PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

Filed January 13, 2012

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 07-O-11017
	)	
REUBEN ALPHONSO SPIVEY,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 143654.	)	
	)	

This is a disbarment case that focuses on the fiduciary duties of an attorney who accepted entrusted funds from a third party. Respondent, Reuben Alphonso Spivey, received $2,070,000 from ACMAR FHP Group Berhad (ACMAR), a Malaysian multinational corporation, and deposited the money into his client trust account (CTA). The funds were intended to pay the costs incurred in a complex international financial transaction that involved one of Spivey's clients, Aida Esacove. Esacove agreed to raise $207,000,000 on ACMAR's behalf. Instead of disbursing the entrusted funds to pay for the costs of the financing transaction, Spivey distributed almost all of the $2,070,000 to himself and Esacove without any proof that the money was spent on ACMAR's behalf.

The hearing judge found that Spivey willfully misappropriated $2,070,000 in violation of Business and Professions Code section 6106[1] and recommended disbarment. Spivey seeks review, contending that he should not be disbarred since the State Bar did not present clear and

[1] All further references to "section(s)" are to the Business and Professions Code unless otherwise noted.

convincing evidence[2] that he converted ACMAR's funds. He argues that the funds actually belonged to his client, Esacove, as a non-refundable retainer fee and as such, he had no duty to safeguard the money on ACMAR's behalf. Indeed, he maintains that Esacove had the absolute right to use the $2,070,000 however she desired, provided she used her best efforts to secure ACMAR's financing. The State Bar disagrees and asks us to affirm the decision below.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we find that Spivey committed acts of moral turpitude in violation of section 6106 by misappropriating entrusted funds from ACMAR. Spivey's misconduct was surrounded by substantial aggravation, including misrepresentations to ACMAR about the status of the financing transaction. These aggravating factors greatly outweigh the evidence in mitigation. Accordingly, we adopt the hearing judge's recommendation to disbar Spivey.

I. FACTUAL AND PROCEDURAL BACKGROUND

Spivey was admitted to practice law in California on December 11, 1989, and has been a member of the State Bar since that time. He has no prior record of discipline.

Spivey had a long-standing friendship with Aida Esacove, who arranged international financing through her firm, Englewood Capital LLC (Englewood). On December 12, 2002, Esacove asked Spivey to join her in a meeting with ACMAR representatives, at which he was asked to draft a Memorandum of Understanding (MOU) documenting Englewood's agreement to raise a total of $207,000,000 for ACMAR. The financing consisted of an investment of $126,000,000 by Englewood in exchange for a 40 percent equity interest in ACMAR, plus an $81,000,000 loan, which Englewood would obtain from a third-party lender. Spivey prepared the MOU, which the parties signed the following day.

[2] The clear and convincing standard "requires a finding of high probability, based on evidence so clear as to leave no substantial doubt [and] sufficiently strong to command the unhesitating assent of every reasonable mind." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552, internal quotations and citations omitted.)

Paragraph 2 (a) of the MOU provided:

> ACMAR will pay 100 basis points which equal the amount of US $2,070,000 to Englewood Capital LLC for hard costs including attorney fees, bank fees, and underwriting fees associated with and a direct result of arranging and bringing forth the amount of US $207,000,000 through incremental draw down schedules.

Paragraph 3 of the MOU provided:

> It is agreed that Mrs. Aida Esacove will be compensated by the company (ACMAR) for her financial consulting services. This compensation is separate and apart from her role as a director of ACMAR, and an equity participant. The rate and payment will be based on invoices submitted by Mrs. Esacove based on an hourly rate or flat rate depending on the task and assigned work.

The MOU further required ACMAR to wire transfer $2,070,000 to Spivey's CTA in three installments between December 18, 2002 and February 6, 2003. Spivey's handwritten notes from the meeting with ACMAR and Esacove are consistent with the language of the MOU. The notes reference the $2,070,000 as "hard costs."

ACMAR wired the first installment on December 23, 2002. By February 28, 2003, the entire $2,070,000 had been deposited into Spivey's CTA. Spivey withdrew $209,998 for Esacove within three days after ACMAR's initial deposit, and he distributed $107,500 to himself within the first month. By March of 2004, Spivey had paid Esacove $1,545,172 from his CTA and $365,000 to himself. He designated $172,500 of that money as repayment to himself for a personal loan he had made to Esacove. Spivey distributed an additional $126,510 to financial brokers who purportedly were involved in obtaining the capital for ACMAR.[3] However, he provided only one invoice for $19,000 to substantiate his disbursements. He produced no other billing records or receipts to establish that any CTA withdrawals were associated with the costs of raising the $207,000,000 for ACMAR.

[3] The evidence does not establish who received the remaining $33,318.

Beginning in early 2003, and continuing for more than two and a half years until 2005, Spivey frequently communicated with ACMAR to assure the company that payment of the $207,000,000 was imminent. For example, on March 4, 2003, Spivey wrote: "now that the total amount [of the upfront costs] has been remitted my clients are working around the clock trying to make up for the delay . . . . However, good progress is being made . . ." On May 13, 2003, Spivey advised that Esacove had received an offer for funding and she "discussed the offer thoroughly with me and the other members of her group and we all decided the offer was not satisfactory." He continued: "Mrs. Esacove as well as myself [sic] are in daily communication with the appropriate funding group" and had requested "another offer with better returns. . . ." In August 2003, he wrote: "[W]e have been informed . . . that the funds will be disbursed on or about September 15th, 2003 . . . [w]e are excited and poised for the results and success of this transaction in September." Then in September, he advised: "We await momentarily, any day, for the disbursement allocation that will be allowed from the funding."

The professed efforts to raise the $207,000,000 continued through mid-2005. On April 7, 2005, Spivey wrote: "It is now suggested and agreed that ACMAR's project financing will close during the week of April 28th." As late as May 4, 2005, Spivey advised: "Mrs. Esacove has been informed that within the next 3-4 days she will be given the exact date as to when she will receive the first disbursement from the bond sale transaction for the [ACMAR] project financing."

In spite of the frequent contacts with ACMAR, Spivey waited until January 7, 2005, to reveal that the $2,070,000 had been spent. At the same time, he also advised the company that it owed an additional $3,500,000 as a consulting fee for Esacove's services in arranging the still-yet-to-materialize capital infusion. ACMAR balked at this additional payment and retained

independent legal counsel. Ultimately, ACMAR obtained no funding from Esacove and terminated her services.

On October 28, 2005, ACMAR filed a lawsuit in the Los Angeles Superior Court against Esacove, her husband and Englewood alleging, inter alia, breach of contract, fraud and conversion. ACMAR subsequently named Spivey as a party and sued him for fraud and conversion. The judge who tried the matter ruled that ACMAR was entitled to $2,070,000 in damages plus interest. However, the parties settled the case before entry of judgment.

The State Bar filed a Notice of Disciplinary Charges (NDC) on January 22, 2010, charging Spivey with one count of moral turpitude for converting ACMAR's funds in violation of section 6106. The hearing judge found Spivey culpable and recommended his disbarment.

II. ANALYSIS

A. EVIDENTIARY ISSUE

Spivey argues that the hearing judge erred in admitting the Superior Court's Statement of Decision and in giving its findings even "minimal" weight. We agree. The Statement of Decision was not a final order or judgment but merely an announcement of the court's intended decision. (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 675.) Spivey timely filed objections and the Superior Court retained jurisdiction to modify its findings and conclusions, but the matter became moot once the case settled. We do not give any evidentiary weight to the findings in the Superior Court's Statement of Decision, which we consider a tentative ruling. (*Bay World Trading, LTD v. Nebraska Beef, Inc.* (2002) 101 Cal.App.4th 135, 140 [court may amend Statement of Decision after it receives objections from affected parties].)[4] However, the hearing judge's admission of the Statement did not result in an unfair trial since the relevant findings in

[4] In light of our ruling, we deny the State Bar's request on review for judicial notice of the Statement of Decision. (See Rules Proc. of State Bar, rule 5.156.)

the Statement were independently established in these proceedings by other competent evidence.[5]

B. CULPABILITY

The State Bar charged, and the hearing judge found, that Spivey committed acts of moral turpitude in violation of section 6106 by misappropriating $2,070,000 of ACMAR's funds when he distributed the entrusted funds to Esacove and himself. We agree.[6]

We reject Spivey's assertion that the $2,070,000 was a non-refundable retainer to compensate Esacove for her services in arranging the financing and that she had the absolute discretion to use the funds in any manner she saw fit, regardless of whether the expenses were related to her efforts to raise capital for ACMAR. Spivey's position is at odds with his handwritten notes taken at the initial meeting between Esacove and ACMAR where he wrote that the $2,070,000 was for "hard costs" and then wrote a second time in his notes that the funds were for "costs." Spivey's assertion also contradicts the plain language of the MOU, which states: "ACMAR will pay. . . $2,070,000 to Englewood Capital LLC for hard costs including attorney fees, bank fees, and underwriting fees associated with and a direct result of arranging and bringing forth the amount of US $207,000,000. . . ." The MOU specifically provides that Esacove will be compensated "for her financial consulting services" to be paid "based on an hourly rate or flat rate depending on the task and assigned work. . . ."

[5] Although we have excluded the Statement of Decision, we note that the hearing judge properly received into evidence the authenticated transcripts of the testimony of ACMAR representatives, Spivey and Esacove in the civil trial. (§ 6049.2.) Accordingly, we reject Spivey's evidentiary challenges and we consider this evidence on review.

[6] We do not adopt the hearing judge's finding that the parties agreed the $2,070,000 would be distributed only *after* Esacove obtained financing. Much of their communication shows that the parties understood the funds would be disbursed on an as-needed basis. But this does not affect our analysis of Spivey's culpability since the hearing judge's finding merely addresses the timing of the distributions and not the intended purpose of the entrusted funds.

Many of Spivey's written communications to ACMAR also contradict his claim that the $2,070,000 payment was a non-refundable retainer fee. For example, in January 2003, within two weeks after ACMAR's initial deposit, Spivey began to press for payment of the last two installments, reminding the company that "all funding is conditioned on Mrs. Esacove/ Englewood Capital LLC *paying the bank costs and fees*." (Italics added.) And, two years later, on January 7, 2005, Spivey wrote the following demand for ACMAR's payment of an additional $3,500,000 for Esacove's consulting fee:

> It was understood by all parties that the [$2,070,000] *would be for costs* associated with Englewood Capital LLC through the assistance of Mrs. Aida Esacove to pay attorneys fees, bank fees, underwriting fees *and any other cost* related to the best efforts by Mrs. Esacove in arranging the funds being sought by ACMAR. [Para.] In addition to the $2,070,000 *for costs* Mrs. Esacove was to be compensated by ACMAR for consulting service in working on this project for ACMAR. (Italics added.)

Spivey concluded by stating that as of January 2005, "no fees whatsoever has [sic] been paid to Mrs. Esacove as compensation for her consulting services." We reject Spivey's argument that ACMAR's request for a short-term loan from Esacove due to its difficulty in timely obtaining all of the initial $2,070,000 deposit required under the MOU is evidence that the deposit belonged to Esacove. ACMAR's loan request neither changed the character of the $2,070,000 deposit nor the intended purpose of those funds.

Also, Spivey incorrectly argues that he owed no duty to ACMAR because it was not his client. Once he accepted the entrusted funds from ACMAR and placed them in his CTA, Spivey had a fiduciary duty to ensure they were used for their intended purpose for ACMAR's benefit. "When an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party. Thus the funds in his possession are impressed with a trust, and his conversion of such funds is a breach of the trust." (*Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) At least $172,500 of the $365,000 that Spivey paid himself was for personal purposes, which constitutes a misappropriation of those funds. (*Himmel v. State Bar*

(1973) 9 Cal.3d 16, 19 [attorney who used entrusted funds for own purpose rather than payment of judgment creditor amounted to conversion]; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364 [improper conversion of trust funds was willful misappropriation involving moral turpitude].)

Spivey testified that he performed no due diligence to ensure that the funds were being spent on ACMAR's behalf; instead, he merely acted in every instance at Esacove's direction. Yet, by his own admission, he had no billing records or receipts to prove that any portion of the deposit in his CTA was used to pay hard costs related to obtaining the funding sought by ACMAR. The absence of such records "is in itself a suspicious circumstance and supports an inference that he converted the proceeds to his own use. [Citation.]" (*Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 900.) Finally, Spivey's distribution of the CTA funds without ACMAR's knowledge or consent is additional evidence of misappropriation involving moral turpitude. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 330.)

III. AGGRAVATION AND MITIGATION

The State Bar must establish aggravating circumstances by clear and convincing evidence while Spivey has the same burden to prove mitigating circumstances. (Std. 1.2(b) and (e).)[7]

A. AGGRAVATION

We agree with the hearing judge that the State Bar proved four factors in aggravation.

1. Dishonesty, Concealment and Overreaching (Std. 1.2(b)(iii))

We adopt the hearing judge's finding in aggravation under standard 1.2(b)(iii) that Spivey's misconduct was surrounded by dishonesty, concealment and overreaching. We assign this substantial weight given the frequency and duration of the misrepresentations. For two and a half years, Spivey misled ACMAR that the much-needed capital infusion was close at hand

[7] Unless otherwise noted, all references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

when in fact no such financing was ever obtained. Spivey argues that he was acting only as a scrivener for Esacove when drafting the letters to ACMAR and that he was not personally involved in any negotiations or structuring of the ACMAR financing. But he intentionally wrote letters to foster ACMAR's belief that funding success was imminent. Many letters indicated that Spivey had personal knowledge of the progress of the negotiations. Most troubling, Spivey made his misrepresentations and unsupported statements to ACMAR on his firm's letterhead, signing the letters as "Law Offices of Reuben A. Spivey" and using the honorific "Esq." after his name. By using his status as an attorney to enhance his own and Esacove's credibility, Spivey took advantage of a relationship of trust and confidence with ACMAR.

2. Significant Harm (Std. 1.2(b)(iv))

Spivey's misconduct caused ACMAR's principals great stress and financial hardship, which is a significant aggravating factor. The company lost its entire $2,070,000 without receiving any benefit, and the continual delays put the company's financial relationship with its bank at risk. An ACMAR representative advised Spivey that it "will be subject to unpleasant queries and penalties imposed by the Central Bank of Malaysia" if the capital infusion did not meet the promised funding schedule. He explained, "our reputation will be tarnished and at stake" if it could not provide the bank with evidence of funding. When the funding schedule was not met in February 2003, ACMAR reiterated that "all our approvals [from the Central Bank of Malaysia] will be withdrawn and an investigation will be conducted, whereby if we are found guilty of misleading [the Central Bank], we can be fined/jailed . . . ." With no funding by July 2004, ACMAR's representative anxiously explained "we are running out of time" and as previously mentioned, "our reputation is in dire stake [sic] with our associations and bankers."

3. Lack of Remorse and Indifference (Std. 1.2(b)(v))

Spivey lacked remorse and showed indifference toward the consequences of his misconduct. (Std. 1.2(b)(v).) We find that his continued insistence that Esacove had the unfettered right to spend the $2,070,000 as she chose and that he owed no fiduciary duty to ACMAR "exhibit[s] a disturbing lack of insight into the misconduct which in turn causes concern that he will repeat his misdeeds." (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380.) We accordingly adopt the hearing judge's finding in aggravation and assign it considerable weight.

4. Lack of Candor (Std. 1.2(b)(vi))

The hearing judge found Spivey's testimony lacked candor. (Std. 1.2(b)(vi).) We agree and give some weight to this finding in aggravation. Spivey argues that the hearing judge erred because he was improperly influenced by the adverse findings of the Superior Court in the civil trial. Spivey is wrong. The hearing judge cited specific examples where Spivey's testimony was directly impeached by the evidence. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 792 [lack of candor strong aggravating circumstance where record was at "complete odds with respondents' testimony in hearing department"].) Furthermore, the hearing judge based his credibility and candor determinations on Spivey's demeanor and self-interest. We give great deference to these determinations (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 951) and find no basis on which to overturn them.

B. MITIGATION

We agree with the hearing judge's finding that Spivey established two factors in mitigation: (1) 13 years of discipline-free practice prior to his misconduct (std. 1.2(e)(i)); and (2) good character evidence. (Std. 1.2(e)(vi).) Spivey incorrectly asserts that the hearing judge awarded only "limited mitigation" for his 13 years of practice without discipline. The judge's

decision stated that Spivey's "13 years of blemish-free practice" are a *significant* mitigating factor. We also assign substantial weight in mitigation to this factor.

Spivey's 11 character witnesses included a retired San Diego Superior Court judge, nine attorneys, a community college professor who is a former DEA agent, a former client and a budget manager. All but one knew him over ten years. Each testified that Spivey is a "truthful" and "honest person" and the attorneys maintained that he did not have a "negative reputation for dishonesty" in the legal community.

The retired superior court judge said Spivey "possessed . . . great integrity" and "good" personal and legal ethics. An attorney who worked and socialized with Spivey testified that he had "excellent integrity" and the attorney would not hesitate to refer a "loved one or close personal friend . . . to Mr. Spivey for legal representation." The interim dean and professor at Pepperdine University School of Law, who was a member of Spivey's faith community, testified that Spivey was active in his church, served on the committee that managed the church's business affairs, and dealt "honestly with the monies at his disposal." We give these witnesses great weight because they "have a strong interest in maintaining the honest administration of justice" (*In the Matter of* Brown (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319). We find that the evidence demonstrated good moral character, which was "attested to by a wide range of references in the legal and general communities." (Std. 1.2(e)(vi).)

Spivey also asks for mitigation credit for mental distress resulting from the untimely loss of his minor son. We are sympathetic about his son's death in August 2002. Ordinarily, we would not afford mitigation credit because Spivey failed to provide sufficient evidence establishing a causal nexus between his emotional difficulties and his misconduct. (See *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 277 [death of parent and break-up of marriage given no weight in mitigation without additional evidence of causal

connection between psychological distress and misconduct].) However, given the close temporal relationship between his son's death and the commencement of his misconduct, we afford modest weight in mitigation.

IV. DISCIPLINE

The purpose of attorney discipline is not to punish the attorney but to protect the public, the courts and the legal profession. (Std. 1.3.) To determine the appropriate discipline, we look to the standards and decisional law. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 913.)

Two standards apply here. Standard 2.3 provides for actual suspension or disbarment for an act of moral turpitude, while standard 2.2(a) suggests disbarment for willful misappropriation unless the amount is insignificant or compelling mitigation predominates, in which case a one-year actual suspension is warranted.[8] Standard 2.2(a) is "a guideline rather than . . . an inflexible rule . . . [Citation.]" (*Lipson v. State* (1991) 53 Cal.3d 1010, 1022.) Nevertheless, "[m]isappropriation of client trust funds has long been viewed as a particularly serious ethical violation" (*Kelly v. State Bar* (1989) 45 Cal.3d 649, 656), and it generally warrants disbarment in the absence of clearly mitigating circumstances. (*Ibid*.)

Spivey misappropriated more than $2,000,000 from ACMAR, using at least $172,500 for personal purposes. Moreover, his misappropriation was surrounded by concealment and affirmative misrepresentations. Spivey secretly disbursed ACMAR's deposit to Esacove and himself for purposes that did not benefit ACMAR in any way while simultaneously providing false reassurances to ACMAR that its much-needed financing was progressing. He took advantage of his status as an attorney to engender the company's trust in him. With its reputation "in dire stake[s]" with its bankers and desperately "running out of time," ACMAR

[8] We apply standard 2.2(a) because improper conversion is a willful misappropriation of trust funds. (*In the Matter of McCarthy, supra*, 4 Cal. State Bar Ct. Rptr. at p. 377.)

was forced to sue Spivey and Esacove to recover its $2,070,000 deposit. And it never did obtain the $207,000,000 in capital that Esacove had agreed to raise.

Spivey's mitigation evidence, though strong, is not compelling enough to predominate over his more serious aggravation and protracted misconduct. We thus will not depart from the guidelines of standard 2.2(a), and we conclude that disbarment is warranted by the facts of this case in order to protect the public, the courts and the legal profession. Our recommendation is supported by comparable discipline cases involving misappropriation or conversion of significant sums. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067 [disbarment where attorney with 10 years of discipline-free practice misappropriated $29,000 from law firm and lied about it]; *Weber v. State Bar* (1988) 47 Cal.3d 492 [disbarment where attorney with 13 years of discipline-free practice misappropriated over $24,000 and attempted to conceal theft, displayed contempt for State Bar Proceeding and lack of remorse]; *In the Matter of Spaith* (1996) 3 Cal. State Bar Ct. Rptr. 511 [disbarment for $40,000 misappropriation, intentionally misleading client about funds, mitigation including emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar not sufficiently compelling].)

V. FORMAL RECOMMENDATION

We recommend that Reuben Alphonso Spivey be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

We further recommend that he be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the Supreme Court order herein.

Finally, we recommend that costs be awarded to the State Bar pursuant to section 6086.10, such costs being enforceable both as provided in section 6140.7, and as a money judgment.

VI. ORDER OF INACTIVE ENROLLMENT

Because the hearing judge recommended disbarment, he properly ordered that Spivey be involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4). The hearing judge's order of inactive enrollment became effective on June 4, 2011. Spivey has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.