

PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed July 15, 2009

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	06-O-15274
)	
ARMANDO R. VENEGAS,)	OPINION ON REVIEW
)	
A Member of the State Bar.)	
_____)	

Respondent Armando R. Venegas was admitted to the practice of law in California on December 1, 1981, and has been disciplined on two previous occasions. In the present proceeding, Venegas was charged with two counts of misconduct in one client matter: (1) failing to release a client file upon request; and (2) making a misrepresentation to the Office of the Chief Trial Counsel of the State Bar (State Bar) during its investigation. The hearing judge found Venegas culpable of misleading the State Bar, but dismissed the charge that he failed to timely release a client file. Finding no factors in mitigation, and considering Venegas’s two prior records of discipline in aggravation, the hearing judge recommended that Venegas be suspended for 60 days.

Venegas seeks review, contending that he committed no misconduct and that no discipline should be imposed. The State Bar does not dispute the 60-day actual suspension recommendation, but argues that Venegas should have been found culpable of both charges. Reviewing the record independently (Cal. Rules of Court, rule 9.12), we find Venegas culpable of both charges of misconduct. We also find additional factors in aggravation, including uncharged misconduct. In light of Venegas’s prior disciplinary record, we increase the recommended discipline to include a six-month period of suspension.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standard of Review

We have independently reviewed the record, giving great weight to the findings of fact of the hearing judge who resolved issues of the credibility of witnesses. (Rules Proc. of State Bar, rule 305(a).) Giving great weight to the credibility determinations of the hearing judge “rests on a sound policy reason, for when evidence turns on assessment of credibility we should insist that an evaluation be made by a judicial officer who sees and hears the witnesses and can translate the credibility accorded witnesses into the weight to be given their testimony as it relates to other evidence in the case.” (*In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 328.)

The hearing judge found that Venegas’s testimony at times lacked credibility. This finding is supported by the record, which contains several inconsistent statements by Venegas that seriously call into question his account of the disputed events. In contrast, the hearing judge found Dennis Balsamo’s testimony credible. We review the evidence in light of these credibility determinations.

B. Findings of Fact

In 2004, Juan Cisneros was injured while making a delivery to Wal-Mart. Cisneros employed Venegas to represent him. Cisneros does not speak or read English. He signed a written fee agreement, providing Venegas a 33.33% contingency fee of any gross recovery before a complaint was filed, and 40% thereafter. Venegas filed a lawsuit on behalf of Cisneros against Wal-Mart, and subsequently, filed a second lawsuit against Cisneros’ employer and a trucking company involved in the accident. The cases ultimately were consolidated for all purposes.

Following a trial in early 2006, a jury found in favor of Cisneros and awarded him \$112,000 in damages. Pursuant to a motion by Wal-Mart, the court reduced that portion of the damages dealing with loss of earning capacity. Thereafter, the court conducted a settlement conference, and in lieu of a new trial on damages, the parties agreed to settle the matter for \$80,200 plus \$6,380 for costs. To facilitate the settlement, Venegas agreed to reduce his 40% contingency fee and Cisneros agreed to the reduced damages award. Venegas testified that, pursuant to their modified fee agreement, the settlement funds were to be disbursed as follows: \$50,000 to Cisneros and the remainder to Venegas as his fees, but he would be responsible for all liens and costs. Although Venegas contends that the modification to his fee agreement with Cisneros occurred outside the courtroom during the settlement conference, no documentation confirming the agreement was ever produced.

On October 9, 2006, Venegas gave Cisneros a check for \$50,000 with the words “client paid in full” on the memo line. Venegas did not provide Cisneros with an accounting of the settlement funds or any statement summarizing the amount of liens or costs at the time of settlement.¹

In late October 2006, concerned about the amount he recovered, Cisneros employed attorney Dennis Balsamo to review his case and dispute the attorney’s fees charged by Venegas. On October 31, 2006, Balsamo sent a letter to Venegas, stating that Cisneros had hired him to tender a second opinion on the settlement. The letter contested the attorney’s fees Venegas charged Cisneros, demanded an accounting of the settlement funds, instructed Venegas to maintain the disputed portion of the funds (\$12,520) in Venegas’s client trust account, and requested that Venegas provide Balsamo with the entire client file for review. On November 10,

¹Respondent claims he prepared an accounting at the time he disbursed the \$50,000 check, but Cisneros refused to sign it. The existence of a written accounting is questionable, however, since throughout the dispute and this proceeding, Venegas failed to produce it and failed to consistently set forth the amounts of the costs and liens.

2006, after receiving no response to his letter and several telephone messages he left for Venegas,² Balsamo sent a complaint letter to the State Bar on Cisneros's behalf and sent a copy of the letter to Venegas.

Venegas wrote to the State Bar in November of 2006 and January of 2007 in response to the complaint. Venegas insisted that he settled any fee dispute with Cisneros by paying him \$50,000 and stated: “[Cisneros] agreed to this settlement and promised me that he would not pursue a complaint to the California Bar, and promised me that he would instruct Mr. Balsamo not do any more work on his behalf because we settled our differences.” As for turning over the file, Venegas states:

“I have not refused to give the file to Mr. Balsamo. I am willing to give up the file on [the trucking matter], which is the only file that is viable. Mr. Balsamo has interfered with my attorney client relationship with Mr. Cisneros. You will note that I am still the attorney of record. Mr. Balsamo or Mr. Cisneros can [drop] me as the attorney of record in the Cisneros v. Barcelos Enterprises [trucking matter], and I will gladly send him the file³...

Mr. Cisneros has a ton of copies of what I have done in the Wal-Mart case and the Barcelos case and he can share these copies with Mr. Balsamo. Mr. Balsamo merely wants free creative legal work by requesting copies of a case that has been settled in its totality...

If the California Bar thinks that I should give up two drawers full of legal work on a case that settled, then I would like to appeal that determination to the appropriate department. I do not think that Mr. Balsamo has made a case for copies of the ton of legal work on a case that has settled.”

While Venegas argued that he was still attorney of record in the trucking matter, in neither letter does Venegas claim that he is refusing to turn over the Wal-Mart file because Balsamo is not Cisneros’ attorney. In fact, in the November letter, Venegas states, “Mr. Balsamo

²Although a November 1, 2006 unsigned letter from Venegas to Balsamo was admitted into evidence, it is clear from the record that this letter was never sent.

³The trucking company involved in the accident defaulted. Venegas stated a default judgment was not pursued by him because the company had “zero liability and would be a waste of time pursuing [the company] as it is judgment proof.”

is harassing me and is initiating unnecessary legal work for the purposes of billing Mr. Cisneros. See a copy of Mr. Balsamo's contract for legal services."

After receiving another request from Balsamo to release the file and for an accounting, Venegas finally responded on April 18, 2007. Venegas sent a letter warning Balsamo that if he filed a lawsuit against Venegas, Balsamo "will face lots of litigation, trial and a counter suit for bad faith filing of the complaint; and, Mr. Cisneros will also face a cross-complaint for fees owed to [Venegas's] office. You are stirring a lot of trouble unnecessarily. Save yourself some time and go after other \$12,500.00 cases because as to this case, it was settled [sic] long time ago." Venegas failed to provide the client file or an accounting with his letter, but did provide a copy of the cancelled \$50,000 check. On April 30, 2007, Cisneros requested fee arbitration with the Santa Clara County Bar Association.⁴

Meanwhile, the State Bar's investigation into the matter continued. In early May 2007, Venegas had a discussion with Deputy Trial Counsel Esther Rogers (DTC Rogers). DTC Rogers informed Venegas that it would be to his advantage to release Cisneros' file. Consequently, Venegas sent Balsamo a letter, stating that Cisneros' file would be available for copying. Balsamo countered that Venegas should provide the original file to Cisneros. On May 16, 2007 – over six months after Balsamo's initial request - Venegas sent Cisneros' file to Balsamo.

Shortly thereafter, DTC Rogers sent Venegas a notice of the State Bar's intention to file disciplinary charges against him based on his failure to timely provide the client file to Balsamo. In response, Venegas wrote: "[s]everal times I suggested that either Mr. Cisneros or Mr. Balsamo [sign] a substitution of attorney so that I can meet my professional obligation as the

⁴In October 2007, the arbitrator determined that \$50,000 was Cisneros' share of the settlement proceeds. However, we reject respondent's argument that this award operates as res judicata and the charges should be dismissed. Although improperly admitted into evidence, the arbitration award does not operate as collateral estoppel or res judicata in this proceeding. (Bus. & Prof. Code § 6204, subd. (e).) Here, we are concerned with the manner in which the fee dispute was resolved, not the amount for which it was resolved.

attorney of record as I understand it.... If [Balsamo] wanted the file, he has an obligation to substitute me as the attorney of record. Likewise for Mr. Cisneros.... Had either Mr. Cisneros signed the substitution of attorney or Mr. Balsamo signed the substitution of attorney I would immediately ... have release[d] the file." At the time Venegas wrote this letter, he had never asked Balsamo to sign a substitution of attorney nor had Balsamo ever refused to sign one. Based on Venegas's representations, DTC Rogers requested that he provide her with copies of correspondence requesting a substitution of attorney from Balsamo in exchange for the client file.

On June 19, 2007, Venegas sent Balsamo a letter, requesting for the first time that Balsamo sign a substitution of attorney. However, Venegas's June letter implies otherwise when he wrote, "[s]ince last year I have requested Mr. Cisneros or for yourself to substitute me out [of] the case but to no avail." Subsequently, Venegas sent DTC Rogers a letter, stating that he had no written proof that he asked Balsamo to sign a substitution of attorney. Venegas stated in the letter to DTC Rogers that over the past six months, Balsamo had "continued to request the file but he continued to not sign the substitution of attorney on all matters before the court." Venegas also enclosed a copy of his June 19, 2007 letter to Balsamo.

C. Conclusions of Law

Count 1 -- Failure to Release Client File

Rule 3-700(D)(1) of the Rules of Professional Conduct of the State Bar of California⁵ states that a member whose employment has terminated "shall promptly release to the client, at the request of the client, all the client papers and property." Based on Venegas's refusal to release the client file for over six months, we find that he willfully violated rule 3-700(D)(1).

On review, Venegas defends his refusal to release the client file by arguing, among other things, that his employment was not terminated because: (1) he was uncertain whether Balsamo

⁵References to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

had been hired by Cisneros; and (2) Balsamo and Cisneros refused to sign a substitution of attorney.⁶ As to the first argument, we find clear and convincing evidence that Venegas knew or should have known that Balsamo was representing Cisneros. Even if Venegas questioned Balsamo's authority, he had a fiduciary obligation to do more than ignore Balsamo's repeated requests for the file. A telephone call to Balsamo or permission to contact Cisneros to confirm the attorney-client relationship would have undoubtedly resolved any legitimate concern about Balsamo's representation. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 325-326 [attorney violated rule 3-700(D)(1) where he failed to release file and made no effort to verify subsequent counsel's representation].)

We also reject Venegas's second argument that he had no obligation to release the file because neither Balsamo nor Cisneros would sign a substitution of attorney. In the first place, we reject the assertion that Balsamo or Cisneros would not sign a substitution. (See discussion *post.*) Moreover, attorneys may not condition the return of a client file upon receiving a signed substitution of attorney. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 377.) The file belongs to the client. By refusing to release the file, which Cisneros needed for the continued protection of his legal interests, Venegas placed his client's interests in jeopardy. "When an attorney . . . assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client [Citations.]." (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 448.) Upon request, Venegas was required to promptly release the file and his failure to do so constitutes a willful violation of rule 3-700(D)(1).

⁶All other arguments raised by Venegas that are not explicitly addressed are deemed rejected as meritless, including his contentions that he was denied discovery, that certain witnesses who were not subpoenaed by Venegas should have been ordered to appear, and that the hearing judge improperly ruled on the admissibility of evidence.

Count 2 – Moral Turpitude—Misrepresentation

The State Bar alleges that Venegas committed acts involving moral turpitude, dishonesty or corruption in violation of Business and Professions Code section 6106⁷ by misrepresenting to the State Bar that the reason he did not turn over the client file was because Balsamo refused to sign a substitution of attorney. We agree with the hearing judge and find that Venegas committed an act of dishonesty in violation of section 6106 by attempting to mislead the State Bar during its investigation.

When faced with potential disciplinary charges in May 2007, Venegas defended his actions by creating the false impression that he did not release Cisneros' file because Balsamo refused to sign a substitution of attorney. However, Venegas did not request that Balsamo sign a substitution of attorney until June 2007 – a month after he released the file. The Supreme Court has repeatedly noted “that deception of the State Bar may constitute an even *more serious offense* than the conduct being investigated. [Citations.]” (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 712.) We find Venegas's attempt to mislead the State Bar during its investigation is a serious offense in violation of section 6106.

II. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Venegas bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e).)⁸ Venegas has failed to set forth any factors in mitigation.

⁷All references to section(s) are to the Business and Professions Code, unless otherwise stated.

⁸ All further references to standard(s) are to this source.

B. Aggravation

There are several aggravating factors.

1. Prior record of discipline

Venegas's two prior disciplines constitute a serious aggravating factor. (Std. 1.2(b)(i).) Effective August 6, 2000, Venegas was privately reprovved with conditions for issuing checks from his client trust account and failing to maintain adequate trust account records, in violation of rules 4-100(A) and 4-100(B)(3). (SBC Case Nos. 98-O-01975 and 99-O-11030.) In mitigation, Venegas's misconduct did not result in harm to any individual, he cooperated with the State Bar, and he had no prior record of discipline. No aggravating factors were involved.

Effective August 9, 2001, Venegas was privately reprovved with conditions for failing to timely submit to the State Bar's Office of Probation three quarterly reports in violation of section 6068, subdivision (k). (SBC Case No. 01-H-01000.) In aggravation, Venegas had a prior record of discipline. In mitigation, his misconduct did not result in harm to any individual, he demonstrated good faith and remorse, and he cooperated with the State Bar.

2. Misconduct Surrounded by Other Violations

We also find Venegas culpable of uncharged misconduct. (Std. 1.2(b)(iii)). Venegas repeatedly stated that he renegotiated his fee agreement, including the \$50,000 payment of settlement funds to Cisneros, in exchange for Cisneros' agreement not to file a discipline complaint. We find this agreement was a clear violation of section 6090.5, which provides that it is cause for discipline for an attorney to seek an agreement that professional misconduct will not be reported to the disciplinary agency. Because the evidence of the violation comes from Venegas's own repeated statements, we find it credible and deem it an appropriate factor in aggravation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.)

3. Lack of Recognition

Venegas displayed indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Not only did he steadfastly refuse to release the file, he continues to maintain that the charges have no merit. Venegas also attempts to shift the blame to Balsamo and Cisneros and claims his ethical responsibility prohibited him from releasing the file (even to his client) until a substitution of attorney was filed. On review, rather than accepting responsibility, he attacks the proceedings by making groundless accusations of bias and political motivation against the deputy trial counsel who investigated his case and the hearing judge. Venegas has not accepted responsibility for his misconduct.

III. LEVEL OF DISCIPLINE

In determining the appropriate level of discipline, we first consider the standards applicable to this case. While we are “not compelled to strictly follow [the standards] in every case,” we look to them for guidance (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and they should generally be given great weight in order to ensure consistency in attorney disciplinary cases. (*In re Brown* (1995) 12 Cal.4th 205, 220.) Ultimately, we are guided by standard 1.3, which instructs that the purpose of disciplinary proceedings is the protection of the public, the courts and the legal profession.

This is Venegas’s third disciplinary proceeding, so our focus is on standard 1.7(b). This standard provides that when there are two or more prior impositions of discipline, in the absence of compelling mitigation, disbarment is the appropriate discipline. However, the Supreme Court has not automatically applied standard 1.7(b) when an attorney has two prior disciplines, even if there is an absence of compelling mitigation.⁹ Rather, standard 1.7(b) is applied “with an eye to

⁹*Blair v. State Bar* (1989) 49 Cal.3d 762 [three priors and marginal mitigation resulting in two years’ actual suspension]; see also *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 241-242 [30 days’ actual suspension for unauthorized practice of law and

the nature and extent of the prior record. [Citations.]” (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.)

We begin with an examination of Venegas’s two prior records of discipline. Both involved fairly minor misconduct that resulted in private reprovations. And although Venegas’s second discipline involved his failure to timely submit probation reports, which is similar in nature to failing to timely release a file, we find that overall the offenses do not demonstrate a pattern of habitual wrongdoing or evidence a common thread. (*Arm v. State Bar* (1990) 50 Cal.3d 763,780.) In addition, since neither of the prior matters resulted in any actual suspension time, it would be punitive to increase the recommendation in this proceeding to disbarment. Thus, “[t]he nature and extent of respondent’s two prior records of discipline are not sufficiently severe to justify our recommending disbarment in this proceeding under standard 1.7(b).” (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 704.)

We also look to standard 2.3, which applies to offenses involving moral turpitude and provides for “actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member’s acts within the practice of law.” Here, the “victim” of Venegas’s dishonesty was the State Bar, and although a serious offense that clearly impeded the State Bar’s investigation, the resulting harm was fairly minimal. It is significant that respondent continues to insist that he did nothing wrong and he should be “complemented instead of charged.” Venegas fails to show an appreciation for his ethical responsibilities, raising serious concerns about his ability to comply with future ethical obligations.

In light of the broad range of applicable discipline under the standards, we have reviewed cases with similar misconduct for further guidance, finding levels of discipline from no actual

three prior disciplines, but with absence of common thread or continuing misconduct of increasing severity and presence of compelling mitigation].

suspension to one-year suspension.¹⁰ Based on the facts of this case, including the uniqueness of Venegas's prior record of discipline, we conclude that Venegas should receive a six-month period of suspension. Along with this period of suspension, Venegas will be required to comply with rule 9.20 of the California Rules of Court, which provides the prophylactic function of ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) While we find that this recommendation will serve the ultimate goals of attorney discipline, any further ethical transgressions by Venegas will call into question whether he should be allowed to continue to practice law in this state.

IV. RECOMMENDATION

We recommend that Armando R. Venegas be suspended for two years, that execution of the suspension be stayed, and that he be placed on two years' probation on the following conditions:

1. He must be suspended from the practice of law for the first six months of probation.
2. During the period of probation, he must comply with the State Bar Act and the Rules of Professional Conduct.
3. He must submit written quarterly reports to the 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.
4. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully any inquiries of the Office of Probation, which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

¹⁰*Conroy v. State Bar* (1991) 53 Cal.3d 495 [one-year actual suspension for failure to act competently and misrepresentations involving moral turpitude, even though no mitigation and two prior disciplines]; *Bach v. State Bar* (1987) 43 Cal.3d 848 [60-day actual suspension for misleading judge, in aggravation prior public reproof and behavior that threatens public and undermines confidence in profession, and no mitigation]; *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211 [no actual suspension for attorney with no prior discipline who misled settlement judge about death of party].

5. Within 10 days of any change, he must report to the Membership Records Office of the State Bar, 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.
6. Within one year after the effective date of the discipline, he must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of the session.
7. The period of suspension and probation will commence on the effective date of the order of the Supreme Court imposing discipline in this matter. At the expiration of the period of this probation, if he has complied with all the terms of probation, the order of the Supreme Court suspending him from the practice of law for two years will be satisfied and that suspension will be terminated.

It is also recommended that Armando R. Venegas take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, and provide proof of passage to the Office of Probation, within one year after the effective date of the discipline herein. Failure to pass the MPRE within the specified time results in actual suspension, without further hearing, until passage.

It is further recommended that he be ordered to comply with rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order.

It is further recommended 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 Business and Professions Code section 6140.7 and as a money judgment.

REMKE, P. J.

We concur:

EPSTEIN, J.

PURCELL, J.