

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case No.: **12-O-14208 - RAH**
)
KIMBERLY RENAE BURKE,) **DECISION**
)
Member No. 248051,)
)
A Member of the State Bar.)

Introduction and Significant Procedural History¹

The Notice of Disciplinary Charges (NDC) in this single-client matter was filed on December 28, 2012. Ashod Mooradian represented the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent represented herself.

The trial commenced on July 22, 2013, and the matter was submitted for decision on July 23, 2013. This case involves respondent Kimberly Renae Burke’s failure to properly control her client trust account (CTA) and failure to supervise the employee who assisted her with that account. As a result of these acts, the employee was arrested and incarcerated for grand theft, and respondent finds herself before this court.

By all accounts, respondent did an excellent job in handling her client’s criminal matter, resulting in her client prevailing on the attempted murder charge. When she belatedly discovered the condition of her CTA and the unauthorized transactions made by her employee, she immediately closed the account, reconstructed the transactions in the account, and, when the

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.

accounting was completed and she could identify the improper payments, paid full restitution to the client.

Under the circumstances, the court disagrees with the State Bar that “[t]here are no extenuating circumstances or compelling mitigating circumstances to justify anything less than disbarment.”² As is set forth below, under the facts of this case, the court finds that an actual suspension of one year will be sufficient to satisfy this court’s primary goal of public protection.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on January 4, 2007 and has been a member of the State Bar of California at all times since that date.

Facts

On September 22, 2010, Daniel Morales Aguirre signed a fee agreement and hired respondent for \$10,000 to represent him in pretrial matters in a recently-filed criminal case. (*People v. Aguirre*, San Bernardino County Superior Court case no. FVA1001422.)

On January 6, 2011, Aguirre signed a second fee agreement and hired respondent for \$10,000 to represent him in the trial of the criminal case.

Initially, Aguirre was arrested and charged with attempted murder of his step-father. That charge was later dropped and replaced with an assault with a deadly weapon charge. After a victim’s advocate became involved, the attempted murder charge was reinstated and the case went to trial with that charge included.

Veronica Pulido

In July 2011, Veronica Pulido was first employed by respondent. She was responsible for various tasks around the office, and acted as a paralegal assistant. Among her tasks was filing matters with the court. Respondent had a very busy trial

² State Bar’s Closing Brief, page 10.

practice, often with trials being conducted back-to-back. Since filings sometimes were required to be made when respondent was in court or otherwise unavailable, Pulido had access to respondent's checks and her business account debit card to make such payments. Pulido was also responsible for all banking, bookkeeping, and billings to clients.

Shortly after Pulido began working for respondent, Pulido began going through a divorce. In October 2011, Pulido told respondent that she had been convicted of misdemeanor welfare fraud and was in violation of her probation. Pulido continued to work for respondent without any apparent incidents for a few months. Pulido told respondent that she was required to move out of her home because it had "black mold." She told respondent she was living in a hotel. Because of Pulido's personal and financial problems, respondent took pity on her. In December 2011, respondent invited Pulido to live with respondent in respondent's home in Rancho Cucamonga.

Payments under the payment plan for respondent's fees in the Aguirre matter were made by Aguirre through his girlfriend, Marissa. Payments were regularly made according to this plan, until Marissa got another boyfriend. Thereafter, in around October 2011, the payments from Marissa stopped.

The Worker's Compensation Award

Aguirre received an award from an unrelated worker's compensation case. On December 3, 2011, pursuant to Aguirre's instructions, respondent received the settlement check from this case in the amount of \$60,530 and deposited it into her Bank of America CTA.

Before Aguirre's funds were deposited, the Bank of America CTA had a balance of \$28.86. Thereafter, the account balance was reduced as follows:

December 6, 2011	\$41,863.86
December 31, 2011	\$16,743.86
January 3, 2012	\$11,743.86
January 31, 2012	\$49.60

February 29, 2012	\$43.86
March 31, 2012	\$43.86
April 30, 2012	\$5.33

During the pretrial and trial period, Aguirre repeatedly asked respondent to make payments from the funds he provided. For example, Aguirre would ask respondent to purchase Disneyland tickets, Mickey Mouse dolls or similar items for his daughter from the amount she held in her CTA. He would also ask her to purchase credits at the jail commissary for Aguirre's use to buy sundry items and food. Aguirre also arranged for respondent to go to a clothing store to buy him two suits to be worn at his trial.

Aguirre communicated with respondent primarily by letters. As one would expect for an incarcerated person, Aguirre's mood changed from letter to letter. For example, his February 2012 letters to respondent vary from tender discussions about his visit with his daughter, to sincere appreciation of respondent's efforts. In his February 20, 2012 letter, he wanted to fire respondent. Then, on February 28, 2012, Aguirre wrote respondent, including the following:

“Kim you know damn well I'm not about to let you go!!! I say things that I really don't mean. I'm vary (sic) sorry that I take things out on you all the time. Look when things go wrong, the first person I wanna talk with is you & when something good happens you're the first person I wanna go to and, to be real, I really like that.”

(Exhibit G.)

Aguirre's letters often contained contradictory instructions. On some occasions, he asked her to send the money to a relative. He became upset that she “disobeyed” his request. Then, he would ask her to purchase items on his behalf either for himself or his young daughter. As noted above, the positive and thankful letter of February 28, 2012 was sent right after Aguirre accused her of disobeying his request to send the funds to his relative. At trial, Aguirre attempted to reconcile these positions by saying that he meant for respondent to give all the money to his relative and then respondent should advance funds on his behalf for his commissary purchases and gifts for his daughter. Thereafter, respondent could seek reimbursement from Aguirre for

these personal expenses. Based on his letters and inconsistent trial testimony, this explanation is not credible. Rather, the court finds that, while his letters were sometimes inconsistent, the proper inference to draw from the totality of the correspondence and circumstances was that respondent was to keep the funds and use them for Aguirre's personal needs, at his direction, and for his legal fees and costs.

Despite this rather difficult client, respondent handled herself in an exemplary manner. Her letter of December 21, 2011 reflected her patient, compassionate handling of his very difficult case. In the end, her representation of Aguirre can only be seen as exceedingly successful, albeit tarnished by the financial mistakes set forth in more detail below.

Pulido's Criminal Conduct

Between December 2011 and February 2012, respondent failed to properly supervise Pulido. During this time, respondent failed to properly review her business bank account and the Bank of America CTA. Further, respondent did not review the bank statement that Pulido gave her. Later, she stopped receiving the statements from Pulido.

In February 2012, respondent received a telephone call from Sammi's Market in Upland, California. The man on the telephone informed her that Pulido had cashed a \$600 check on the Bank of America CTA that had been returned for non-sufficient funds. Upon seeing the check, respondent realized that it was a forgery. Respondent immediately notified the bank and reported the matter to the authorities. Around this same time, Pulido left respondent's home, leaving a note that she could not "do this anymore." Respondent tried to get in contact with Pulido, but was unable to do so. Pulido did not show up for work or return to respondent's house. Respondent sent a text to her to advise her to leave her key to the office and other personal property. Pulido finally responded that her mother was ill and was being admitted to the hospital, so she could not immediately get in touch with respondent. Later, respondent learned from Pulido's sister that their mother had not been ill and was not admitted to the hospital as Pulido had told her.

After contacting the bank, respondent learned that several cashed checks made out to or referencing Pulido and “Alvarado” (Pulido’s prior name), were fraudulent. In addition, she found about ten fraudulent debit charges. While searching Pulido’s work area at respondent’s office, respondent found a legal pad Pulido left behind which had two pages containing Pulido’s handwriting. One of the pages had respondent’s checking account number, her birth date, the last four numbers of her Social Security number, her driver’s license number, her mother’s maiden name, and her debit card number and expiration date. On the second page, there were several attempts to imitate respondent’s signature.

After respondent examined Pulido’s work area, she discovered that a “black binder” containing all of her bookkeeping materials, including client ledgers and receipts, had been removed from the office. Respondent believes that Pulido stole this binder to cover up her illegal activities. In addition, other items were stolen from respondent’s house, including furniture.

Immediately after the above discoveries, respondent was contacted by a woman named Rosa Tanori. Tanori had met with respondent months earlier, but Tanori did not retain respondent. Tanori explained that Pulido had told her that respondent later agreed to accept her as a client, which was not true. Pulido then collected \$150 in payments of \$50 from Tanori. Respondent never received these checks. Respondent immediately refunded Tanori’s \$150. Respondent later noticed documents with the name “Abraham Tanori.” Respondent called Rosa Tanori and learned that Abraham was her son, and that her son had also “retained” respondent to handle his divorce. Respondent was unaware of any such retention and did not receive any funds from Abraham.

In February 2012, respondent began the long process of examining all of her books, many of which were completely fraudulent. Aguirre requested that she provide an accounting, but she told him that she could not do the accounting and prepare for his trial at the same time. She promised that she would do the accounting after the trial.

In reviewing the remaining documents in the office, she began to see patterns in how the money was improperly disbursed. In some cases, there were direct fraudulent checks drawn on the accounts, using forged signatures. In other cases, since Pulido did not have signature authority on the trust account, there were trust account checks requested by Pulido to be payable to the business account and later signed by respondent and deposited into the business account. Pulido told respondent that these checks were to reimburse respondent from the client trust account for checks that had been supposedly written from the business account for clients' expenses. In fact, no such checks had been written on the business account, but this enabled Pulido to remove funds from the trust account, for which she had no signature authority. As a result, some checks were forgeries, not signed or authorized by respondent, and others were, in fact, signed by respondent but were obtained by Pulido by fraudulent means.

On March 14, 2012, Pulido was arrested. On March 22, 2012, Pulido pled to one count of felony grand theft and was sentenced 180 days in San Bernardino County Jail.

The Aguirre Trial

In March 2012, the criminal case was tried over several days and Aguirre was found not guilty on two counts and the jury was hung on the remaining two counts. Ultimately, the trial court declared a mistrial and a new trial was scheduled on the hung counts. Aguirre did not retain respondent to represent him in the new trial.

Respondent's Restitution

On July 6, 2012, respondent opened a new client trust account with Pacific Western Bank and deposited \$10,000 from her personal checking account into that account. On July 18, 2012, respondent deposited \$27,796.76 from her personal checking account into the Pacific Western CTA. Despite the disappearance of her binder containing all her client ledgers, respondent attempted to piece together the appropriate amount of restitution, based on what she knew were legitimate entries on Aguirre's account. According to this accounting, respondent owed Aguirre no more than \$37,796.76. On August 13, 2012, pursuant to Aguirre's instructions, respondent

issued a check to Aguirre's father for Aguirre in the amount of \$37,796.76, for which his father signed a receipt. However, when the father deposited the funds in his own account, they were immediately garnished to satisfy unpaid support payments owed by the father.

Respondent's Current Business Practices

Respondent has recognized how careless she was in managing her office. She knows that she not only trusted Pulido, but she abdicated her responsibilities, knowing that Pulido's background was questionable. Nevertheless, she acted out of compassion for Pulido's difficult station in life.

Since the incidents that form the basis for this matter occurred, respondent has changed the manner in which she practices law. She now locks up her client trust account records with a key. She is careful who has access to the account, even when she is actively supervising. She has also made sure that she does not keep personal data (mother's maiden name, Social Security number, etc.) in the office or in her home where friends or guests may find it.

The record does not reflect any legitimate criticism of her legal abilities. It appears to the court that she handled the Aguirre matter in an exemplary fashion. Further, Jeffrey Sklan testified as to her qualities as a lawyer. He had met her when she was a brand new lawyer - "green as cactus" - as he described her, and he has remained a mentor to her to the present day. He noted that in every matter with which he has worked with her, she has handled herself professionally and competently. He knows her well, since they speak weekly about her cases. She consulted him immediately about the forgeries, and asked his advice as to how to proceed.

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Conclusions

Count One - (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

By not maintaining \$37,796.76 in her trust account on Aguirre's behalf, respondent willfully violated rule 4-100(A).

Count Two - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

By misappropriating \$37,796.76 through her gross negligence in failing to supervise her employee, Pulido, respondent committed an act of moral turpitude, dishonesty or corruption, in violation of section 6106.

Counts Three and Five - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

Respondent maintained records of client ledgers and bank account journals. However, Pulido's criminal acts, including stealing the binder containing these documents, and her unauthorized falsification of these documents, prevented respondent from accessing the accurate records. She was required to recreate Aguirre's ledger from other sources, delaying her accounting to Aguirre. As such, the State Bar has not shown by clear and convincing evidence

that respondent willfully failed to comply with rule 4-100(B)(3), and therefore, Counts Three and Five are dismissed with prejudice.

Count Four - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

Respondent repeated failures to supervise Pulido allowed Pulido to deplete the Bank of America CTA in willful violation of rule 3-110(A).

Aggravation³

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

The misconduct involved multiple acts. This is an aggravating factor.

Mitigation

**Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)
Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)**

Respondent has prepared an accounting based on receipts and records she can locate. She has only identified expenses for which she has a verifiable receipt. From her own personal funds, she repaid the amounts that were improperly removed from her account. When she discovered Pulido's criminal activity, respondent notified the authorities and consulted with a mentor attorney. Further, she has shown sincere remorse in her failure to supervise Pulido and her failure to properly maintain her business records and safeguard her trust account records. She has also modified her business practices to prevent a reoccurrence. She is entitled to mitigation for her remorse and her recognition of her wrongdoing. Moreover, respondent was candid and cooperated during these proceedings by entering into a stipulation.

³ All references to standards (std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Good Character (Std. 1.2(e)(vi).)

Respondent presented limited evidence of her good character. However, the evidence she produced was positive and showed support for respondent's strong moral character. In addition, the actions she took in working on the case and taking it to a positive result, in the face of the pending criminal investigation of Pulido, reflects additional evidence of good moral character. As such, for this, respondent is entitled to some mitigation.

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 shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Discipline is progressive. However, the standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.7(c).)

Standards 2.2(a) and (b), 2.3 and 2.4(b) 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 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.) Although 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.)

Respondent has been found culpable, in one client matter, of violating rules 3-110(A), 4-100(A) and (B)(3) and section 6106 for the grossly negligent misappropriation of a client’s funds. She did not act deceitfully, out of self-interest or with the intent to defraud her client. Multiple acts of misconduct was the sole aggravating factor. Respondent presented compelling mitigating factors, including good character, remorse, remedial action in her business practices and in making restitution, candor and cooperation, all sufficient to support a deviation from the guideline of standard 2.2(a).

The court believes that the conduct in this case was aberrational and is unlikely to reoccur. Nonetheless, respondent is responsible for client funds entrusted to her. Had she consistently reviewed and reconciled her trust account records, she would have known about Pulido’s criminal activity and may have prevented some of the misappropriation of funds.

The State Bar recommends disbarment. Respondent seeks actual suspension. Having considered the parties’ contentions, the court believes that, under these circumstances, one year of actual suspension is sufficient to protect the public from further misconduct from respondent.

In *Lipson v. State Bar* (1991) 53 Cal.3d 1010, the Supreme Court recognized that misappropriation can be committed in different degrees of culpability deserving of different discipline. “Even where the most compelling mitigating circumstances do not clearly predominate, extenuating circumstances relating to the facts of the misappropriation may render

disbarment inappropriate.” (*Lipson, supra*, 53 Cal.3d at p. 1022; See also, *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708; *In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652.

The Supreme Court has differentiated between mere negligent misappropriations unaccompanied by acts of deceit or other aggravating factors and willful misappropriations where a client’s money is taken by the attorney through acts of deception or with an intent to deprive, noting, “[a]n attorney who deliberately takes a client’s funds, intending to keep them permanently, and answers the client’s inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception.” (*Edwards v. State Bar* 52 Cal.3d 28, 38.) Respondent certainly comes within the latter category calling for less severe discipline than disbarment.

Disbarment will not be recommended where there is no evidence that a sanction short of it is inadequate to deter future misconduct and protect the public. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 472.) In the instant case, respondent’s misconduct resulted “more from [her] lack of understanding or recognition of [her] conduct measured against an attorney’s duties rather than from innate venality.” (*In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 665.) She can be rehabilitated by a one-year suspension and strict probation conditions, and the court so recommends.

Recommendations

It is recommended that respondent Kimberly Renae Burke, State Bar Number 248051, 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 probation⁴ for a period of three years, subject to the following conditions:

1. Respondent Kimberly Renae Burke is suspended from the practice of law for the first one year of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's 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.
4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.
6. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.
7. Respondent must comply with the following reporting requirements:

⁴ 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.)

- a. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent must file with each required report a certificate from a certified public accountant or other financial professional approved by the Office of Probation certifying that:
 - i. Respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a “Trust Account” or “Clients’ Funds Account”; and
 - ii. Respondent has complied with the “Trust Account Record Keeping Standards” as adopted by the Board of Governors pursuant to rule 4-100(C) of the Rules of Professional Conduct.
- b. If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period. In this circumstance, respondent need not file the certificate described above.

The requirements of this condition are in addition to those set forth in rule 4-100 of the Rules of Professional Conduct.

8. Within three months after the effective date of the discipline herein, respondent must develop a law office management/organization plan which must be approved by the Office of Probation. This plan must include procedures for sending periodic reports to clients, documentation of telephone messages received and sent, file maintenance, meeting deadlines, withdrawing as attorney, whether of record or not, when clients cannot be contacted or located, and training and supervision of support personnel.
9. 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 of the State Bar’s Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

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 _____, 2013

RICHARD A. HONN
Judge of the State Bar Court