The Supreme Court of South Carolina

In the Matter of Thomas M. Tupper, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 16, 1988, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 15, 2011, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Thomas M. Tupper shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 11, 2012

The Supreme Court of South Carolina

In the Matter of Shannon Marchell, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 22, 2006, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 12, 2011, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Shannon Marchell shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 11, 2012

The Supreme Court of South Carolina

In the Matter of Sara Schechter-Schoeman,

Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 14, 1980, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 6, 2011, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

The records in the Office of the Clerk show that she has returned her Certificate of Admission.

Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Sara Schechter-Schoeman shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 11, 2012

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 17, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Graham Law Firm, P.A., Appellant,

v.

Mohamed Makawi,
Individually and d/b/a
International House of
Pancakes, and MKKM, Inc., Respondents.

Appeal From Florence County
W. H. Seals, Jr., Circuit Court Judge

Opinion No. 27086
Heard October 19, 2011 – Filed January 17, 2012

REVERSED AND REMANDED

Edward L. Graham and Mary H. Watters, both of Graham Law Firm, of Florence, for Appellant.

Walker H. Willcox and E. Lloyd Willcox, II, both of Willcox, Buyck & Williams, of Florence, for Respondents.

JUSTICE PLEICONES: Appellant, Graham Law Firm (Graham), appeals the trial court's order granting respondents' motion to set aside default judgment on the grounds that the court lacked jurisdiction based upon inadequate service of process. Because we find that appellant was not given sufficient opportunity for discovery and cross-examination of witnesses on the matter of authorization to accept service of process, we reverse and remand for further proceedings consistent with this opinion.

FACTS

In 2007 Graham filed suit against Respondents MKKM, Inc., and Mohamed Makawi, individually and doing business as International House of Pancakes, seeking payment for professional services. Graham served both complaints on Makawi, who is MKKM's president and registered agent for service of process, by certified mail, return receipt requested, restricted delivery, at the IHOP location in Florence, South Carolina. The documents sent to Makawi individually were signed for by Kim Richardson, while those mailed to him as agent for MKKM were signed for by Ana Carvajal. The circuit court found that Edward Graham of Graham Law Firm received a phone call from Makawi in which Makawi acknowledged receipt of the summons and complaint and asked for copies of the itemized bill.

Neither Makawi nor MKKM filed an answer to the complaint, and Graham's motions for entry of default and default judgment were granted. Graham served a copy of the order granting default judgment by certified mail on Makawi and Makawi as registered agent of MKKM, and the return receipt was signed by [illegible] Makawi. In March 2009, counsel for respondents contacted Graham to request information about the judgment.

Thereafter, respondents filed a Rule 60(b), SCRCP, motion for relief from judgment alleging improper service based, among other arguments, upon the certified mail having been signed for by unauthorized persons. At the hearing on the 60(b) motion, the only evidence offered in support of the motion was an affidavit from Makawi in which he stated that he was the only person authorized to receive service of process for MKKM, IHOP, or himself

individually; that Richardson was a bookkeeper for MKKM with no administrative duties; that he had never heard of Carvajal and that she had never worked for him or for MKKM; and that he had not been made aware of the lawsuit until more than a year after the default judgment was entered. Graham presented evidence of its efforts to serve the summons and complaint and notice of default on Makawi as well as evidence that Carvajal had worked as a hostess at IHOP.

The trial court denied respondents' motion to set aside the default judgment, finding that Makawi had telephoned Graham acknowledging receipt of the summons and complaint in March 2007 and had received proper notice of the entry of default in May 2007; that Carvajal had worked at IHOP; and that Makawi's affidavit was "unconvincing under these circumstances." Respondents filed a Rule 59(e), SCRCP, motion to alter or amend the judgment and submitted a second affidavit from Makawi. Graham's brief in response included requests for discovery and cross-examination.

After reconsideration, the trial court issued an order granting respondents' motion. The court's order accepted the assertions of the second affidavit that Carvajal was not authorized to receive service of process on behalf of MKKM and that Richardson was unauthorized to receive it on behalf of Makawi individually. Graham then filed a Rule 59(e) motion to alter or amend the judgment, including a request for a ruling on the discovery request made in its brief in opposition to respondents' 59(e) motion, which the trial court denied.

Graham timely appealed the orders granting respondents' Rule 60(b) motion and denying Graham's Rule 59(e) motions. This matter was certified from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUES

1. Did the trial court err in holding that the service of process on respondents was not effective?

2. Did the trial court err when it accepted the contents of Makawi's second affidavit despite having found Makawi's first affidavit unreliable?
3. Did the trial court err when it failed to grant Graham's request for discovery and cross-examination?

DISCUSSION

I. Service of Process

The trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard. Clark v. Key, 304 S.C. 497, 500, 405 S.E.2d 599, 601 (1991).

Rule 4(d)(8), SCRCP, sets forth the requirements for effective service of process by certified mail in relevant part:

> **Service by Certified Mail.** Service of a summons and complaint upon [an individual or corporate] defendant . . . may be made . . . by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.

As we have noted, "[w]hen the civil rules on service are followed, there is a presumption of proper service." Roche v. Young Brothers, Inc., 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1994). Once the plaintiff has demonstrated compliance with the rules, the defendant can rebut an inference that service was effected only by showing "that the return receipt was signed by an unauthorized person." Rule 4(d)(8), SCRCP.

The class of persons authorized to sign on behalf of defendants is narrow: "Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996). Service on an employee is effective when the employee has apparent authority to receive it on behalf of the employer. *See* Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009) (holding that hotel receptionist had authority to receive service of process where she was only employee present in office, which represented to third parties that she was in charge).

An agent's high level of actual or apparent responsibility suffices to permit service to be effective as against the principal. *See* Richardson, *supra*; Roberson v. Southern Finance of South Carolina, Inc., 365 S.C. 6, 615 S.E.2d 112 (2005) (holding that service on clerical employee of registered agent was improper); Burris Chemical, Inc. v. Daniel Construction Co., 251 S.C. 483, 163 S.E.2d 618 (1968) (finding that an acting general superintendent in charge of fifteen men was an agent upon whom service could be made). This Court has also held service on a corporate officer effective as against the corporation. Roche, *supra*.

The trial court ruled that Graham's attempt to serve the summons and complaint on respondents by certified mail was not effective because, although Graham followed the proper steps for service by certified mail, the respondents met their burden of demonstrating that the return receipts were signed by unauthorized persons and thus no effective service was made.

Graham contends that the trial court erred when it ruled that proper service on respondents was not effected, in part because it used the wrong legal standard, requiring specific authorization for receipt of service of process.

In this case, the return receipt for the summons and complaint served on Makawi individually was signed for by Richardson, an employee of MKKM who is described by Makawi as a bookkeeper with no administrative responsibility and by Graham as an office manager with substantial authority.

Makawi asserts that he has never authorized Richardson to receive service of process for him individually. The return receipt for the summons and complaint served on Makawi as registered agent for MKKM was signed for by Carvajal, a hostess at the IHOP restaurant. Respondents describe Carvajal's position as an entry-level one entailing no managerial duties. The trial court, recognizing both actual and apparent authority as bases for finding effective service, found that Richardson and Carvajal were not authorized to receive service of process on behalf of respondents based upon Makawi's assertions to that effect in the second affidavit and the absence of evidence offered by Graham to establish that Richardson or Carvajal possessed apparent authority.[1]

Respondents argue that, as a matter of law, Richardson could not have been authorized to sign the return receipt on behalf of Makawi individually because South Carolina law permits service of process on an agent for a corporation but not for an individual, citing Langley v. Graham, 322 S.C. 428, 472 S.E.2d 259 (Ct. App. 1996). Langley held that service of process by means of certified mail was ineffective when the return receipt was signed by the defendant's sister. The Court of Appeals noted that

> Although the [Supreme] Court in Roche states Rule 4(d)(8) "does not require the specific addressee sign the return receipt," we think the Court intended to limit the force of the statement to service upon corporations. Service on a corporation may only be accomplished by service upon an authorized person; thus, a corporate defendant accepts service of process when a person authorized to accept service does so for the corporation. On the other hand, an individual ordinarily accepts service under the rule when he signs the return receipt. If the rule permitted acceptance by anyone who happens to pick up the mail, the requirement that delivery of the suit papers by certified mail be restricted to the addressee would have no meaning.

[1] As explained below, we find that the trial court wrongly denied Graham's request that he be allowed to look for such evidence and cross-examine witnesses on this issue.

322 S.C. at 431 n.2, 472 S.E.2d at 261 n.2.

We now clarify Roche, which the Court of Appeals read too narrowly in Langley. A rule permitting certain persons to receive service of process on behalf of others does not imply that "anyone who happens to pick up the mail" can stand in for the defendant. As with corporations, the class of persons who may receive service of process on behalf of an individual is limited. Nevertheless, an individual is as competent as any other entity to confer authority on an agent. Rule 4(d)(1), SCRCP, itself contemplates service on the agent of an individual, permitting service "[u]pon an individual . . . by delivering a copy to an agent authorized by appointment . . . to receive service of process." [2]

Thus, although Richardson could have been authorized to receive service of process on behalf of Makawi, the trial court's finding that Richardson and Carvajal were unauthorized persons within the meaning of Rule 4(d)(8) is sufficiently supported by the evidence in the record—or, specifically, the lack of evidence in the record to rebut Makawi's affidavit. The trial court found that Graham had not offered "any evidence of declarations or conduct on the part of the [respondents] that could potentially give rise to apparent authority in Richardson or Carvajal." Thus, we cannot say that the trial court abused its discretion when it made this determination.

II. Reliability of Affidavit

Graham contends that the trial court improperly relied on respondents' assertions in Makawi's second affidavit that Richardson and Carvajal were unauthorized to receive service of process because the trial court found in its first order that Makawi's first affidavit was "unconvincing." Because this finding has not been appealed or amended, Graham argues it is therefore the law of the case.

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[2] In Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996), the court, after citing the language of Rule 4(d)(1) and 4(d)(3) permitting service on an authorized agent, found that no proper service took place because the plaintiffs failed to show that a receptionist was authorized to receive service of process for an attorney either individually or on behalf of the law firm.

This argument lacks merit. Rule 59(e) allows a court to reconsider its earlier ruling. Moreover, the substantive assertions that the judge found to be unconvincing in the first affidavit were either not repeated in the second affidavit or were portions on which the trial court did not rely when it granted respondents' Rule 59(e) motion. The result advanced by Graham would deny the fact finder's right to accept all, some, or none of the testimony of a particular witness. *See*, e.g., Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 418, 114 S.E.2d 565, 569 (1960) ("The well-established rule in this state is that if there is any testimony whatever to go to the jury on an issue involved in a cause, or even if more than one inference can be drawn from the testimony then it is the duty of the judge to submit the cause to the jury. This is true, even if witnesses for the plaintiff contradict each other, or if a witness himself in his testimony makes conflicting statements.") (internal quotation marks and citation omitted). Graham would have us hold that, having found one affidavit unreliable, the trial court was precluded from accepting any statement from Makawi as reliable throughout the remainder of the proceedings. Thus, the trial court did not err in finding some statements in Makawi's second affidavit credible despite having found that the first affidavit was not.

III. Discovery and Cross-Examination

Graham further contends that the trial court erred when it failed to grant Graham's request for discovery and cross-examination in connection with respondents' Rule 59(e) motion. Graham contends that, in light of the determinative nature of the court's findings regarding jurisdiction, the court erred when it denied Graham an opportunity to fully explore the factual issues involved through further discovery and cross-examination of witnesses. We agree.

"Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses." Brown v. South Carolina State Board of Education, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing Goldberg v. Kelly, 397 U.S. 254 (1970)); *see* South Carolina Department of Social Services v. Holder, 319 S.C. 72, 459 S.E.2d 846 (1995) (right to confrontation applies in civil context).

The Court of Appeals explained the application of due process concerns to issues of personal jurisdiction:

> When the plaintiff can show that discovery is necessary in order to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless plaintiff's claim appears to be clearly frivolous. However, where a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the court need not permit even limited discovery confined to issues of personal jurisdiction if it will be a fishing expedition. When a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery.

Sullivan v. Hawker Beechcraft Corporation, 2011 WL 4444085 (Ct. App. Sept. 21, 2011) at *3 (internal quotation marks and citations omitted).[3]

In this case, Graham's claim of personal jurisdiction over Makawi and his corporation through service on their agents is not conclusory, frivolous, or attenuated. Kim Richardson, who signed the receipt for the summons and complaint sent to Makawi individually, may have had authority to accept them if she did serve as an office manager with significant authority as an

[3] Sullivan dealt with minimum contacts analysis for out-of-state defendants, but the same reasoning applies to the question of whether a plaintiff is entitled to discovery in order to obtain evidence tending to show that the court has jurisdiction over an in-state defendant. The Sullivan court further noted that "a plaintiff is not required to assert he will be 'meritorious' on personal jurisdiction; rather, he must demonstrate enough facts to support a prima facie showing [of jurisdiction]." The plaintiff may allege the necessary facts in the complaint or present them by way of affidavit. *See* Sullivan at *2, citing Coggeshall v. Reproductive Endocrine Associates of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

employee of IHOP or by virtue of the services Graham alleges Richardson performed for Makawi personally.[4]

With regard to MKKM, Graham has claimed no greater status for Carvajal as an MKKM employee than that she was a hostess at IHOP for a few months. Even if it seems unlikely that further discovery will demonstrate that she had sufficient authority or responsibility to be deemed an agent for purposes of service of process on MKKM, Graham's claim that MKKM was properly served is not conclusory, frivolous, or attenuated, given that she was an employee of MKKM and signed the return receipt.

Not only has Graham made a sufficient showing to entitle it to discovery on the issue of jurisdiction, but it must receive a full and fair opportunity to be heard on the matter, because the findings with regard to service of process may determine the merits of the case in chief. *See* Wetzel v. Woodside Development Limited Partnership, 364 S.C. 589, 615 S.E.2d 437 (2005) (finding that an order granting a motion to set aside an entry of default for improper service effectively dismisses an improperly served party from the action); Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005) (holding that a trial court's findings related to personal jurisdiction could later be preclusive). Because a finding that a party was not properly served for purposes of a motion to set aside an entry of default judgment is binding with regard to the remainder of the litigation, such a ruling may "in effect determine[] the action" or "strike[] out . . . [a] pleading in [an] action." S.C. Code Ann. § 14-3-330(a), (c).

In this case, if the court finds that no proper service was effected, Graham will be unable to dispute a statute of limitations defense.[5] Thus, due process requires that Graham receive an opportunity to conduct adequate discovery on this question and confront adverse witnesses.

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[4] We express no opinion on the question of whether employees of IHOP can be considered employees of Makawi for purposes of this dispute.

[5] Graham has conceded that if service was improper, no action was commenced within the applicable limitations period.

Respondents argue that Graham had an opportunity for discovery beginning with the respondents' motion for relief from the entry of default judgment that was filed on May 21, 2009, and failed to avail itself of it, not formally requesting an opportunity for discovery until its September 8 motion following the judge's order granting relief from the entry of default judgment on August 31. Graham denies that it had reason to request discovery until the August 31 order because the only evidence presented by respondents to support the associated motion was the second affidavit, which it views as only a "broadened and embellished" revision of the first affidavit that the trial court had found unreliable.

Respondents cite Richardson v. P.V., Inc., *supra*, in support of their contention. In Richardson, at the hearing on the appellants' motion to set aside an entry of default, they argued only defective service, asking that the court schedule a later hearing to consider setting aside the default on grounds of mistake, inadvertence, surprise or excusable neglect if the court found that service was not defective. 383 S.C. at 616-17, 682 S.E. 2d at 266. The appellants also indicated at the hearing that they did not believe they needed to present evidence on the good cause issue, and they did not seek a continuance to permit completion of discovery. Id. at 618, S.E. 2d at 267.

Unlike the Richardson appellants, Graham did not bear the burden of production on this issue at this stage.[6] Further, the record in this case is replete with instances of the respondents' delay and receipt of additional time,[7] and it would be inequitable to hold Graham to a strict standard on this

[6] After Graham established that it had performed all requirements of Rule 4(d)(8), the burden shifted to respondents to show that the receipts were signed by unauthorized persons. Roberson, 365 S.C. at 10, 615 S.E. 2d at 115.

[7] Respondents' first motion for relief from default judgment was unsupported; the first affidavit was served in an untimely manner; and respondents failed to enter the motion for relief from default judgment until more than two years after they knew of the lawsuit (the trial court found that Makawi called Graham acknowledging receipt of the summons and complaint in March 2007).

issue when the respondents have had both ample time and the opportunity to withdraw and amend their own scant evidentiary submissions to conform to the evidence presented by Graham. Also unlike the Richardson appellants, Graham fully explained to the trial court its need to conduct discovery and cross-examine witnesses. Moreover, no hearing was held in connection with the respondents' Rule 59(e) motion at which Graham could have cross-examined Makawi or other witnesses. On this record, it cannot be said that Graham had a full and fair opportunity to be heard on an issue that may be determinative of its legal rights.

In light of this decision, we need not reach Graham's remaining arguments.

CONCLUSION

We reverse the order of the trial court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ivan James Toney, Respondent.

Opinion No. 27087
Heard December 1, 2011 – Filed January 17, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for Respondent.

PER CURIAM: In this attorney discipline matter, Respondent Ivan James Toney was accused of misconduct in twenty-three separate complaints. Following a hearing, a panel of the Commission on Lawyer Conduct (the Panel) recommended Respondent receive a definite three-month suspension, along with certain other requirements. Given the pattern of Respondent's misconduct and the multitude of complaints at issue, we impose a definite suspension from the practice of law for a period of nine months from the date of this opinion. Further, we adopt all other sanctions recommended by the Panel.

I.

These disciplinary proceedings are based upon twenty-three complaints received by the Office of Disciplinary Counsel (ODC). ODC filed formal charges against Respondent, alleging Respondent

committed misconduct violating Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.5, 3.2, 8.1, and 8.4(a). Respondent ultimately stipulated to the facts alleged in the formal charges and admitted that his conduct constituted grounds for discipline. The factual stipulations regarding the twenty-three complaints are summarized below.

A.
Failure to enter a proper fee agreement

In Matters I and XXIII, Respondent accepted fees for the purpose of representing clients in a personal injury matter and a domestic matter, respectively, without entering a proper fee agreement.

B.
Failure to diligently handle client matters

In Matter I, Respondent was retained to represent a client in a personal injury matter. Respondent failed to settle the case or file appropriate pleadings before the expiration of the statute of limitations.

In Matter XX, Respondent was hired to recover forfeited monies on behalf of a client. Respondent failed to take any action to protect his client's interests in the forfeiture proceedings, and an order of default was signed. Eighteen months after the entry of default, Respondent filed a motion to set aside the default judgment; however, he failed to ensure the motion was properly served upon the opposing party.

C.
Failure to timely return client files

In Matters II and XVII, Respondent failed to timely return client files and other original documents.

D.
Failure to file a corrected affidavit and follow the court's instructions

In Matter III, Respondent was retained by a client to file an action for custody. Based on information from his client, Respondent drafted an affidavit, which the client signed, and filed a motion for emergency relief. The client thereafter informed Respondent that some of the information contained in the affidavit needed to be corrected; however, Respondent failed to file a corrected affidavit with the court.

Additionally, after receiving the motion for emergency relief, the judge instructed Respondent to have his client contact the Department of Social Services (DSS) regarding her concerns for the child's safety. Respondent failed to adhere to the judge's instructions. Instead of advising his client to contact DSS directly, as the judge instructed, Respondent faxed a copy of the cover sheet and motion to DSS himself.

E.
Failure to appear for a hearing

In Matter XV, Respondent was retained to represent a client in a child support action. A hearing in the matter was scheduled in Spartanburg County. At the same day and time, Respondent was scheduled to appear in General Sessions court in Greenville County with another client. Respondent failed to advise the court of his Greenville County appearance and, instead, instructed his client to inform the DSS caseworker that he would be running late. Respondent did not arrive until after the hearing was concluded.

F.
Failure to adequately communicate

In Matter I, a client sought a status report regarding her case, and Respondent misled the client into believing he had filed pleadings on her behalf. Further, Respondent acknowledged he failed to maintain

adequate communication with his clients in Matters I, II, VI, and XVII. Additionally, in Matters XVI, XXI, and XXIII, the attorney/client relationship was terminated by the client due to problems communicating with Respondent.

G.
Failure to timely refund unearned fees

Certificates of non-compliance were issued against Respondent based on his failure to comply with orders of the South Carolina Bar Resolution of Fee Disputes Board (the Board), which required him to refund fees totaling more than $16,900 to former clients in Matters VIII, XI, XII, XVI, XVIII, XIX, and XXII. Respondent has since paid the full amount of the award in each of those matters.

In Matter VI, Respondent was paid a $2,500 retainer fee to represent a client regarding pending criminal charges. Subsequently, Respondent was relieved as counsel and voluntarily refunded $1,000 to the client. The client thereafter filed a claim with the Board, and Respondent was ordered to refund the remaining $1,500 to the client. Approximately twelve months later, the Board issued a certificate of non-compliance against Respondent based on his failure to comply with the Board's order. Respondent paid the full amount of the award prior to his hearing before the Panel.

In Matter VII, Respondent was paid a $1,500 retainer fee to represent a client in a domestic matter. Subsequently, the client submitted a claim with the Board and was awarded a refund of the entire fee. Additionally, in Matters XXI and XXIII, Respondent failed to refund unearned fees to former clients, even though no refund claims were filed with the Board. It is unclear whether Respondent has refunded the unearned fees in these three matters.

H.
Failure to respond

Respondent failed to timely respond to initial inquiries by ODC in Matters IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV. In each matter, Respondent was sent an additional letter pursuant to In re Treacy,[1] reminding him to submit a written response. Respondent eventually responded in each of the matters, although in some instances, a response was not received for up to nine months.

II.

At the August 2010 hearing, the Panel considered two aggravating factors: Respondent's disciplinary history involving similar misconduct and the large number of complaints involving multiple violations of the same rules. In mitigation, the Panel considered Respondent's testimony regarding "personal or emotional problems" and his expression of remorse.

The Panel recommended Respondent receive a definite three-month suspension. In addition, the Panel recommended Respondent be ordered to pay costs and, as a condition of reinstatement, complete the Legal Ethics and Practice Program Ethics School and Trust Account School. The Panel also recommended that, upon reinstatement, Respondent be appointed a mentor approved by the Commission on Lawyer Conduct who shall monitor Respondent for a period of one year and issue quarterly progress reports.[2]

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[1] 277 S.C. 514, 290 S.E.2d 240 (1982) (declaring that failure to respond to disciplinary inquiries is misconduct and grounds for sanction).

[2] Specifically, the Panel recommended the mentor's quarterly reports to the Commission on Lawyer Conduct include, but not be limited to, the following issues: (1) communication with clients; (2) organizational skills; (3) stress management; (4) concentration and focus, along with personal or outside distractions; (5) recognition of professional limitations; and (6) management of clients' and others' expectations.

III.

"The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court." In re Boney, 390 S.C. 407, 414, 702 S.E.2d 241, 244 (2010). "The Court has the sole authority to decide the appropriate sanction after a thorough review of the record." Id. (internal quotations omitted). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." Id. This Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission." Rule 27(e)(2), RLDE, Rule 413, SCACR.

IV.

Respondent admits his misconduct constitutes grounds for discipline under the Rules of Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate the Rules of Professional Conduct), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or conduct demonstrating an unfitness to practice law), and Rule 7(a)(10) (lawyer shall not willfully fail to comply with a final decision of the Board).

In addition, Respondent admits he violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client), Rule 1.2 (lawyer shall pursue client's objectives), Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client), Rule 1.4 (lawyer shall consult with client about objectives of representation, keep client reasonably informed about status of a matter, and promptly comply with reasonable requests for information), Rule 1.5 (lawyer shall communicate to client the scope of representation and the basis for fee), Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation), Rule 8.1(b) (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority), and Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct).

Both Respondent and ODC object to the Panel's recommendation that Respondent receive a definite three-month suspension from the practice of law. ODC requests that the Court impose a definite suspension of greater than three months and adopt all of the Panel's other recommendations. Respondent requests that the Court consider a sanction ranging from a private admonition to a public reprimand.[3]

We concur in the Panel's findings that Respondent's prior disciplinary history[4] and pattern of misconduct are aggravating factors. Further, we are troubled by Respondent's habitual recalcitrance to respond to inquiries by ODC. We also consider Respondent's testimony in mitigation, although we do not believe the mitigation justifies a three-month suspension. We view the mitigation testimony alongside Respondent's persistent pattern of failures to communicate adequately with his clients, to exercise appropriate diligence in pursuing their objectives, to timely refund unearned fees, and to cooperate with ODC.

Accordingly, in light of the multitude of complaints (twenty-three) involving repeated violations of the same rules, we find a nine-month definite suspension is an appropriate sanction for Respondent's misconduct. See, e.g., In re Braghirol, 383 S.C. 379, 680 S.E.2d 284 (2009) (imposing a nine-month suspension where lawyer failed to communicate adequately with a client, failed to return client documents, failed to appear for scheduled court hearings, failed to refund fees to a client as ordered by the Board, and failed to respond to inquiries by ODC); In re Sturkey, 376 S.C. 286, 657 S.E.2d 465 (2008) (imposing a nine-month suspension where, in eight matters, lawyer

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[3] Respondent does not object to any of the Panel's other recommendations.

[4] Respondent's disciplinary history includes an April 2004 confidential admonition citing Rules 3.3(d) and 8.4(a), upon which we may rely in imposing a sanction. "[A]n admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of sanction to be imposed." Rule 7(b)(4), RLDE, Rule 413, SCACR. Additionally, in July 2002, Respondent entered into a Deferred Disciplinary Agreement, citing the following Rules of Professional Conduct: 1.2, 1.3, 1.4, 5.1, 5.3, and 7.3. See In re Thornton, 342 S.C. 440, 538 S.E.2d 4 (2000) (considering prior Deferred Disciplinary Agreement involving similar misconduct in concluding that Respondent's disciplinary history demonstrated a pattern of misconduct).

failed to communicate with his clients, failed to pursue their objectives, and failed to respond to inquiries by ODC); In re Conway, 374 S.C. 75, 647 S.E.2d 235 (2007) (imposing a nine-month suspension where lawyer failed to pay court reporter, failed to safeguard client files, failed to file suit on client's behalf and failed to respond to charges); In re Cabaniss, 369 S.C. 216, 632 S.E.2d 280 (2006) (imposing a twelve-month suspension where, in nine separate matters, lawyer failed to communicate adequately with his clients, failed to diligently and promptly pursue their objectives, and failed to respond to inquiries by ODC); In re Moise, 355 S.C. 352, 585 S.E.2d 287 (2003) (imposing a nine-month suspension where lawyer failed to communicate adequately with his clients and failed to diligently pursue their objectives in nine matters, failed to timely refund unearned fees in four matters, and failed to respond to inquiries by ODC in seven matters); In re Newell, 349 S.C. 40, 562 S.E.2d 308 (2002) (imposing a nine-month suspension where lawyer failed to communicate adequately with five clients, failed to timely file and handle four client matters, failed to refund unearned fees, and failed to respond to inquiries by ODC); cf. In re Sims, 380 S.C. 61, 668 S.E.2d 408 (2008) (imposing a ninety-day suspension where lawyer failed to communicate adequately with a client, failed to timely file and handle a client matter, failed to refund unearned fees to a client and failed to respond to inquires by ODC in two matters).

V.

We hereby suspend Respondent from the practice of law for a period of nine months. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30, RLDE, Rule 413, SCACR.

We further impose as a condition of reinstatement completion of the Legal Ethics and Practice Program Ethics School and Trust Account School.[5] Upon reinstatement to the practice of law, Respondent shall complete twelve months of mentoring in accordance with the Panel's recommendations. We hereby authorize the Panel to

[5] As an additional condition of reinstatement, Respondent shall refund the unearned fees in Matters VII, XXI, and XXIII to the extent he has not already done so.

extend the mentoring requirement at the conclusion of the twelve-month period if it deems it necessary. We order Respondent to pay the costs of these disciplinary proceedings to the Commission on Lawyer Conduct within sixty days of the date of this opinion.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Richard M.
Lovelace, Jr., Petitioner.

ORDER

Respondent was suspended on October 10, 2011, for a period of ninety (90) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Hearn, J., not participating

Columbia, South Carolina

January 10, 2012

The Supreme Court of South Carolina

In the Matter of Jeffery Glenn Smith, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Ladson F. Howell, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Howell shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Howell may make disbursements from respondent's trust account(s), escrow

account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Ladson F. Howell, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Ladson F. Howell, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent’s mail and the authority to direct that respondent’s mail be delivered to Mr. Howell's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

January 13, 2012

The Supreme Court of South Carolina

In the Matter of Douglas
Francis Gay, Respondent.

ORDER

Respondent was arrested and charged with twelve (12) counts of failing to pay withholding taxes to the South Carolina Department of Revenue in violation of S.C. Code Ann. § 12-54-44(B)(2) (2000). The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, and seeks the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that W. Chaplin Spencer, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Spencer shall take

action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Spencer may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that W. Chaplin Spencer, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that W. Chaplin Spencer, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Spencer's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina

January 13, 2012