

Filed May 21, 2009

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	05-O-05201
JON MICHAEL SMITH)	
A Member of the State Bar.)	OPINION ON REVIEW
_____)	

After a two-day contested disciplinary hearing, involving five counts of misconduct in one client matter, the hearing judge found Jon Michael Smith culpable of a single trust account violation and recommended that he receive a one-year stayed suspension and a two-year period of probation with no period of actual suspension. The State Bar sought review, contending that Smith should be found culpable of two additional counts of misconduct, including misappropriation, and that the recommended discipline should be increased to include an actual suspension of one year. Smith did not submit a brief on review and therefore was precluded from appearing at oral argument.¹ On our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's finding of culpability but also find Smith culpable of misappropriation, failing to promptly return client funds and failing to cooperate with a State Bar investigation. In light of the additional culpability, as well as aggravating factors, we recommend a 90-day actual suspension as a condition of a one-year stayed suspension and a two-year period of probation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Smith was admitted to practice law in 1993 and has no prior record of discipline. He was the sole attorney in a high-volume personal injury litigation practice in Fresno for eleven years,

¹(Rules Proc. of State Bar, rule 303(a).)

and the firm grew to eight employees at its peak, including Smith's wife at the time, Mary Ann Smith. In 1999 and again in 2003, Smith suffered significant back injuries. In the first incident, Smith's spine was injured during a chiropractic treatment, which prompted him to undergo experimental surgery. Smith's back pain did not subside, and was aggravated by an automobile accident in 2003, which resulted in additional surgeries. Between the two injuries, Smith initiated divorce proceedings. Mary Ann resigned as Smith's employee shortly after their divorce was finalized in about October 2003.

Guillermina Salas, Smith's legal assistant from 1996 until 2004, observed that the culmination of Smith's injuries and divorce left him in a depressed state. Smith stopped coming to work regularly, and at the end of December 2004, he shut down his office, moved to southern California, and filed for bankruptcy. Smith cited numerous reasons for closing his office, including the realization that he “couldn't run a business” and his inability to manage bookkeeping responsibilities. He also complained about his lack of desire, pain from his injuries, loss of energy due to Graves' disease (which was diagnosed around that time), emotional isolation and the need to be closer to his parents.

When he closed his office, Smith opened a post office box in Cerritos in December 2004 (Box 311), but did not update his State Bar membership records address until May 2005.² From January until August 2005, Smith worked as a contract deposition attorney. Due to his pain and personal problems, he stopped working in August 2005 and rarely left his apartment complex until the fall of 2006. In November 2006, he began his current part-time position in which he assists in settling cases in an office that caters exclusively to Vietnamese-speaking clients. At the time of trial, Smith had no client trust account (CTA) duties.

²As an explanation for not updating his address, Smith wrote, “at that time I was told by the Bar investigator that she was closing the LAST file dealing with the closure of my office, and I felt free to drop from the face of the earth for 18 months or so, which I did with a passionate abandon for all things civil.”

The disciplinary charges stem from Smith's handling of settlement funds on behalf of Kara Hughes, who hired him in 2002 to represent her after she was injured in an automobile accident. Smith filed a complaint on Hughes' behalf in superior court and initiated a claim against the defendant's insurance company, State Farm Insurance (State Farm). When the case settled in March 2004, State Farm sent Smith a check for \$10,000, which he deposited in his CTA. Shortly thereafter, Hughes went to Smith's office, and he provided her with a settlement breakdown statement as follows: \$5405.38 to Hughes; \$3,000 for attorney fees and \$907.55 for costs to Smith; and the remaining \$687.07 to reimburse Blue Cross Life and Health Insurance Company of California (Blue Cross) for medical costs it paid on behalf of Hughes in 2003. Smith gave Hughes a check for her portion of the funds, which she promptly cashed.

On several occasions prior to the settlement, Blue Cross had notified Smith of its medical lien and request for reimbursement from any settlement. Blue Cross originally claimed it was entitled to more than \$1,500, but Smith's office ultimately negotiated a reduction in the amount. On July 20, 2004, Smith wrote a CTA check (number 4115) for \$654.39³ to Blue Cross. Although Smith's standard office procedure was to have Salas mail the settlement check, there is no evidence that check number 4115 was mailed or that Blue Cross received it. It is clear that check number 4115 was not debited from the CTA.

Smith failed to realize that check number 4115 never cleared the bank because he did not have an adequate method of reconciling his CTA. Prior to 2004, Smith delegated management of both the CTA and the general account to Mary Ann. Although she was not a signatory on the accounts, Smith authorized Mary Ann to sign his name on checks. Despite Mary Ann's repeated attempts to teach Smith her method, he found it too confusing and did not learn it.

Shortly before Mary Ann left the firm in about October of 2003, Smith closed the CTA account she had managed and opened a new account that he alone managed. He used a simple

³This figure is the reduced amount that respondent had agreed to pay Blue Cross.

system for reconciling the CTA by comparing check withdrawals listed on monthly bank statements to check stubs in his checkbook. The information listed on each stub included the check number, the client's name, the date and the party to which the check was written. When the check number would appear on his monthly bank statement, Smith would place a checkmark on the corresponding check stub. This was the full extent of his efforts to reconcile his CTA. He did not review the stubs to ensure that all checks had cleared. He did not reconcile the monthly balance in his CTA with his bank statement or keep a separate ledger detailing the funds in the CTA. Around the time Smith wrote check number 4115, he had become frustrated even with his rudimentary reconciliation system and stopped using it.

When Smith closed his office in December of 2004, he did not properly conclude his operations. He did not close his CTA or reconcile the remaining balance in the account at the time. He also failed to notify the bank of his change of address, and after Smith moved to southern California, he no longer received CTA bank statements.⁴ On February 15, 2005, the CTA balance dropped to \$312.71, where it remained until at least 2007. This amount was \$374.36 less than the \$687.07 of Hughes's remaining settlement funds owed to Blue Cross that should have been kept in the CTA. Smith did instruct Salas to send a letter notifying existing clients of his office closure, but Salas did not send Hughes a letter because her case had settled.

In late 2005, Hughes received notice that Blue Cross had not been reimbursed for her medical expenses. She attempted to contact Smith, but found his office closed and his telephone disconnected. Hughes filed a complaint with the State Bar, and an investigator sent letters to Box 311 in December 2005 and January 2006. Because Smith rarely left his apartment complex from August 2005 until the Fall of 2006 due to his pain, he delegated the responsibility of

⁴The January to June 2005 bank statements were mailed to Smith's former residence in Coarsegold, California. Starting in July 2005, the bank no longer mailed the statements and indicated that they were "not deliverable."

picking up his mail to his cousin, who Smith knew was unreliable and prone to misplacing the mail. Smith did not receive the State Bar letters.

State Bar Deputy Trial Counsel Jean Cha contacted Smith by phone on February 21, 2007, informed him of the investigation and recommended he pay \$654.39 to Hughes.⁵ Smith sent Hughes a personal check for this amount within a week, and thereafter, he continued to communicate with Cha.

In August 2007, the State Bar served the formal notice of disciplinary charges (NDC) on Smith. The NDC alleges that Smith violated the following provisions of the Rules of Professional Conduct⁶ and the Business and Professions Code:⁷ (1) rule 4-100(A) for failure to maintain appropriate funds in his CTA; (2) section 6106 for dishonestly or with gross negligence misappropriating \$374.36 from the CTA; (3) rule 4-100(B) for failing to promptly pay funds to a client; (4) section 6068, subdivision (m) for failure to respond to client inquiries; and (5) section 6068, subdivision (i) for failure to cooperate with a disciplinary investigation.

The parties stipulated to many facts bearing on culpability, but not on mitigating or aggravating factors. The hearing judge found culpability as to count one only. He found no aggravation and several factors in mitigation, including: lengthy practice with no prior discipline, good faith, candor and cooperation towards victims of misconduct, remorse and recognition of wrongdoing, emotional and physical disabilities at the time of misconduct, and community service. The recommended discipline included a one-year stayed suspension and a two-year period of probation, but no actual suspension.

⁵Since there is no evidence that Smith was entitled to the difference between the remaining settlement funds (\$687.07) and the amount due to Blue Cross (\$654.39),

we find that Smith must reimburse the difference (\$32.68) to Hughes.

⁶Unless noted otherwise, all references to rules are to the State Bar Rules of Professional Conduct.

⁷Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

A. Count One (Rule 4-100(A))

We agree with the hearing judge's finding that Smith failed to maintain client funds in his trust account in willful violation of rule 4-100(A) because the balance fell below the \$687.07 required to be held in trust for Hughes. An attorney entrusted with client funds "assume[s] a personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) This duty requires an attorney to maintain client funds in the CTA until outstanding balances are settled. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal State Bar Ct. Rptr. 113, 123.) Although it may not be deliberate, a trust account violation caused by "serious and inexcusable lapses in office procedure" is "willful" for disciplinary purposes. (*Palomo v. State Bar, supra*, 36 Cal.3d at pp. 795-796.) There is clear and convincing evidence that Smith willfully violated rule 4-100(A) by not maintaining the balance of Hughes' settlement funds in his CTA.

B. Count Two (Section 6106)

It is well-established that even if an attorney's conduct is unintentional, carelessness leading to trust account violations may involve moral turpitude. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 475 ["Gross carelessness and negligence constitute violations of the oath of an attorney to faithfully discharge his duties to the best of his knowledge and ability, and involve moral turpitude as they breach the fiduciary relationship owed to clients."].) We find that Smith's gross negligence in handling his CTA, and the resulting misappropriation, constitute a willful violation of section 6106. (See *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410 [where attorney's fiduciary trust account duties are involved, finding of gross negligence will support violation of section 6106]; (*Palomo v. State Bar, supra*, 36 Cal.3d 785, 796, fn. 8 [office procedure was "so lax" as to be grossly negligent when over four months passed before attorney discovered check he endorsed had been misappropriated].)

Smith failed to properly manage his CTA. He delegated his non-delegable trust account duties to his former wife for nearly 10 years. Then, when forced to take responsibility for his CTA after his former wife's departure, Smith failed to implement or follow the most basic procedures to safeguard his CTA. From October 2003 until he closed his office in December 2004, Smith did not even attempt to reconcile the monthly balance in his CTA. His excuse that the process was "frustrating" is unacceptable. His carelessness and gross negligence resulted in the misappropriation of \$374.36 of Hughes' settlement funds and constitutes conduct amounting to moral turpitude.

C. Count Three (Rule 4-100(B)(4))

We also find Smith culpable of violating rule 4-100(B)(4). This rule requires an attorney to promptly pay funds to which the client is entitled, and extends to third parties to whom the attorney has agreed to distribute the client funds. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10.) Smith had notice of Blue Cross's medical lien and requests for payment. Smith testified that he negotiated a reduction in the amount owed and agreed to pay Blue Cross on behalf of Hughes. Further, as is evident from the settlement breakdown statement, Hughes anticipated that Smith would use the remaining funds to reimburse Blue Cross. Smith failed to satisfy his obligation to reimburse Blue Cross on behalf of Hughes as promised, in willful violation of rule 4-100(B)(4).

D. Count Four (Section 6068, Subd. (m))

The hearing judge found Smith was not culpable of violating section 6068, subdivision (m), based on failure to promptly respond to reasonable status inquiries from his client. Although there is evidence that Hughes wrote letters to Smith, the State Bar failed to provide clear and convincing evidence that the letters were properly mailed. Accordingly, we adopt the hearing judge's finding and dismiss count four with prejudice.

E. Count Five (Section 6068, Subd. (i))

The final count alleges that Smith failed to cooperate with the State Bar during its investigation in violation of section 6068, subdivision (i). The hearing judge found that Smith was not culpable because Smith did not receive the letters the State Bar sent in December 2005 and January 2006, and then he fully cooperated once he was located in February 2007. We do not agree.

After Smith closed his practice in December 2004, he decided to “drop from the face of the earth.” Smith failed to update his State Bar membership record address until five months later. Even after updating his State Bar records, for over a year he depended on his cousin, whom he knew to be unreliable, to check his mailbox. Smith’s own gross carelessness in fulfilling his ethical duties prevented the State Bar from contacting him for over a year. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 488 [attorney’s failure to maintain current address made consequences of misconduct more severe since client was unable to make contact]; *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 527 [requirement of valid current address ensures both State Bar and clients can locate attorney].) Smith’s carelessness showed indifference to his obligations to his former clients and to the State Bar, frustrated the investigation of this matter, and thus, constitutes a willful violation of section 6068, subdivision (i). To hold otherwise would only condone an attorney’s ostrich-like behavior, which we are unwilling to do.

II. DISCIPLINE

The primary purposes of disciplinary proceedings are the protection of the public, the courts and the legal profession, the maintenance of high professional standards for attorneys, and the preservation of public confidence in the legal profession. (Rules Proc. of State Bar, tit. IV,

Stds. for Atty. Sanctions for Prof Misconduct, std. 1.3.)⁸ There is no fixed formula for determining the proper level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Ultimately, the appropriate degree of recommended discipline rests on a balanced consideration of all relevant factors, including issues of aggravation and mitigation.

A. Mitigation

We find several factors in mitigation. Smith has practiced law since 1993 and has no prior record of discipline. (Std. 1.2(e)(i); *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591 [12 years' prior practice without discipline considered in mitigation].) Once in contact with the State Bar, he displayed candor and cooperation during this proceeding, including entering into a stipulation prior to trial. (Std. 1.2(e)(v).) However, based on the limited nature and extent of the evidence provided, Smith's community service work is entitled to little weight in mitigation. (*In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 287.)

Smith is also entitled to some weight in mitigation for physical disabilities and emotional difficulties. Smith testified about chronic pain and distress stemming from his accidents and Graves disease, and the hearing judge observed Smith's "evident pain and discomfort" during the evidentiary hearing. Coinciding with these physical limitations and his divorce, Smith lost enthusiasm for his practice and stopped coming to work. He closed his office due to these physical and emotional obstacles, which undoubtedly contributed to his poor management of his practice.

The State Bar contends these circumstances are not established by clear and convincing evidence because Smith failed to present expert testimony establishing that the emotional

⁸Unless noted otherwise, all references to standards are to the Standards for Attorney Sanctions for Professional Misconduct.

difficulties and physical disabilities were “directly responsible for [his] misconduct.” (Std. 1.2(e)(iv).) Recognizing that “the standards are guidelines, not inflexible mandates,” we have previously considered “lay testimony of emotional problems as mitigation.” (*In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 341; see also *In re Brown* (1995) 12 Cal.4th 205, 222 [some mitigation for effects of attorney’s illness despite lack of expert testimony].). Although Smith’s physical and emotional difficulties warrant some weight in mitigation, we decline to assign the more significant weight that would have been appropriate had Smith’s testimony or that of an expert established the nexus between his “personal stress factors” and his trust account violations, or had he shown that these factors are permanently under control. (*Kelly v. State Bar* (1991) 53 Ca1.3d 509, 520 fn. 7 [no mitigation for emotional difficulties from divorce where no expert testimony, attorney’s testimony was vague and he did not seek therapy].)

We do not find that Smith acted pursuant to a good faith belief that he had paid Blue Cross because this assumption was unreasonable in light of his inadequate accounting procedures. (See std. 1.2(e)(ii); *In the Matter of Davis, supra*, 4 Cal. State Bar Ct. Rptr. at p. 589 [to establish good faith in mitigation, attorney’s beliefs must be honestly held *and* reasonable].) When Smith closed his office, the balance remaining in his CTA clearly should have alerted him to a problem requiring investigation. His decision to do nothing was unreasonable.

B. Aggravation

After independently reviewing the record, we find that Smith's misconduct harmed his client. Hughes’ medical bill went unpaid for over two years, was sent to a collection agency, and caused her anxiety about her family’s credit. (Std. 1.2(b)(iv).) As a result of Smith’s gross negligence in overseeing his CTA, even when confronted by the State Bar about the problem, he was unable to account for the amount due Hughes. (Std. 1.2(b)(iii).)

C. Degree of Discipline

In determining the appropriate level of discipline, we start with the standards, which serve as guidelines and are accorded great weight. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) When two or more acts of misconduct are found in a single proceeding and different sanctions are prescribed by the standards, the more severe of the applicable sanctions for these violations should be imposed (std. 1.6(a)), adjusted as appropriate to reflect the balance of aggravating and mitigating circumstances. (Std. 1.6(b).)

Standard 2.2 is the more severe of the applicable sanctions and relates to Smith's trust account violations. Where misappropriation is involved, standard 2.2(a) sanctions disbarment unless compelling mitigating circumstances clearly predominate, in which case a one-year actual suspension is warranted. However, the Supreme Court has noted that in many cases, even the imposition of a one-year suspension is not faithful to the teachings of its decisions. (*Kelly v. State Bar, supra*, 53 Ca1.3d at p. 518.) Moreover, "the term willful misappropriation covers 'a broad range of conduct varying significantly in the degree of culpability.' [Citation.]" (*Ibid.*) In cases such as this one, involving less serious yet still "willful" trust account violations, disbarment is rarely appropriate (*Edwards v. State Bar* (1990) 52 Ca1.3d 28, 38), and even a one-year period of actual suspension would be "unduly harsh." (*Brockway v. State Bar* (1991) 53 Ca1.3d 51, 66.) Within the spectrum of willful misappropriation cases, less discipline has been imposed in cases in which the attorney's circumstances indicate the "misconduct was aberrational and hence unlikely to recur," and in cases in which the attorney lacked evil intent. (*Edwards v. State Bar, supra*, 52 Ca1.3d at pp. 37-38.) Standard 2.2(b) provides that a violation of rule 4-100 that is not the result of willful misappropriation shall result in at least a three-month actual suspension, irrespective of mitigating circumstances.

While the misappropriation in the present case was limited to one client matter and involved a small amount, this was fortuitous in light of Smith's habitual disregard of his fiduciary obligations for over a year. His gross carelessness caused an ethical violation likely to undermine public confidence in the legal profession. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.) Fortunately, he ultimately recognized his inability to comply with his ethical responsibilities and closed his office. Moreover, Smith has no prior record of discipline and his misconduct involved gross negligence, not dishonesty. (*Kelly v. State Bar, supra*, 53 Cal.3d at pp. 519-520 [lack of wrongful intent does not excuse misconduct but is important consideration in determining discipline].) Although the one-year suspension under standard 2.2(a) is unwarranted under these circumstances, we find that there is no justification to deviate from the minimum 90-day suspension suggested by standard 2.2(b).

Our recommendation is guided by other cases in which an attorney committed misappropriation involving gross negligence but not dishonesty in a single client matter. (*Kelly v. State Bar, supra*, 53 Cal.3d 509 [120-day actual suspension for misconduct in two client matters for failure to pay funds, willful misappropriation without deceit or intent to harm, and other trust violations where attorney had 13 years of discipline-free practice]; *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47 [90-day actual suspension for misconduct involving violation of former rule 8-101(B)(4), moral turpitude based on gross negligence and failure to communicate where attorney had 14 years of discipline-free practice].)

III. FORMAL RECOMMENDATION

For all the reasons cited, we recommend that Jon Michael Smith be suspended for one year, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first 90 days of probation;

2. He must make restitution to Kara Hughes in the amount of \$32.68 plus 10 percent per year from July 20, 2004, and must furnish satisfactory proof to the State Bar's Office of Probation within 90 days of the effective date of the Supreme Court order in this matter;
3. Within one year of the effective date of the discipline, he must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar and passage of the test given at the end of that session;
4. Within one year of the effective date of the discipline, he must provide to the Office of Probation satisfactory proof of attendance at a session of the Client Trust Accounting School, given periodically by the State Bar and passage of the test given at the end of that session;
5. He must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
6. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone or, if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and to the State Bar's Office of Probation;
7. He must submit written quarterly reports to the State Bar's Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct and all conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the reporting due date for the next calendar quarter and will cover the extended period. In addition to all quarterly reports, he must submit a final report, containing the same information required by the quarterly reports. The final report must be submitted no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period;
8. Subject to the assertion of applicable privileges, he must answer fully, promptly and truthfully, any inquiries of the State Bar's Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with these probation conditions;
9. The period of probation will commence on the effective date of the Order of the Supreme Court imposing discipline in this proceeding. At the expiration of the period, if he has complied with all of the terms and conditions of probation, the two-year period of stayed suspension will be satisfied and terminated.

We further recommend that he be ordered to comply with the requirements of rule 9.20 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and to file the affidavit provided for in paragraph (c) of the rule within 40 days of the effective date of the order showing his compliance with said order.

We further recommend that he be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period.

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

REMKE, P. J.

WE CONCUR:

EPSTEIN, J.

PURCELL, J.