

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 12-O-14108-RAP
)	
MARK DOUGLAS ESTES,)	DECISION
)	
Member No. 110518,)	
)	
A Member of the State Bar.)	

Introduction¹

In this contested disciplinary matter, the State Bar of California (State Bar) has charged respondent **Mark Douglas Estes**, with four counts of misconduct stemming from a single client matter. The alleged misconduct included entering into an improper business transaction with a client, misrepresentation, issuing checks against non-sufficient funds, and failing to cooperate in a State Bar investigation.

Having considered the facts and the law, the court finds respondent culpable on all four counts of misconduct, and recommends, among other things, that he be actually suspended from the practice of law for a period of one year and until payment of restitution.

Significant Procedural History

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) against respondent on April 8, 2013. Respondent filed a response to the NDC on May 2, 2013.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

The State Bar was represented by Senior Trial Counsel Mia Ellis. Respondent represented himself in pro-per. Trial was held on August 8 and 9, 2013. The matter was submitted for decision on August 9, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 12, 1983, and has been a member of the State Bar of California at all times since that date.

Case No. 12-O-14108 – The Faulkenberg Matter

Facts

Frank Faulkenberg (Faulkenberg) has known respondent since approximately 1991 when Faulkenberg hired respondent to prepare taxes.² Respondent prepared Faulkenberg's taxes for about the next 15 years.

In approximately 1992, respondent represented Faulkenberg in a legal matter involving Faulkenberg's employer. Respondent helped Faulkenberg without charging a fee.

In 2006, respondent represented Faulkenberg in litigation involving the Nellie Reinhardt Trust, which was Faulkenberg's family trust (the Faulkenberg Trust). In September of that year, the Faulkenberg Trust litigation settled. At the time of the settlement, the parties agreed that certain real estate was to be sold and the proceeds distributed to Faulkenberg and three others.

Shortly thereafter, the real estate was sold and the proceeds distributed. On or about April 6, 2007, Faulkenberg received a check made payable to Faulkenberg and respondent in the amount of \$575,000. On April 9, 2007, Faulkenberg deposited the check into his bank account and respondent was paid a fee of about \$10,000 for representing Faulkenberg in the matter.

In April 2007, a few days after Faulkenberg deposited the settlement check into his bank account, respondent called Faulkenberg with a proposition for Faulkenberg to loan respondent

² Respondent is also a certified public accountant.

\$50,000 at 10% interest. Faulkenberg told respondent that \$50,000 was a considerable amount of money and that he would have to consider the proposal.

Faulkenberg considered respondent's loan proposal for two days. Then Faulkenberg called and told respondent that he agreed to the loan, but not on a handshake deal. To provide some security on the loan, Faulkenberg wanted a legally binding paper or note. Respondent agreed. Respondent told Faulkenberg he would prepare the documents, but did not mention how the loan would be secured.

A few days later, respondent called Faulkenberg and told him that the paperwork was ready. They agreed to meet at Faulkenberg's bank to complete the loan.

On April 17, 2007, Faulkenberg met respondent at Faulkenberg's bank. Respondent had prepared and executed: (1) a Note Secured by Deed of Trust (the Note); and (2) an unrecorded Deed of Trust and Assignment of Rents and Request for Special Notice (the Deed). This was the first time Faulkenberg saw these two documents. Respondent gave the original documents to Faulkenberg. Faulkenberg, who is unfamiliar with real estate law, asked respondent if these were the documents, if everything was legal and secure, and if anything else was needed. Respondent told Faulkenberg that nothing else was needed to secure the loan.

The Note was secured by respondent's personal residence located in San Diego County (the San Diego property). Other than visiting it once in the past, Faulkenberg knew nothing about the San Diego property. And unbeknownst to Faulkenberg, there were already two liens on record against the San Diego property, in addition to a mortgage loan. Prior to executing the loan, respondent did not tell Faulkenberg about the encumbrances on the property.

While at the bank, respondent never told Faulkenberg that the Deed needed to be recorded or that it had been notarized.³ Respondent never told Faulkenberg that respondent would or would not record the Deed.⁴

The terms of the Note were for one year. The Note provided that interest would accrue at the rate of 10% per annum, payable monthly in the amount of \$416.67. Further, the Note provided that if the principal and interest was not paid by May 1, 2008, respondent would pay interest on the balance or principal and interest unpaid at a rate of 12% per annum, payable monthly.

Prior to accepting the loan, respondent did not advise Faulkenberg in writing that he could seek the advice of an independent lawyer of Faulkenberg's choice regarding the terms and conditions of the proposal. Prior to accepting the loan, respondent did not allow Faulkenberg an opportunity to seek independent legal advice. Respondent also never obtained Faulkenberg's written consent to the terms of the loan.

On April 17, 2007, Faulkenberg delivered \$50,000 to respondent by wire transfer. Respondent paid the interest on the loan as due; however, he did not pay off the loan within one year. Consequently, on May 1, 2008, respondent requested that Faulkenberg extend the term of the Note for one additional year. Faulkenberg agreed.

On August 1, 2008, respondent prepared and delivered to Faulkenberg a second Note Secured by Deed of Trust (Second Note) and an unrecorded Deed of Trust and Assignment of Rents and Request for Special Notice on the San Diego property (Second Deed). Again, the term

³ Exhibit No. 5 is a copy of the original Note and Deed that respondent prepared, executed, and gave to Faulkenberg on April 17, 2007. The Deed is not notarized. Respondent testified that he had the Deed notarized on April 17, 2007, while on his way to meet Faulkenberg at the bank. Respondent, however, could produce no evidence that the Deed had ever been notarized and his testimony on this subject was not credible.

⁴ Respondent testified that he told Faulkenberg that the Deed needed to be recorded. The court finds respondent's testimony on this subject not credible.

of the loan was one year. The Second Note provided that interest shall accrue at the rate of 10% per annum, payable monthly in the amount of \$416.67. Further, the Second Note provided that if the principal and interest was not paid by July 31, 2009, respondent would pay interest on the balance of principal and interest unpaid at a rate of 12% per annum, payable monthly.

Respondent did not record the Second Deed. He did not tell Faulkenberg that he had not or would not record the Second Deed.⁵ In addition, respondent again failed to inform Faulkenberg that two other liens (in addition to the mortgage) were already recorded on the San Diego property. Faulkenberg trusted respondent, his long-time income tax preparer and attorney, to insure that that the loan transaction was legal and secure.

Faulkenberg made copies of the Second Note and Second Deed. Because these documents were legally important, Faulkenberg placed them in his bank safety deposit box.

Prior to extending the term of the loan, respondent did not advise Faulkenberg in writing that he could seek the advice of an independent lawyer of Faulkenberg's choice regarding the terms and conditions of the loan. Prior to extending the term of the loan, respondent did not allow Faulkenberg an opportunity to seek independent legal advice. Respondent also never obtained Faulkenberg's written consent to the terms of the loan extension.

Respondent continued to pay the interest on the loan, but did not pay off the principal. In May 2009, respondent requested another one-year extension of the Second Note. Faulkenberg verbally agreed and asked for new paperwork. Respondent told Faulkenberg that no additional paperwork was needed. Respondent further advised Faulkenberg that the Second Note was still secured by the San Diego property. At the time respondent made this representation to Faulkenberg, respondent knew that it was false because respondent had not recorded either the

⁵ If instructed to do so by respondent, Faulkenberg would have recorded the Deed and Second Deed.

Deed or Second Deed. Respondent's failure to record the Deed or Second Deed materially altered the terms of the loan in a manner that rendered the terms of the loan as both unreasonable and unfair to Faulkenberg.

Following the parties' verbal agreement, the loan was now due in May 2010. Respondent made some payments, but did not pay off the loan by May 1, 2010.

In March and April 2009, respondent issued two checks to Faulkenberg, totaling \$1,325.01. Both of these checks were drawn against insufficient funds. Respondent issued the checks when he knew or was grossly negligent in not knowing that there were insufficient funds in the account to pay them.

Respondent has not paid any funds to Faulkenberg since January 2010. Also, sometime in 2009 respondent stopped making the mortgage payments on the San Diego property. Respondent never notified Faulkenberg that he had stopped paying the mortgage on the San Diego property which was the subject of the Deed and Second Deed.

From February 1 to September 22, 2010, Faulkenberg called respondent regarding repayment of the loan. Faulkenberg left voicemail messages for respondent requesting a return call. Respondent received the voicemail messages but did not respond.

On October 14, 2010, Faulkenberg filed a civil complaint for damages against respondent in the San Diego County Superior Court, entitled *Frank E. Faulkenberg v. Mark Estes*, alleging breach of contract, fraud, and breach of fiduciary duty. The San Diego superior court subsequently found respondent culpable of breach of contract and breach of fiduciary duty.

On April 19, 2012, the superior court entered judgment against respondent for breach of contract and breach of duty. The judgment was for \$50,833.32, and also included prejudgment interest. Respondent received the judgment but did not pay it.

On August 27, 2012, the judgment was amended. The judgment is currently \$87,771.06. Once again, respondent received the amended judgment but did not pay it.

Faulkenberg expended \$22,000 in attorney fees to obtain and attempt to collect the judgment. Faulkenberg was on a fixed income and the loss of the \$50,000 and interest income related to respondent's loan has seriously affected him.⁶ In addition, Faulkenberg feels betrayed by his attorney, in whom he placed complete trust.

In 2012, respondent filed a bankruptcy petition and listed the Faulkenberg judgment as a debt to be dismissed. Respondent's bankruptcy petition, however, was later withdrawn.⁷

On June 14, 2012, a State Bar investigator mailed respondent a letter regarding Faulkenberg's complaint. The letter was properly addressed to respondent at his membership records address. The letter requested a written response by June 28, 2012, to the specific allegations of misconduct being investigated by the State Bar. Respondent received the letter but did not respond.

On June 29, 2012, a State Bar investigator mailed respondent a second letter that was properly addressed to respondent's membership records address. The letter requested a written response to specific allegations of misconduct being investigated by the State Bar by July 13, 2012. Again, respondent received the letter but did not respond.

⁶ Respondent blames Faulkenberg for filing a lawsuit against him in an attempt to recover his funds. According to respondent he would have agreed to notarize the Deed if Faulkenberg had asked and then would have worked out a payment plan, obviating the need for a trial. Respondent, however, failed to explain how such a negotiation could have be worked out when respondent was not returning Faulkenberg's telephone messages.

⁷ Respondent testified that he wants to repay Faulkenberg, but does not have the financial ability to do so at this time. The court does not find respondent's testimony on this subject to be credible. Respondent initiated the discharge of Faulkenberg's judgment in bankruptcy and has not made any payments to Faulkenberg since January 2010. And other than his own testimony, respondent did not produce any evidence concerning his inability to pay any portion of the judgment.

Conclusions

Count One – Rule 3-300 [Avoiding Interests Adverse to a Client]

Rule 3-300 provides that an attorney must not enter into a business transaction with a client or knowingly acquire an ownership, security, possessory, or other pecuniary interest adverse to a client unless: the transaction/acquisition and its terms are reasonable and fair to the client and are fully disclosed and transmitted in writing to the client in a reasonably understandable manner; the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so; and the client thereafter consents in writing to the terms of the transaction/acquisition.

Respondent claims that at the time of the loan in April 2007 there was no attorney-client relationship between himself and Faulkenberg. He argued that the relationship ceased in September 2006, when the trust lawsuit settled and the underlying case was dismissed. Respondent's claim, however, is without merit. Respondent chose to ignore the fact that the settlement funds were received and his legal fees were paid in April 2007. Mere days after Faulkenberg received the settlement funds and with knowledge of the amount of the settlement Faulkenberg received, respondent approached Faulkenberg and requested a \$50,000 loan. Rule 3-300 was enacted to protect clients from just this type of conduct.

Rule 3-300 mandates that the attorney take steps to ensure the client's informed written consent and an opportunity to consult with independent counsel to ensure that the terms of the loan are reasonable and fair to the client. Respondent failed in this duty on at least three occasions – the original loan and the two loan extensions. It is inconceivable to the court that an independent counsel would have advised Faulkenberg to enter into the loan with respondent based on respondent's inadequate loan documents, the failure to record the Deed and Second Deed, and the two undisclosed liens recorded against the San Diego property.

Therefore, the court finds that respondent willfully violated rule 3-300 by entering into a business transaction with a client in which the terms were not fair and reasonable to the client, the client was not advised in writing that he may seek the advice of an independent attorney and given a reasonable opportunity to seek that advice, and the client did not consent in writing to the terms of the transaction.

Count Two – § 6106 [Moral Turpitude–Misrepresentation]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. By advising Faulkenberg that he would secure the loan with the San Diego property, failing to record either the Deed or Second Deed, failing to notify Faulkenberg that he never filed either Deed, and by falsely advising Faulkenberg in or about May 2009 that the Second Note was still secured by the San Diego property when he knew it was not because he had never recorded the Deed or Second Deed, respondent committed acts involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

Count Three – § 6106 [Moral Turpitude–NSF Checks]

The court finds that there is clear and convincing evidence that respondent willfully committed an act of moral turpitude, in violation of section 6106, by issuing two checks to Faulkenberg when respondent knew or was grossly negligent in not knowing that there were insufficient funds in the account to cover the checks. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54 [issuing NSF checks on personal account constitutes act of moral turpitude].)

Count Four – § 6068, subd. (i) [Failure to Cooperate]

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding

pending against the attorney. The court finds that there is clear and convincing evidence that respondent willfully failed to cooperate in a State Bar investigation, in violation of section 6068, subdivision (i), by failing to provide a written response to the State Bar investigator's letters and by failing to otherwise cooperate and participate in the State Bar's investigation of the Faulkenberg matter.

Aggravation⁸

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent's misconduct evidences multiple acts of misconduct.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's misconduct caused Faulkenberg extensive financial and emotional harm.

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

Respondent's actions since his original misconduct evidences indifference toward rectification or atonement for his misconduct. Respondent stopped returning Faulkenberg's calls and Faulkenberg was forced to take respondent to court in an effort to recover the loan proceeds. Despite Faulkenberg's efforts and expenses, respondent has demonstrated no intention of paying down the \$87,771.06 judgment.

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Respondent was admitted to the practice of law in 1983 and has no prior record of discipline. Although the misconduct in this matter is considered serious, respondent is still entitled to significant mitigation credit for his long practice of law without discipline.

⁸ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Cooperation with the State Bar (Std. 1.2(e)(v).)

Respondent entered into an extensive stipulation of facts and admission of documents at trial in this matter and is entitled to some mitigation for his cooperation. However, since the court found that portions of respondent's testimony lacked credibility and he also failed to cooperate with the State Bar investigation, the amount of mitigation for respondent's trial cooperation is significantly reduced. (See *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 105.)

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, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) 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 shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.3, 2.6, and 2.8 apply in this matter. The most severe sanction is found at standard 2.3 which provides that culpability of an act of moral turpitude, fraud, or intentional dishonesty, or of concealment of a material fact, must result in actual suspension or disbarment depending upon the degree of harm to the victim, the magnitude of the misconduct, and the extent to which it relates to the member's practice of law.

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Ct. Rptr. 980, 994.) It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar recommended that respondent be suspended from the practice of law for a period of one year. Respondent, on the other hand, argued that this was a minor offense and he has been punished enough. Consequently, he requested no actual suspension and a court-ordered payment plan. The court strongly disagrees with respondent’s assertion that the present case is a minor violation, and turns to the case law for further guidance.

The court found *Rodgers v. State Bar* (1989) 48 Cal.3d 300, to be somewhat instructive. In *Rodgers*, the attorney was actually suspended for two years for an improper loan coupled with dishonesty and intentional concealment of the loan from the probate court and opposing counsel. In mitigation, the attorney had no prior record of discipline in ten years of practice prior to the misconduct. In aggravation, the attorney committed a series of unethical acts, significantly harmed the conservatee, and consistently attempted to conceal his wrongful acts.

While the present case is somewhat analogous to *Rodgers*, it does not entail the same level of deception and dishonesty. And with respondent’s lengthy discipline-free record, the present case involves more extensive mitigation than *Rodgers*. That being said, respondent’s serious misconduct and subsequent indifference toward rectification warrant a significant period of actual suspension.

Therefore, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of that period of suspension be stayed, and that he be placed on probation for three years, including a minimum period of actual suspension of one year and until respondent pays restitution to Faulkenberg.

Recommendations

It is recommended that respondent Mark Douglas Estes, State Bar Number 110518, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation⁹ for a period of three years subject to the following conditions:

1. Respondent Mark Douglas Estes is suspended from the practice of law for the first year of probation, and he will remain suspended until the following requirement is satisfied:
 - i. Respondent must make restitution to Frank Faulkenberg in the amount of \$87,771.06 plus 10 percent interest per year from August 8, 2013 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Frank Faulkenberg, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles; and
 - ii. If respondent remains suspended for two years or more as a result of not satisfying the preceding requirement, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)
2. Respondent must also comply with the following additional conditions of probation:
 - i. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
 - ii. Respondent must submit written quarterly reports to the State Bar's Office of Probation (Office of Probation) on each January 10, April 10, July 10,

⁹ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, the report must be submitted on the next following quarter date, and cover the extended period.

In addition to all the quarterly reports, a final report, containing the same information is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probationary period;

- iii. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein;
 - iv. Within 10 days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
 - v. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request; and
 - vi. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
3. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of respondent's 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.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

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.

Dated: October 15, 2013

RICHARD A. PLATEL
Judge of the State Bar Court