

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case Nos.: **11-O-14714-RAH**
) (11-O-15257; 11-O-15974)
MARIE DARLENE ALLEN,)
) **DECISION**
Member No. 138263,)
)
A Member of the State Bar.)

Introduction¹

In this disciplinary matter, respondent Marie Darlene Allen is charged with three counts of professional misconduct. Based on the evidence before the court, respondent is found culpable, by clear and convincing evidence, of two of the three counts.

For the reasons set forth below, the court recommends that respondent be suspended for one year, stayed, with one year probation on conditions, including 30 days' actual suspension.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a First Amended Notice of Disciplinary Charges (NDC) on February 7, 2012.² On March 23, 2012, respondent filed a response to the NDC.

The State Bar was represented by Rosalba L. Gutierrez. Respondent was represented by Scott J. Drexel.

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.

² The original notice of disciplinary charges was filed on January 17, 2012.

On May 11, 2012, the State Bar filed its pretrial statement. On May 14, 2012, respondent filed her pretrial statement.

On May 21, 2012, the parties entered into a partial stipulation of facts; and trial began that same day. On May 26, 2012, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 12, 1988, and has been a member of the State Bar of California at all times since that date.

Case Nos. 11-O-14714; 11-O-15257; and 11-O-15974

Facts

Respondent operated an unlawful detainer practice in which her clients paid a flat fee for her legal services. As was the case with most of her clients, respondent accepted the payment of this flat fee through the use of a credit card. The receipt of these flat fee payments was processed by the credit card company and deposited into respondent's general office account because the bank was prohibited from linking the credit card payments directly to respondent's client trust account (CTA) at JPMorgan Chase Bank, N.A. (bank). The processing of these payments normally took approximately two days before the funds were available.

Once respondent's clients paid the flat fee, they expected respondent to file the unlawful detainer action as soon as possible, usually by the following day.³ Respondent would issue checks from her CTA to the court for the unlawful detainer filing fee and to the process server for the service of the summons and complaint in the unlawful detainer action. Respondent would transfer the funds to cover these checks from her general office account to her CTA.

Prior to May 2011, respondent relied on the "float" period between the time the deposits to her general office account cleared and the time it took for the CTA checks to clear. Because

³ Unlawful detainer cases are expedited proceedings in the Superior Court.

of this delay in clearing the CTA checks, she was able to avoid drawing upon non-sufficient funds (NSF).

Commencing in late May 2011, however, checks issued for payment to the court and to the process server began to be presented for payment electronically. As a result, these checks were processed before the transfer of funds from respondent's general office account to cover the checks could be credited to respondent's CTA. Since funds in the CTA were not available at the time the checks received by the court and process server were presented to the bank, the bank issued NSF notices.

Between May 2011 and August 2011, respondent issued check numbers 2019, 2046, 2068, 2070, 2076, 2082, 2090, 2093, 2094, 2101, 2102, and 2111, from her CTA. At the time the above-referenced checks were presented, there were insufficient funds credited to respondent's CTA to cover the checks. Respondent, however, was unaware of this problem because when she did monthly cursory reviews of her electronic statements, she did not see any negative ending balances listed in her CTA. The online statements did not reflect the NSF checks.

Respondent's office received letters from the bank dated June 1, 2011 and June 21, 2011, notifying her that check nos. 2019 and 2046, respectively, were not honored due to insufficient funds. Respondent received these letters, but does not recall reading them.

In July 2011, after she became aware of the process server's NSF checks, respondent hired a bookkeeper to work on her CTA. After July 2011, respondent's office received additional letters from the bank dated July 8, 2011; July 21, 2011; July 27, 2011; and August 3, 2011; regarding the other above-mentioned NSF checks. These letters went directly to the bookkeeper. It then took the bookkeeper a couple weeks to get through the letters, load the data into the computerized accounting system, and discover the full extent of the issue.

On or about July 29, 2011 and August 15, 2011, a State Bar investigator sent a letter to respondent. These letters stated that CTA check nos. 2019 and 2046 – for \$150 and \$500, respectively – had been presented for payment against insufficient funds and returned unpaid or paid against non-sufficient funds. The investigator’s letters requested that respondent provide the State Bar with: (1) respondent’s written response; (2) “[a]ll client trust account ledger cards which relate[d] to the above-referenced check [sic], maintained pursuant to rule 4-100(C), Rules of Professional Conduct;” and (3) “[her] written trust account journal and each monthly reconciliation from and including 3/1/11 to and including 7/30/11, maintained pursuant to rule 4-100(C), Rules of Professional Conduct.” The investigator’s letters requested that respondent produce the requested documents by August 12, 2011 and August 29, 2011, respectively. Respondent received these letters.

Respondent provided a written response to the State Bar on August 29, 2011, concerning CTA check nos. 2019 and 2046. Her response stated, in part, that she had been “so inundated with business... that [she] did not have time to reconcile [her] bank accounts... [and had] hired a bookkeeper to come in every Thursday afternoon to reconcile [her] accounts to prevent such future problems.” Respondent provided two client account ledgers, but did not produce the trust account journal or monthly reconciliations.⁴

On September 9, 2011 and October 4, 2011, the State Bar investigator sent letters to respondent requesting, in part, that respondent: (1) identify the name, address, and telephone number of respondent’s bookkeeper; and (2) produce copies of any accountings prepared by the bookkeeper. The letters requested respondent’s written response by September 23, 2011 and

⁴ Respondent credibly testified that she maintained records of clients’ funds on her computer, but they were not printed out and sent to the State Bar.

October 11, 2011, respectively. Respondent received the letters, but did not provide a written response to the State Bar by the stated deadlines.

On September 9, 2011 and October 4, 2011, the investigator also sent letters to respondent stating that CTA check nos. 2070, 2068, 2082, 2093, 2076, 2090, 2094, 2101, 2102, and 2111 had been presented for payment against insufficient funds and had been returned unpaid or paid against non-sufficient funds. The letters requested – by September 23, 2011 and October 11, 2011, respectively – that respondent provide the State Bar with: (1) respondent’s written response; (2) “[a]ll client trust account ledger cards which relate[d] to the above-referenced check [sic], maintained pursuant to rule 4-100(C), Rules of Professional Conduct;” and (3) “[her] written trust account journal and each monthly reconciliation from and including 7/1/11 to and including the present date.” Respondent received these letters, but did not timely respond to the letters or otherwise communicate with the investigator.

During this period of time, respondent’s husband, with whom she reconciled her relationship after being separated for a period of time, was seriously ill with prostate cancer, diabetes, and a heart condition. In April 2011, he moved back in with respondent and she took care of him. In late November 2011, he was eventually required to be hospitalized while visiting relatives out of state. He died on December 8, 2011.

Respondent provided additional documents to the State Bar on December 15, 2011 and December 21, 2011. Respondent has fully paid all of the NSF checks and has modified the manner in which she pays these expenses to avoid any future NSF check problems.

Conclusions

Count One (§ 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.

It is well settled that the “conduct of issuing numerous checks with insufficient funds ‘manifests an abiding disregard of the fundamental rule of ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice.’” (*Bambic v. State Bar* (1985) 40 Cal.3d 314, 324, citing *Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 577.) Moreover, “[i]n every instance of which we are aware, where an attorney was found to have written multiple bad checks, the Court has found such continued conduct to be an act of moral turpitude. [Citations.]” (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 53-54.)

Respondent was unaware that she had issued checks with insufficient funds because when she did monthly cursory reviews of her electronic statements, she did not see any negative ending balances listed in her CTA. However, simply checking the ending balances online was insufficient. Respondent had a duty to maintain and review the client account ledgers, which would have detailed all money received and paid out on behalf of each client and shown each client’s balance following every receipt or payment. Respondent did not take any steps to make sure that the money transferred from her general account to her CTA had cleared prior to issuing checks from her CTA. As a result, any checks written on those un-cleared funds would be returned NSF or would be drawn on funds from other clients.

Accordingly, respondent willfully violated section 6106, by engaging in acts of moral turpitude by repeatedly issuing checks drawn upon her CTA when she knew or was grossly negligent in not knowing that there were insufficient funds in the account to pay them, and by failing to ensure that there were sufficient funds in the account to pay the checks.

Count Two (§ 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.

By not providing a timely written response to the State Bar investigator's September 9, 2011 and October 4, 2011 letters, respondent failed to cooperate and participate in a disciplinary investigation pending against him, in willful violation section 6068, subdivision (i).

Count Three (Rule 4-100(B)(3) [Maintain Records of Client Property]

The State Bar alleged that respondent violated rule 4-100(B)(3) by failing to maintain records of all client funds, securities, and other properties coming into her possession. While respondent did not provide the State Bar with all the trust account journals and monthly reconciliations requested by the State Bar investigator, it has not been shown, by clear and convincing evidence, that respondent failed to maintain, and to preserve for five years from final appropriate disposition, complete records of all client funds coming into her possession. To the contrary, the court found credible respondent's testimony that records were maintained on her computer, but not printed and turned over upon the State Bar investigator's request.

Respondent's conduct does not demonstrate, by clear and convincing evidence, that respondent failed to maintain client records. Consequently, Count Three is dismissed with prejudice.⁵

⁵ The court declines to consider respondent's failure to provide the State Bar with all requested trust account journals and monthly reconciliations as uncharged misconduct because the evidence of this violation fails to comply with the requirements for such evidence set forth by relevant case law. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.)

Mitigation⁶

The record establishes four factors in mitigation by clear and convincing evidence. (Std. 1.2(e).)

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

Respondent does not have a prior record of discipline. (Std. 1.2(e)(i).) The court takes judicial notice of the State Bar's official membership records, which establish that respondent has no prior record of discipline.⁷ Accordingly, respondent is entitled to mitigation for more than 22 years of misconduct-free practice from her admission in 1988 through 2011, when she first engaged in the misconduct found in this proceeding.⁸

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

Respondent has presented evidence of her good character by the testimony of several character witnesses. (Std. 1.2(e)(vi). Respondent has assisted several individuals and charitable organizations in the past 24 years. She has provided pro bono legal services to vulnerable clients and Citizens Against Card Club. She has also acted as a volunteer, vice president, and president of Pops, a local orchestra group.

⁶ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁷ Because of the importance that the Supreme Court places on the issue of whether or not an attorney has a prior record of discipline (e.g., *In re Mostman* (1989) 47 Cal.3d 725, 741), the State Bar Court has long judicially noticed the State Bar's official records to determine the presence or the lack of a prior record of discipline.

⁸ The weight of this mitigation could have been discounted by the fact that the record shows that respondent had a long practice of writing checks on funds that had not yet cleared her CTA. (See *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.) While not charged separately as misconduct, respondent's practice of relying on the "float" between deposits to her credit card account and the time it took for CTA checks to clear was a violation of her duties. However, there was not clear and convincing evidence of the instances of such misconduct to support either a reduction of the weight given in mitigation for lack of a prior record or uncharged misconduct in aggravation.

Several character witnesses commented favorably on respondent's good character. According to all the character witnesses, respondent was honest, always acted with integrity and composure, and cared about her clients. Respondent had revealed to these witnesses the full extent of the charges pending against her. Moreover, included in the witnesses testifying on her behalf were attorneys. Without question, good character testimonials from attorneys are given great weight because such individuals "possess a [keen] sense of responsibility for the integrity of the legal profession." (*In re Menna* (1995) 11 Cal.4th 975, 988, quoting *Warbasse v. The State Bar* (1933) 219 Cal. 566, 571.) Accordingly, the testimony of respondent's character witnesses is entitled to considerable weight in mitigation.

Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)

Respondent has expressed remorse and recognition of her wrongdoing. As soon as she was notified by her process server that her checks were not honored, respondent paid the balance owed and the NSF fees. To date, respondent has fully paid the balance owed on the NSF checks and has modified the manner in which she pays these expenses to avoid any future NSF check problems. She now holds off on writing checks until the transfer of funds has been cleared. Consequently, respondent's remorse and recognition of her wrongdoing warrants consideration in mitigation.

Other Mitigation

Respondent had serious family problems at the time she engaged in the misconduct. After a period of separation, respondent and her husband reconciled their relationship during her husband's illness with diabetes, heart issues, and prostate cancer, which metastasized to his ribs and back. In April 2011, he moved back in with respondent and she acted as his caretaker. This commitment often interfered with her ability to carry on business affairs at her office, but she continued to take on new cases and did not miss any court hearings. In late November 2011,

while visiting relatives out of state, respondent's husband experienced heart failure and was hospitalized. Respondent stayed with him at the hospital. He died on December 8, 2011.

Aggravation

The record does not establish any factors in aggravation by clear and convincing evidence. (Std. 1.2(b).)

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 2.3 and 2.6 apply in this matter. Standard 2.3 provides that culpability of an act of moral turpitude 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. Standard 2.6 states that culpability of a member of a violation of section 6068 "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3."

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.)

Respondent has been found culpable of violating sections 6106 and 6068, subdivision (i). In mitigation, the court considered respondent's good character, remorse and recognition of wrongdoing, and family problems, as well as her over 22 years of discipline-free practice.

The State Bar recommends that respondent be actually suspended for 90 days. In support of its recommended discipline, the State Bar cited, among other cases, *In the Matter of McKiernan*, *supra*, 3 Cal. State Bar Ct. Rptr. 420.

In *McKiernan*, the attorney allowed his long-time friend to use his law firm's client trust account for business purposes. During this same time period, the attorney failed to maintain and supervise his client trust account and commingled his own funds within the account.

Additionally, the attorney issued two client trust account checks when he knew there were insufficient funds to cover them. The Review Department found that the attorney's repeated misuse and neglect of his client trust account constituted a violation of rule 4-100(A).

Additionally, the Review Department found that by issuing checks without a reasonable expectation that they would be honored upon presentation, the attorney's actions, at best, were the result of his gross negligence and therefore involved moral turpitude in violation of section 6106. In mitigation, the attorney had no prior record of discipline in over 21 years of practice, prior to the start of his misconduct.⁹ In aggravation, the attorney demonstrated indifference toward rectification and atonement for his misconduct. The Review Department ultimately

⁹ The weight of this mitigation was discounted by the fact that the attorney's inattention to the maintenance and supervision of his client trust account began before the charged misconduct.

concluded that there was no compelling reason to depart from the three-month minimum suspension called for by standard 2.2(b). As a result, it was recommended that the attorney be suspended for two years, stayed, and that he be placed on probation for two years, including a 90-day period of actual suspension.

The present case, however, does not involve a violation of rule 4-100(A). Therefore, standard 2.2(b) does not apply. In addition, the present case involves more mitigation and less aggravation than *McKiernan*. While there does not appear to be any case law directly on point, the court finds that a lower level of discipline than *McKiernan* is appropriate.

Having considered the parties' contentions, as well as the facts, relevant law, and standards, the court recommends that respondent be actually suspended for 30 days, with other requirements and conditions, set forth below.

Recommendations

Accordingly, it is recommended that respondent **Marie Darlene Allen**, State Bar Number 138263, be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that she be placed on probation for a period of one year¹⁰ subject to the following conditions:

1. Respondent is suspended from the practice of law for the first 30 days of probation;
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, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether she has complied with the State Bar Act,

¹⁰ The probation period will commence on the effective date of the Supreme Court's order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

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 her personally or in writing, relating to whether she 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 her 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;
- 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); and
- vii. Within one year after the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of completion of the State Bar's Client Trust Accounting School. The program is offered periodically at either 180 Howard Street, San Francisco, California 94105-1639 or at 1149 South Hill Street, Los Angeles, California 90015. Arrangements to attend the program must be made in advance by calling (213) 765-1287 and paying the required fee. This requirement is separate and apart from any MCLE requirements; and respondent will not receive MCLE credit for attending the State Bar's Client Trust Accounting School (Rule 3201, Rules of Procedure of the State Bar).

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 one year 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 within one year after the effective date of the discipline herein and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

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: August _____, 2012

RICHARD A. HONN
Judge of the State Bar Court