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on December 18, 1973, and has been a member of the State Bar of California at all times since that date.

A. Case No. 09-O-12351 - The Macy Family Trust Matter

Facts

On or about October 5, 1989, Richard D. Macy (Richard) and Virginia R. Macy (Virginia) created the Macy Family Trust (the Macy Trust). Richard and Virginia had four children, including respondent, Dennis Warren Macy (Dennis), Marilyn Macy Wilson (Marilyn), and Thomas Lee Macy (Thomas).

On or about September 5, 1999, Richard and Virginia executed a restatement of the Macy Trust. Pursuant to the terms of the 1999 restatement, Virginia was appointed co-trustee of the Macy Trust together with respondent.

Contemporaneously with the execution of the 1999 restatement, Virginia and respondent, as co-trustees of the Macy Trust, created a family limited partnership known as Macy Investments, L.P. (the Partnership). At the time the Partnership was formed, the Macy Trust was the sole partner. On or about November 30, 1999, the partnership agreement for the Partnership was restated to reflect the addition of the four children, respondent, Dennis, Marilyn and Thomas, as limited partners. Pursuant to the restated partnership agreement, the Macy Trust owned a 2% general partnership interest and a 94% limited partnership interest. Each of the four children owned a 1% limited partnership interest.

As of November 30, 1999, the capital contributions to the Partnership were valued at approximately \$1.6 million and included the family's summer home in Big Bear, California, and miscellaneous cash and securities.

On or about December 8, 1999, Virginia died. Upon Virginia's death, respondent was left as sole successor trustee of the Macy Trust. As sole trustee of the Macy Trust, respondent served as the general partner of the Partnership. As sole trustee of the Macy Trust and as general partner of the Partnership, respondent maintained control of the Macy Trust and the Partnership assets for the benefit of the beneficiaries and partners.

The Macy Trust and the Partnership maintained accounts at Northern Trust Bank. The Partnership maintained an additional account at Salomon Smith Barney.

In his capacity as sole trustee of the Macy Trust and as general partner of the Partnership, respondent used the trust and partnership assets for his personal use and self-enrichment, spending approximately \$725,424.80 from the trust and partnership accounts. These expenditures and disbursements were not made for legitimate expenses or purposes of the Macy Trust or the Partnership and were substantially more than respondent's beneficial interest in the Macy Trust estate.

Between in or about April 2000 and July 2000, respondent withdrew, in eight separate disbursements, approximately \$8,651 from the Partnership's account at Salomon Smith Barney for his personal use. These disbursements were not used for any legitimate trust or partnership expenses or purposes.

Between in or about January 2000 and February 2004, respondent withdrew approximately \$369,339 from the Partnership's account at Northern Trust Bank solely for his personal benefit. Respondent wrote 73 checks to himself from the Partnership's account totaling

\$317,900. Included in this sum was a cashier's check in the amount of \$40,000 that respondent withdrew from the Partnership's account to pay off a settlement of personal litigation with a law partner. In addition, respondent wrote 4 checks to "Cash" from the Partnership's account totaling \$6,600. Respondent also used \$12,120.40 in Partnership account funds to pay the mortgage on his personal residence, used an additional \$4,890.98 to pay his legal secretary, and withdrew \$3,070.00 to pay personal medical expenses. The remaining funds withdrawn from the Partnership's account by respondent—totaling approximately \$24,758—were used by respondent for a variety of miscellaneous office and other personal expenses.

Between in or about October 2000 and March 2004, respondent withdrew approximately \$328,933 from the Macy Trust's account at Northern Trust Bank solely for his personal benefit. Included in this sum are 49 checks respondent wrote to himself totaling \$245,300. On or about October 13, 2000, respondent withdrew \$932.19 from the Macy Trust's account to pay for law books. On or about October 31, 2000 and September 4, 2001, respondent withdrew funds totaling \$2,705.42 from the Macy Trust's account to pay his home mortgage. On or about July 28, 2001, respondent issued a check from the Macy Trust's account to purchase a new car in the amount of \$33,497.75. On or about October 20, 2001, respondent withdrew \$5,180.35 from the Macy Trust's account to pay for his son's college tuition. Between on or about 2000 and 2001, respondent issued four checks payable to "Cash" totaling \$25,300 from the Macy Trust's account. Respondent also withdrew an additional \$16,017.63 from the Macy Trust's account to pay for various miscellaneous personal expenses including payments to his legal secretary in the total amount of \$2,440.55 and one check written for \$200 for personal medical expenses.

On or about May 10, 2002, Richard died. Pursuant to the terms of the restated Macy Trust, upon Richard's death, the trustee was required to distribute the Macy Trust estate in equal shares to the four children.

In or about January 2003, respondent made an unsecured loan to Bakker Ventures LLP (Bakker) in the amount of \$50,000 on behalf of the Partnership. Bakker's business is the rehabilitation and resale of residential property and is owned by respondent's friend, Ron Baker. No principal or interest was ever collected on the loan. In or about April 2003, respondent made an additional investment of \$20,000 in Bakker Ventures in his own name using funds from the Macy Trust. At that time, respondent requested that Bakker Ventures give him a priority position relative to the other investors, including the Macy Trust.

During the years 2003 and 2004, the beneficiaries made repeated requests to respondent to obtain an accounting and copies of cancelled checks to verify the legitimacy of respondent's disbursements and to confirm the status of the Macy Trust and Partnership accounts. Respondent refused to provide the requested documentation, thereby forcing the beneficiaries to obtain the banking records through other means.

On or about February 5, 2003, counsel for beneficiaries Marilyn and Dennis mailed a letter to respondent and requested, among other things, that respondent provide certain recent bank statements. Again, on or about June 20, 2003, the same counsel mailed a letter to respondent requesting bank statements for April and May 2003, for both the Macy Trust and Partnership accounts and the most current Saloman Smith Barney account statement. Respondent received the letters but did not provide the requested documents.

On or about November 21, 2003, counsel for Marilyn and Dennis again requested bank statements and copies of cancelled checks regarding the Macy Trust. Respondent did not provide the requested information.

On or about February 16, 2004, counsel for Marilyn and Dennis mailed a letter to respondent demanding the requested banking information and informing respondent of his intention to file a petition to remove respondent as trustee if the information was not provided. Respondent received the letter but did not provide the requested information.

On or about May 6, 2004, the beneficiaries filed a petition in the San Diego County Superior Court entitled *In re: The Matter of: Trust Created October 5, 1989, as Amended by Restatement Dated September 15, 1999 by Richard D. Macy and Virginia R. Macy Deceased*, Case No. P186615, seeking to remove respondent as trustee and to appoint a successor trustee (the Macy Case).

On or about May 26, 2004, the court entered an order in the Macy Case suspending respondent's powers as trustee and appointing Colin Fort (Fort) as temporary successor trustee. Shortly thereafter, respondent resigned as trustee. On or about September 17, 2004, the court appointed Fort as permanent trustee.

On or about June 30, 2006, Marilyn and Dennis filed a petition seeking to recover the misappropriated funds from respondent in the Macy Case. In or about November 2008, the parties reached a settlement in the Macy Case.

On or about May 1, 2009, Dennis made a complaint to the State Bar alleging that respondent committed professional misconduct in the handling of his fiduciary duties as trustee of the Macy Family Trust and as general partner of Macy Investments, L.P. (the Dennis Macy complaint).

On or about May 15, 2009, a State Bar investigator mailed a letter to respondent's counsel, Giacinti, requesting a response to the Dennis Macy complaint. On or about May 21, 2009, respondent's counsel informed the State Bar that he would forward the May 15, 2009, letter to respondent and further requested that the State Bar send the letter to respondent directly.

On or about May 22, 2009, the State Bar investigator mailed a letter to respondent at his member records address concerning the Dennis Macy complaint and requesting that respondent cooperate and participate in the investigation by providing a written response to the allegations under investigation. The letter also requested that respondent provide copies of any and all accountings he prepared as trustee for the Macy Family Trust and proof of all payments he made to reimburse the Macy Family Trust. Respondent received the letter. Respondent did not provide a written response to the letter or otherwise cooperate with the State Bar's investigation.

On or about June 16, 2009, the State Bar investigator mailed a letter to Giacinti, with a copy to respondent at his member records address, reminding them that the State Bar had not received a response to the Dennis Macy complaint. Respondent received the letter. Respondent did not provide a response to the Dennis Macy complaint or otherwise cooperate in the State Bar's investigation.

Conclusions of Law

1. Count One – (Bus. & Prof. Code, § 6106⁵ [Moral Turpitude–Misappropriation])

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. By misappropriating funds from the Macy Trust and the Partnership for his own use and benefit in breach of his fiduciary duties as Trustee of the Macy Trust,

⁵ Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

respondent committed acts involving moral turpitude, dishonesty or corruption, in willful violation of section 6106.

2. *Count Two – (§ 6106 [Moral Turpitude])*

The State Bar alleged that by not providing documents and accounts as requested by the beneficiaries in breach of his fiduciary duties as Trustee of the Macy Trust, respondent committed acts involving moral turpitude, dishonesty or corruption. The court disagrees. While the present conduct demonstrates a failure to account, the court lacks clear and convincing evidence that respondent's failure to provide the beneficiaries with the requested documents rises to a level of moral turpitude. Consequently, Count Two is dismissed with prejudice.

3. *Count Three – (§ 6068, subd. (i) [Failure to Cooperate in State Bar Investigation])*

Section 6068, subdivision (i) provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. By not providing a written response to the allegations in the Dennis Macy complaint or otherwise cooperating with the investigation on the Dennis Macy complaint, respondent failed to cooperate and participate in a disciplinary investigation pending against him, in willful violation of section 6068, subdivision (i).

B. Case No. 10-N-10356 - The Rule 9.20 Matter

Facts

On or about January 12, 2010, the California Supreme Court filed an order in its case number S177750, State Bar Court Case No. 07-O-13002 (the Order).

The Order required respondent to comply with rule 9.20, California Rules of Court, by performing the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Order.

Notice of the Order was properly served upon respondent in the manner prescribed by California Rules of Court, rule 9.18(b), at the address respondent maintained with the State Bar in accordance with California Business and Professions Code section 6002.1, subdivision (a).

Respondent received the Order. And the Order became effective on February 11, 2010, 30 days after it was filed, and has remained in full force and effect at all times thereafter.

Respondent was ordered to comply with subdivision (a) of rule 9.20 of the California Rules of Court, by no later than March 13, 2010.

Respondent was ordered to comply with subdivision (c) of rule 9.20, by no later than March 23, 2010.

Respondent did not file with the Clerk of the State Bar Court a declaration of his compliance with California Rules of Court, rule 9.20(a) and (b), by March 23, 2010. By failing to file a proof of his compliance with California Rules of Court, rule 9.20(a) and (b) by March 23, 2010, respondent willfully violated rule 9.20(c).

Conclusions of Law

1. Count One - (§ 6103 [Violation of a Court Order])

Section 6103 provides that “[a] wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.” By not filing a declaration of his compliance with rule 9.20 in conformity with the requirements of rule 9.20(c), respondent failed to timely comply with the Order requiring his compliance with California Rules of Court, rule 9.20, in willful violation of section 6103.

IV. Aggravation and Mitigation

A. Aggravation

1. Prior Record of Discipline

Respondent's prior record of discipline is a significant factor in aggravation. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).)⁶ On January 12, 2010, the California Supreme Court issued an order (S177750) suspending respondent from the practice of law for 3 years, stayed, with a 3-year period of probation, including an 18-month actual suspension and/until respondent provides proof of his rehabilitation, fitness to practice, and learning and ability in the law. In this proceeding, respondent stipulated to failing to render accounts and failing to deposit and maintain client funds in trust. In mitigation, respondent had been a member of the State Bar since 1973, with no prior record of discipline. No aggravating circumstances were involved.

2. Multiple Acts of Misconduct

Respondent was found culpable of three acts of misconduct. Multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

3. Failure to Cooperate

Respondent's failure to participate in the present proceedings constitutes an additional factor in aggravation. (Std. 1.2(b)(vi).)

B. Mitigation

No mitigating factors were submitted into evidence and none could be gleaned from the record. (Std. 1.2(e).)

⁶ All further references to standard(s) are to this source.

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.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.2(a), 2.3, and 2.6 apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is a one-year actual suspension.

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.) 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.)

The State Bar urges that respondent should be disbarred. The court agrees. The Supreme Court has repeatedly held that disbarment is the usual discipline for willful misappropriation.

(See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; and *Howard v. State Bar* (1990) 51 Cal.3d 215, 221.) In addition, an attorney's willful failure to comply with rule 9.20, subdivision (c) is extremely serious misconduct for which disbarment is also generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.)

Here, respondent willingly abandoned his fiduciary duties owed to his father and siblings in exchange for his own financial benefit. Respondent has simultaneously demonstrated an inability or unwillingness to comply with the professional obligations and rules of court imposed on California attorneys. Based on respondent's egregious misconduct, his failure to participate in the present proceedings, and the other factors in aggravation, the court finds no reason to deviate from the standards. Therefore, it is recommended that respondent be disbarred.

VI. Recommendations

The court recommends that respondent **James Allen Macy** 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.

A. California Rules of Court, Rule 9.20

The court further 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.⁷

⁷ Respondent is required to file a rule 9.20(c) 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.)

B. Costs

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

VII. Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(D)(1).)

Dated: May 23, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court