

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **13-O-10942-LMA**
)
RICHARD THOMAS FERKO,) **DECISION AND ORDER OF**
) **INVOLUNTARY INACTIVE**
Member No. 80029,) **ENROLLMENT**
)
A Member of the State Bar.)
_____)

Introduction¹

In this disciplinary matter, respondent Richard Thomas Ferko is charged with four counts of professional misconduct in a single client matter. The charged acts of misconduct include: misappropriation of client funds, failing to maintain client funds in trust, failing to account, and failing to promptly pay out client funds.

This court finds, by clear and convincing evidence, that respondent is culpable on all four counts. Based on the nature and extent of culpability, as well as the applicable aggravating and mitigating circumstances, in conjunction with meeting the goals of attorney discipline, the court recommends, among other things, that respondent be disbarred.

Significant Procedural History

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 Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on December 11, 2013.

Respondent filed a response to the NDC on January 31, 2014.

A one-day trial was held on April 8, 2014. That same day, the parties filed a Stipulation as to Facts and Admission of Documents. Senior Trial Counsel Anthony Garcia represented the State Bar. Respondent represented himself. This matter was submitted for decision on April 8, 2014.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 23, 1978, and has been a member of the State Bar of California at all times since that date.

The following findings of fact are based on the testimony and evidence presented at trial, and the parties' factual stipulation.

Facts

In 1999, respondent was hired on a contingency basis by the owners of 530 Jackson Street, Inc. (530 Jackson) in a construction defect matter involving their building located at 530 Jackson Street in San Francisco, California.

Between 2000 and 2003, respondent was also hired by owners of 530 Jackson to defend them in lawsuits filed by Heller Financial, Inc. (the Heller litigation). Respondent was paid for his hourly fees in defending the Heller litigation.

On or about October 10, 2003, respondent drafted a fee agreement for the construction defect matter involving 530 Jackson. On or about that same day, Paul McAleese (McAleese), on behalf of 530 Jackson, and respondent signed the fee agreement. Under the fee agreement, respondent and McAleese agreed that respondent would receive a contingent fee of 40% of any amount received if the matter went to trial or settled within 100 days of the first trial date. Also

under the fee agreement, respondent and McAleese agreed that McAleese would advance all costs incurred in the construction defect matter. The fee agreement specifically excluded any other claims respondent handled for McAleese and stated that these other matters would not be included in the contingency fee agreement for the construction defect matter.²

On June 24, 2004, respondent filed the lawsuit for the construction defect matter involving 530 Jackson in San Francisco Superior Court.

On May 24, 2007, the parties to the 530 Jackson construction defect matter informed the court that the matter had been settled. In June and July 2007, the parties signed a Settlement Agreement memorializing the terms of the settlement.

Pursuant to the terms of the settlement agreement, respondent received a total of \$1,374,666.67 of McAleese's settlement funds between March and September 2007, in the increments specified in the following 10 paragraphs:

1. On March 30, 2007, respondent received \$20,000 of McAleese's settlement funds from Berman, Berman, & Berman on behalf of the Insurance Corporation of New York and deposited these funds into his client trust account (CTA).
2. On April 19, 2007, respondent received \$35,000 of McAleese's settlement funds from Berman, Berman, & Berman on behalf of the Liberty Mutual and deposited these funds into his CTA.
3. On May 3, 2007, respondent received \$59,500 of McAleese's settlement funds from Golden Eagle Insurance and deposited these funds into his CTA.
4. On May 24, 2007, respondent received \$3,000 of McAleese's settlement funds from Arrowpoint Capital and deposited these funds into his CTA.

² Respondent testified that it was his understanding that he would take fees for the Heller litigation from the construction defect lawsuit. Respondent's testimony on this subject was not credible. Although he had worked on the Heller litigation prior to preparing the fee agreement in the construction defect matter, there was no reference in the retainer agreement to such an arrangement. Further, McAleese credibly testified that respondent was paid for the Heller litigation.

5. On June 7, 2007, respondent received \$3,000 of McAleese's settlement funds from Gemini insurance Company and deposited these funds into his CTA.
6. On July 12, 2007, respondent received \$64,513.75 of McAleese's settlement funds from Tudor Insurance Company and deposited these funds into his CTA.
7. On August 2, 2007, respondent received \$60,847.50 of McAleese's settlement funds from Zurich American Insurance Company and deposited these funds into his CTA.
8. On August 22, 2007, respondent received \$49,638.75 of McAleese's settlement funds from Admiral Insurance Company and deposited these funds into his CTA.
9. On August 24, 2007, respondent received \$79,166.67 of McAleese's settlement funds from Berman, Berman, & Berman on behalf of Bob Iron's and deposited these funds into his CTA.
10. On August 30, 2007, respondent received \$1,000,000 of McAleese's settlement funds from Berman, Berman, & Berman on behalf of Wellington Financial Ser. Inc. and deposited these funds into his CTA.

Of the \$1,374,666.67 that respondent received, respondent was entitled to retain \$549,866.67 of the settlement funds as his 40% legal fee.

Respondent made the following disbursements between May 2007 and June 2008 in the increments specified in the following 10 paragraphs:

1. On May 1, 2007, respondent disbursed \$3,096.74 of McAleese's settlement funds to Klenifelder Inc. on McAleese's behalf from his CTA.
2. On August 27, 2007, respondent disbursed \$6,209.97 of McAleese's settlement funds to Saarman Construction on McAleese's behalf from his CTA.
3. On August 27, 2007, respondent disbursed \$7,444.33 of McAleese's settlement funds to Bethco Builders on McAleese's behalf from his CTA.
4. On August 29, 2007, respondent disbursed \$7,055 of McAleese's settlement funds to Griffiths Castle & Lawlor on McAleese's behalf from his CTA.
5. On September 6, 2007, respondent disbursed \$10,681.29 of McAleese's settlement funds to Paulson Reporting on McAleese's behalf from his CTA.

6. On September 21, 2007, respondent disbursed \$500,000 of McAleese's settlement funds to McAleese from his CTA.³
7. On October 22, 2007, respondent disbursed \$29,330.84 of McAleese's settlement funds to Edward Takahashi from his CTA.
8. On March 14, 2008, respondent disbursed \$516 of McAleese's settlement funds to Stanley Patnoi from his CTA.
9. On June 4, 2008, respondent disbursed \$550 of McAleese's settlement funds to the Clerk of the Court from his CTA.
10. On June 23, 2008, respondent disbursed \$25,000 of McAleese's settlement funds to McAleese from his CTA.

These disbursements total \$589,884.17. The disbursements and respondent's fees totaled \$1,139,750.84. In August 2008, respondent should still have had \$234,915.83 (\$1,374,666.67 - \$1,139,750.84) in his CTA for the McAleese settlement funds. On August 28, 2008, the balance in respondent's Client Trust Account was -\$511.14.

On November 3, 2009, respondent received \$13,500 of McAleese's settlement funds from Scottsdale Insurance Company and deposited these funds into his CTA. Of the \$13,500, respondent was entitled to retain \$5,400 as his 40% contingent attorney fee.

On December 31, 2009, the balance in respondent's CTA was \$31,638.75. In December 2009, the balance should have been \$243,015.83 (\$234,915.83 + \$8,100).

On July 6, 2012, McAleese's attorney asked respondent for a full accounting on the construction defect matter. To date respondent has not provided any accounting to McAleese.⁴ To date respondent has not disbursed any additional funds to McAleese.

³ At trial, respondent testified that McAleese understood that he was only going to receive a total of \$500,000. Once again, respondent was not credible on this subject. The cover letter he sent with the \$500,000 check stated that the check was a "portion of the settlement." And the memo line on the \$500,000 check stated "partial paymt. 530 Jackson v. Webcon." Furthermore, respondent's subsequent actions are inconsistent with his testimony, as he disbursed another \$25,000 to McAleese in June 2008.

Respondent testified that he properly maintained the construction defect matter pleadings, accountings, and documents for five years before throwing them away. Respondent's testimony on this subject was not credible. The negotiated settlement in the construction defect matter was signed on July 27, 2007, and permitted 530 Jackson to pursue additional claims. Respondent continued to work on the construction defect matter for several years after 2007. And even if the court were to accept respondent's assertion that he could properly throw away all of his client records five years after the 2007 settlement was signed, McAleese's attorney requested an accounting on July 6, 2012, less than five years after the signing of the 2007 settlement agreement.

Conclusions

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

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 failing to maintain \$234,915.83 in his CTA on McAleese's behalf, respondent failed to maintain funds received for the benefit of a client in a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import, in willful violation of rule 4-100(A).

The court does not give any credence to respondent's argument that the present charges are time-barred pursuant to rule 5.21 of the Rules of Procedure of the State Bar. Respondent

⁴ Respondent testified that he provided an accounting, but later discarded it with the rest of McAleese's file. The court did not find respondent's testimony on this subject to be credible.

continued to represent 530 Jackson and McAleese until at least June 27, 2011.⁵ Consequently, the five-year statute of limitations was tolled. (Rules Proc. of State Bar, rule 5.21(C)(1).)⁶

Count Two – § 6106 [Moral Turpitude – Misappropriation]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. ““There is no doubt that the wilful misappropriation of a client’s funds involves moral turpitude. [Citations.]’ [Citations omitted.]” (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, the law is clear that where an attorney’s fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support such a charge. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

By misappropriating \$234,915.83 of McAleese’s funds, respondent committed an act involving moral turpitude, dishonesty, or corruption in willful violation of section 6106. As addressed above, the court did not find credible respondent’s testimony that he was simply collecting outstanding fees from the Heller litigation. The record is devoid of any credible indication that respondent communicated such an intent to McAleese or made any effort to procure McAleese’s authorization for the transfer of these funds. In addition, McAleese credibly testified that respondent was paid at an hourly rate for his representation in the Heller litigation.

Count Three – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

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

⁵ On June 27, 2011, respondent filed a Request for Dismissal on behalf of 530 Jackson.

⁶ The court also notes that Counts Three and Four constitute continuing offenses and are ongoing today.

accounts to the client regarding such property. The court finds that there is clear and convincing evidence that respondent failed to render an appropriate accounting of client funds to a client, in willful violation of rule 4-100(B)(3), by failing to respond to McAleese's July 6, 2012 request for an accounting.

Count Four – Rule 4-100(B)(4) [Failure to Pay Client Funds Promptly]

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive. The court finds that there is clear and convincing evidence that respondent failed to pay client funds promptly, in willful violation of rule 4-100(B)(4), by failing to pay McAleese a portion of his settlement funds after respondent received the funds.

Aggravation⁷

Prior Record of Discipline (Std. 1.5(a).)

Respondent has no prior record of discipline. Respondent currently has a matter pending before the Review Department of the State Bar Court, but this matter has not received a final adjudication. Consequently, the court gives no weight to respondent's pending disciplinary matter.

Harm to Client/Public/Administration of Justice (Std. 1.5(f).)

Respondent's misconduct resulted in significant financial harm to McAleese. Respondent failed to account for or disburse \$243,015.83 in settlement funds and forced McAleese to hire new counsel in an effort to identify and collect these funds. The significant harm respondent caused to McAleese warrants some consideration in aggravation.

Mitigation

No Prior Record (Std. 1.6(a))

Respondent has no prior record of discipline over 30 years of practice prior to the first act of misconduct in this matter. Respondent's lack of a prior record of discipline warrants significant consideration in mitigation; however, this mitigation is somewhat reduced due to the

⁷ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

serious nature of the present misconduct. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49.)

Cooperation with the State Bar (Std. 1.6(e).)

Respondent entered into an extensive Stipulation as to Facts and Admission of Documents. Respondent's cooperation preserved court time and resources and warrants some consideration in mitigation.

Discussion

The primary purposes of attorney 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; std. 1.1.)

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 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors. And 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. 1.7(a).)

Standards 2.1(a) and 2.7, among others, apply in this matter. The most severe sanction is found at standard 2.1(a) which recommends disbarment for intentional or dishonest misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or 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.) 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.)

The State Bar urges the court to disbar respondent from the legal profession. Respondent, on the other hand, argued that the charges should be dismissed. While the court gives significant consideration to respondent’s mitigation evidence, the magnitude of the present misconduct and the significant harm he caused are particularly troubling.

The Supreme Court has repeatedly held that disbarment is the usual discipline for the willful misappropriation of client funds. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; and *Howard v. State Bar* (1990) 51 Cal.3d 215, 221.) “In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client’s money is not only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit.” (*Howard v. State Bar, supra*, 51 Cal.3d 215, 221.)

Here, the court found *In the Matter of Spaith* (1996) 3 Cal. State Bar Ct. Rptr. 511, to be instructive. In *Spaith*, the attorney was found culpable of misappropriating approximately \$40,000 from a client and misleading the client regarding the status of the money for over a year. In mitigation, the attorney demonstrated good character; provided community service and other

pro bono activities; and cooperated with the State Bar by admitting his wrongdoing and stipulating to the facts and culpability. In addition, the attorney had no prior record of discipline in over 15 years of practicing law.⁸ In aggravation, the attorney's misconduct involved multiple acts of wrongdoing. The Review Department ultimately found that the mitigating circumstances were not sufficiently compelling to justify a lesser sanction than disbarment when weighed against the attorney's misconduct and aggravating circumstances. (*Id.* at p. 522.)

The present case is more egregious than *Spaith*. Here, respondent misappropriated nearly a quarter of a million dollars. Despite the large sum of money involved, respondent failed to employ the requisite extraordinary care and fidelity required while dealing with client funds. Respondent's claim that he destroyed all of his records in this matter is highly suspect considering the amount of money involved and the duration of the case. Respondent has not only failed to account for the missing funds, but has attempted to shift this responsibility onto his client. Moreover, respondent has not taken any steps toward making his client whole.

Accordingly, despite the significant factors in mitigation, the court finds that the interests of public protection mandate a recommendation of disbarment.

Recommendations

It is recommended that respondent Richard Thomas Ferko, State Bar Number 80029, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

Restitution

The court also recommends that respondent be ordered to make restitution to Paul McAleese in the amount of \$243,015.83, plus 10% interest per annum from August 1, 2008.

⁸ Although the attorney paid restitution, this did not warrant mitigative credit due to the fact that none of the restitution was paid until after the attorney's client threatened to report him to the State Bar.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

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.

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.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: June _____, 2014

LUCY ARMENDARIZ
Judge of the State Bar Court