

FILED APRIL 5, 2012

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of	)	Case No. 07-O-11504
	)	
LINDA NELL LOWNEY,	)	OPINION
	)	
A Member of the State Bar, No. 83670.	)	
_____	)	

I. SUMMARY

In 2005, Linda Lowney became romantically involved with a client. She was 54. The client was 85 and had emphysema and terminal cancer. Lowney married him shortly before he died, after filing a false confidential marriage license application. Upon the client's death, Lowney misappropriated his savings of nearly \$340,000.

The hearing judge found that Lowney obtained an interest adverse to her client, failed to comply with the law, maintained an unjust action, and committed acts of moral turpitude (misappropriation and filing a false marriage license). Applying standard 2.2(a),¹ the hearing judge recommended disbarment.

Lowney seeks review. She admits acquiring an interest adverse to her client when she obtained his savings without a written agreement. She also admits failing to follow the law by filing a false marriage license application. But Lowney denies committing any acts of moral

¹ This standard calls for disbarment for misappropriation unless the amount is insignificant or mitigation exists. Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

turpitude, including misappropriating her client's money. She requests a one-year actual suspension retroactive to March 4, 2011 (the hearing decision filing date), since this is her first discipline in 32 years of practice. The Office of the Chief Trial Counsel of the State Bar (State Bar) supports Lowney's disbarment.

We have independently reviewed the record (Cal. Rules of Court, rule 9.12) and considered the factual findings that Lowney has raised. (Rules Proc. of State Bar, rule 5.152(C) [factual errors not raised on review are waived].) We find Lowney culpable of failing to comply with the law, maintaining an unjust action, and moral turpitude for filing a false confidential marriage license application and misappropriating her client's savings. However, she is not culpable for acquiring the savings as an adverse interest since she actually *misappropriated* that money. Overall, the aggravating factors of multiple acts, harm, lack of insight or remorse, and overreaching greatly outweigh the mitigating factors of no prior discipline and a nominal showing of good character.

In simple terms, Lowney took financial advantage of a sick, elderly client – conduct the hearing judge rightly called “heartless and egregious.” Given Lowney's lack of insight, we agree with the hearing judge that “disbarment is the only adequate means of protecting the public from further wrongdoing.”

II. FINDINGS OF FACT²

A. LOWNEY'S RELATIONSHIP WITH HER CLIENT

At 81 years old, Thor Tollefsen hired Lowney to help him plan his estate. In 2002, Lowney prepared a pour-over will and a revocable trust (Tollefsen Trust) that distributed Tollefsen's property upon his death, including nearly \$340,000 held at Franklin Templeton

² The hearing judge's findings of fact are entitled to great weight on review. (Rules Proc. of State Bar, rule 5.155(A).) We adopt these findings, and summarize them with additional relevant facts from the record.

Investment (Franklin funds). The value of his assets, including real property, totaled between \$1,000,000 and \$1,500,000. Tollefsen named his sister, Solveig Bergsaker, as beneficiary, and if she did not survive him, her children Elisabeth and Anne Bergsaker, who were also designated as successor co-trustees. The Bergsaker family lived in Norway, where Tollefsen was born. Tollefsen signed the estate documents on July 30, 2002. In March and November 2005, Lowney prepared two amendments to the trust that did not involve the Franklin funds. In the second amendment, Tollefsen removed his sister as beneficiary and left the bulk of the estate to his nieces.

By August 2005, Tollefsen and Lowney had become romantically involved despite the 30-year age difference and Tollefsen's deteriorating health. Around this time, Lowney promised Tollefsen she would take care of him. Having already gifted Lowney at least \$10,000, Tollefsen decided to transfer the Franklin funds to Lowney, *as his attorney*, to use for his care. Lowney testified that Tollefsen wanted her to have the Franklin funds after he died to use for her retirement. But the hearing judge did not find this testimony credible and it was contrary to Tollefsen's directive in his trust that named the Bergsakers as beneficiaries.

On August 10, 2005, Tollefsen called his sister and two nieces in Norway for permission to transfer the Franklin funds to Lowney. Elisabeth credibly testified that she and her sister understood that the funds not used for Tollefsen's care would be returned to the trust. At Tollefsen's request, Elisabeth and Anne Bergsaker prepared, signed and sent this statement:

We hereby testify that we have no objections to Thor Tollefsen's suggestion that his *Franklin Funds* ought to be transferred to his attorney, Linda N. Lowney.
(Italics in original.)

On August 26, 2005, Tollefsen transferred the Franklin funds, valued at \$339,451.02, to two joint accounts he opened with Lowney. Lowney testified that before the transfer she *orally*

advised him to talk to another lawyer, but never put anything in writing. Again, the hearing judge rejected Lowney's testimony as not credible.

In the fall of 2005, Tollefsen's condition worsened. By October, he was receiving radiation for his cancer and could not walk without a walker. He needed constant care.

B. LOWNEY AND TOLLEFSEN MARRY

Near the end of 2005, Lowney told Tollefsen she wanted to get married. He agreed. But Lowney did not want her minor daughter or the Bergsakers to find out and suggested a confidential marriage. Lowney and Tollefsen filled out the confidential marriage license application, which required that the applicants had been living together. Under penalty of perjury, Lowney and Tollefsen *falsely* stated they were living together and filed the application. They were married under a confidential license that was issued to them on January 23, 2006.

By the fall of 2006, Tollefsen told his relatives in Norway that he was "fed up" with Lowney because he could not reach her and she did not take care of him as she had promised. In early January 2007, Tollefsen moved into a senior care facility.

On January 26, 2007, Lowney brought Tollefsen to his home for the weekend. The next day, he did not appear well and Lowney called an ambulance. She followed the ambulance to the emergency room but did not stay, claiming Tollefsen told her to go home. Lowney was not present when Tollefsen died the following day.

Tollefsen's neighbors notified the Bergsakers about their uncle's death. When Elisabeth and Anne Bergsaker came to the United States to attend to Tollefsen's affairs, they discovered his financial binders were missing from his home. The mortuary also informed them that Lowney had authorized Tollefsen's body to be cremated, which was contrary to his testamentary wishes set out in his will: "I donate my body to medical science. I do not want a

funeral, cremation or burial.” Lowney testified that Tollefsen changed his mind and wanted to be cremated, but she never amended his will. The hearing judge did not believe Lowney.

C. LITIGATION AFTER TOLLEFSEN’S DEATH

After Tollefsen died, several significant events occurred. The Franklin funds became Lowney’s sole property as a joint owner of the accounts. The Tollefsen Trust became irrevocable. The Bergsaker nieces became successor co-trustees and beneficiaries. And Lowney moved the Franklin fund money to her own accounts, explaining at trial: “I tried to put \$100,000 in different banks, so it would be insured, in case there was a bank failure.”

On February 5, 2007, a week after Tollefsen’s death, Lowney filed a petition to remove the Bergsaker nieces as co-trustees. The court denied Lowney’s petition on May 8, 2007, and imposed \$2,750.37 in sanctions against her for filing a bad faith action because she should have known she did not have standing to file the petition, and her request was contrary to Tollefsen’s intent. By this time, Anne and Elisabeth Bergsaker had filed a State Bar complaint against Lowney detailing her undue influence over their uncle.

Lowney filed a first amended spousal property petition on May 11, 2007, just three days after the court denied her petition to remove the Bergsakers. Among other claims, Lowney asserted she was an “omitted spouse” under the Probate Code.³ The Bergsakers filed a motion for summary judgment arguing that the confidential marriage was void since it was based on a false application. The court granted the motion. Lowney appealed, and on October 28, 2009, the First District California Court of Appeal affirmed the Bergsakers’ summary judgment order. The appellate court found the case “troubling,” and referred its opinion to the State Bar, stating:

³ Probate Code section 21610 provides that a share of the decedent’s estate goes to an omitted spouse, that is, where a decedent fails to provide in a testamentary instrument for a surviving spouse who married the decedent after the testamentary instrument was issued.

In particular, an inference may be drawn that appellant [Lowney], a licensed attorney, knowingly made a false representation on a recorded instrument in an attempt to take advantage of a client in order to secure a portion of his estate for herself. This case also raises implications regarding the laws as it pertains to the financial abuse of elders. Accordingly, we are forwarding a copy of this opinion to the California State Bar so that it may evaluate whether a disciplinary investigation of appellant is warranted. (*In re Estate of Tollefsen* (October 28, 2009, A123071) [nonpub. opn. at p. 7] fn. omitted.)

III. CONCLUSIONS OF LAW⁴

Count Two – Section 6106 [Moral Turpitude – Misappropriation]⁵

Section 6106 provides that an attorney’s “commission of any act involving moral turpitude . . . whether committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension.” Lowney is culpable of moral turpitude for misappropriating the Franklin funds. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020 [willful misappropriation of client funds sufficient to prove act of moral turpitude].)

When Lowney received the Franklin funds as Tollefsen’s attorney (August 26, 2005), she became a fiduciary. Where a fiduciary relationship exists, one must act with the utmost good faith for the benefit of the other party. (See *Worth v. State Bar* (1976) 17 Cal.3d 337, 341 [attorney who accepts fiduciary responsibility held to high standards of legal profession whether or not acting in capacity of attorney]; see also *Cox v. Delmas* (1893) 99 Cal. 104, 123 [“The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity”].)

In her fiduciary role, Lowney was obligated to handle the Franklin funds according to Tollefsen’s intent – that his estate pass to the Bergsakers. Lowney knew this intent since she

⁴ Count One alleges that Lowney acquired the Franklin funds as an interest adverse to Tollefsen in violation of rule 3-300 of the Rules of Professional Conduct. Tollefsen never intended for Lowney to acquire any interest in the Franklin funds; he wanted her to hold them in trust for his benefit. Since Lowney *misappropriated* the funds, as detailed in Count Two, we dismiss Count One with prejudice as not applicable to these facts.

⁵ Unless otherwise noted, all further references to “section(s)” are to the provisions of the Business and Professions Code.

drafted the estate documents and all the amendments. Lowney also admitted at trial that Tollefsen refused to add her as a beneficiary after their marriage. In fact, Lowney knew that the Bergsakers expected to receive the Franklin funds after Tollefsen's death: "They [the Bergsakers] signed that [written permission to transfer Franklin funds to Lowney] knowing they would take it away from me, because they put 'attorney.'" Despite this knowledge, Lowney misappropriated the Franklin funds after Tollefsen died, and did not release them to the Bergsakers for nearly four years.

Lowney argues that she did not have to hold the Franklin funds in trust for the Bergsakers since she was acting as Tollefsen's "girlfriend" when she received the money in August 2005. But Lowney signed a trial stipulation stating that the money came to her "as Tollefsen's attorney." She never sought to be relieved as counsel and continued to act as Tollefsen's attorney through November 2005, when she prepared his second amendment to the trust. We reject Lowney's argument and find that she was required to hold the money in trust.

We also reject Lowney's claim that her attorney in the probate litigation, Larry Padway, forced her to withdraw money from the Franklin funds account. She testified that Padway "insisted that [she] take the monies out of the Franklin Fund so that he could be paid to represent her." But Lowney moved the money to her own accounts immediately after Tollefsen died and before she hired Padway. At trial, Lowney never asked Padway to confirm or deny her claim and no other evidence supports it.

Count Three – Section 6068, subdivision (a) [Failure to Comply with Laws]

Lowney and Tollefsen filed a confidential marriage license application that falsely stated they had had lived together as husband and wife. Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and the laws of California and the United States. California Penal Code section 115 states that it is a crime to offer a false document for filing in a

public office. Lowney admits that she violated the law by filing the false application but justifies her conduct because the law governing confidential marriages is “stupid,” “obsolete,” and “irrelevant.” She offered this explanation at trial:

Q.: (State Bar Prosecutor) Didn’t you think it was wrong to attest and affirm that you were living together as husband and wife when it wasn’t true?

A.: (Lowney) No, I didn’t think it was wrong. I thought it was stupid that that was there. I think people should be able to have a confidential marriage for whatever reason they need to have it.

Q.: (State Bar Prosecutor) Okay. And you signed the document under penalty of perjury. Is that correct?

A.: (Lowney) Yes, and I think it’s stupid.

We find Lowney culpable of violating section 6068, subdivision (a).

Count Four – Section 6106 [Moral Turpitude – Offering False Marriage License for Filing]

Lowney committed an act of moral turpitude, dishonesty or corruption by filing a false marriage license application. However, this misconduct also forms the basis for Count Three above – failure to comply with the law (violation of § 6068, subd. (a)). Since section 6106 supports the same or greater discipline as section 6068, subdivision (a), we rely on the section 6106 violation to determine the level of discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

Count Five – Section 6068, subdivision (c) [Maintaining an Unjust Action]

Lowney is culpable of maintaining an unjust action for filing the petition to remove the Bersakers as co-trustees of the Tollefsen Trust. Since she was not named as a settler, trustee, or

beneficiary of the trust, she lacked standing to file the petition. Further, as the probate court noted in its sanctions ruling, Lowney's request was contrary to Tollefsen's intent.⁶

IV. AGGRAVATION AND MITIGATION

Lowney must establish mitigation by clear and convincing evidence (std. 1.2(e)). The State Bar has the same burden to prove aggravation. (Std. 1.2(b).)

A. FOUR FACTORS IN AGGRAVATION

The hearing judge found three factors in aggravation: multiple acts of misconduct, significant harm, and lack of insight. We agree. However, we find the additional aggravating factor of overreaching.

1. Multiple Acts (Std. 1.2(b)(ii))

Lowney committed multiple acts of misconduct over an extended period of time, which greatly aggravates this case.

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

Lowney caused significant harm to her client, the public and the administration of justice. She cremated Tollefsen's body against his written directive and thwarted his intent to pass his estate to the Bergsakers. In fact, Ann and Elisabeth traveled back and forth from Europe to the United States for nearly four years to litigate estate issues that Lowney raised. They spent over \$600,000 in attorney fees and costs but recovered only \$500,000 in a recent settlement. These unnecessary and protracted legal proceedings were time-consuming, costly, and burdensome for the Bergsakers and the legal system.

⁶ The remaining counts (Six, Seven, and Eight) concerned Lowney's litigation filings after Tollefsen's death and were dismissed for lack of evidence. Neither Lowney nor the State Bar challenges these dismissals on review, and we affirm them.

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

The hearing judge correctly found that Lowney “displayed indifference to her misconduct . . . [and] she does not appreciate the seriousness of her misconduct.” Lowney has not acknowledged that filing a false document in a public office constitutes attorney misconduct. Instead, she argues that the law should not apply. And she views herself as the victim in these proceedings despite depriving the Bergsakers of their rightful inheritance for nearly four years. While Lowney need not be falsely penitent, the law “does require that [she] accept responsibility for [her] acts and come to grips with [her] culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) We assign substantial weight to this factor because it demonstrates that Lowney does not understand that her conduct is wrong, making her a danger to the public.

4. Bad Faith, Dishonesty, Concealment, or Overreaching (Std 1.2(b)(iii))

Standard 1.2(b)(iii) provides that misconduct surrounded by bad faith, dishonesty, concealment, or overreaching is aggravating. Lowney engaged in gross overreaching with Tollefsen, a client who was elderly, sick, and alone. Lowney did not provide disinterested advice to him about transferring the Franklin funds to her since she wanted the money for herself. And her romantic involvement with him clouded his ability to make objective financial decisions. Lowney preyed on Tollefsen’s insecurities when she persuaded him to sign a false marriage license application and ultimately transfer the Franklin funds to her. This transfer made it easy for Lowney to misappropriate the money after Tollefsen’s death. For these reprehensible acts of overreaching, we assign the greatest weight in aggravation.

B. TWO FACTORS IN MITIGATION

In mitigation, the hearing judge found that Lowney had never been disciplined and that she presented some evidence of good character. We agree.

1. No Prior Discipline (Std 1.2(e)(i))

Lowney has practiced law without discipline for 32 years. Normally, we would assign significant mitigating weight to this factor. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49 [17 years of discipline-free practice is “significant” mitigation].) However, the weight given is diminished due to the serious nature of Lowney’s misconduct. (Std. 1.2(e)(i) [standard provides mitigation credit for “absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious”].)

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

Lowney presented 15 character witnesses (mostly long-term friends, former clients or tenants) who testified to her honesty and integrity. To qualify for mitigation credit, the standard calls for “an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member’s misconduct.” Since most of Lowney’s witnesses knew little about her “marriage” to Tollefsen or the misconduct charges, she is entitled to only nominal mitigating weight. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [seven witnesses and 20 support letters not “significant” mitigation because witnesses unfamiliar with details of misconduct]; *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [character evidence entitled to limited mitigation where declarants not fully aware of misconduct].)

Overall, the factors in aggravation substantially outweigh those in mitigation.

V. LEVEL OF 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.) We look to the standards and the decisional law to determine the fair discipline. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 913.)

Two standards apply here. Standard 2.3 calls for actual suspension or disbarment for an act of moral turpitude. Standard 2.2(a) provides for disbarment for willful misappropriation unless the amount is insignificant or compelling mitigation predominates, in which case a one-year actual suspension is warranted. We acknowledge that standard 2.2(a) is “a guideline rather than . . . an inflexible rule.” (*Lipson v. State Bar*, *supra*, 53 Cal.3d at p. 1022.) But misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656 [misappropriation is particularly serious ethical violation because it breaches basic notions of honesty and endangers public confidence in legal profession].) Lowney misappropriated nearly \$340,000 – a significant amount. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of \$1,355.75 deemed significant].) And she did not present compelling mitigation when weighed against her misconduct and aggravation. Therefore, it is appropriate to apply standard 2.2(a).

We also look to case law to guide our disciplinary analysis. Our research reveals that in similar cases where attorneys have taken advantage of clients to misappropriate entrusted funds, disbarment has been the proper discipline. (*Kelly v. State Bar*, *supra*, 45 Cal.3d 649 [disbarment for \$20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party with no prior record in mitigation and no aggravation]; *In re Abbott* (1977) 19 Cal.3d 249, 253-254 [disbarment for \$29,500 misappropriation in a single client matter with mitigation for 13 years discipline-free practice and emotional problems undergoing treatment]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 [disbarment for \$40,000 misappropriation, intentionally misleading client with mitigation for emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar].)

This case demonstrates the tragic results that happen when an attorney's greed prevails over fiduciary responsibilities to a client. Lowney's overreaching misconduct toward Tollefsen is simply inexcusable, despite her 32 years of discipline-free practice. Where an attorney uses "undue influence to acquire a valuable asset from an aged and ultimately helpless client," disbarment is the proper remedy even without any prior record of discipline. (*Eschwig v. State Bar* (1969) 1 Cal.3d 8, 18.) Given Lowney's grave misconduct and present lack of insight, we recommend that she be disbarred.⁷

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Linda Nell Lowney be disbarred and that her name be stricken from the roll of attorneys.

We also recommend that she must 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 calendar days, respectively, after the effective date of the Supreme Court order herein. Failure to do so may result in disbarment or suspension.

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

VII. ORDER

The hearing department's order that Linda Nell Lowney be enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective March 7, 2011,

⁷ We deny Lowney's request to take judicial notice of Elisabeth Bergsaker's 2007 deposition. This testimony was available at the time of trial and is not a proper subject for judicial notice on review. (Rules Proc. of State Bar, rule 5.156(B) [judicial notice on review proper for orders and decisions of Supreme Court or State Bar Court or other facts occurring after trial ended relating to restitution or rehabilitation].)

will continue, pending the consideration and decision of the Supreme Court on this recommendation.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.