

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos. 07-O-13699-RAH (07-O-14312)
)	
JON MICHAEL SMITH,)	
)	DECISION AND ORDER OF
Member No. 166458,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
A Member of the State Bar.)	
_____)	

I. Introduction

In this default disciplinary matter, respondent **Jon Michael Smith** is charged with multiple acts of professional misconduct in two client matters, including (1) failing to pay client funds promptly; (2), misappropriating settlement funds (\$24,667); (3) failing to communicate with client; and (4) threatening criminal charges to obtain an advantage in a civil dispute.

The court finds, by clear and convincing evidence, that respondent is culpable of the alleged misconduct. In view of respondent's serious misconduct and the evidence in aggravation, the court recommends that respondent be disbarred from the practice of law and be ordered to make restitution.¹

¹ The Rules of Procedure of the State Bar of California were amended effective January 1, 2011. However, the former Rules of Procedure of the State Bar apply to this proceeding because injustice would otherwise result. (Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 3.)

II. Pertinent Procedural History

On October 8, 2010, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address. The NDC was returned as undeliverable. Respondent did not file a response.

On December 14, 2010, respondent's default was entered. However, on April 5, 2011, the court on its own motion vacated the default and submission because the default was prematurely entered by eight days. At the same time, the court provided respondent with a new opportunity to file a response to either the NDC or the State Bar's motion for entry of default. Respondent did neither. Consequently, respondent's default was entered on June 23, 2011, and the matter was submitted for decision on July 14, 2011.²

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Former Rules Proc. of State Bar, rule 200(d).)

Respondent was admitted to the practice of law in California on December 9, 1993, and has since been a member of the State Bar of California.

A. Case No. 07-O-13699 (The Hagan Matter)

In or about September 2002, Sarah Hagan ("Hagan") employed respondent to represent her in a personal injury matter arising from an automobile accident ("the automobile accident"). Respondent agreed to provide legal services to Hagan on a contingency fee basis.

² The State Bar's December 27, 2010, discipline brief contained several errors, albeit inconsequential (e.g., respondent's date of admission is not "June 8, 1992" (p. 3) and Business and Professions Code section 6068, subdivision (i), was not charged in the NDC (pp. 4-5)).

Hagan's medical provider, UFCW Northern California Trust Fund ("UFCW"), paid Hagan's medical bills arising out of the automobile accident.

In or about October 2002, UFCW sent respondent an agreement to subrogate, reimburse and for lien ("the agreement"), requesting that Hagan sign the agreement in order for UFCW to process her medical bills. On or about October 30, 2002, Hagan and respondent signed the agreement. In or about November 2002, respondent sent the executed agreement to UFCW.

On or about November 19, 2002, UFCW sent a letter to respondent advising him that the total benefits paid to date on Hagan's claim amounted to \$52,494.93. UFCW requested respondent to notify UFCW when a settlement had been reached.

Between November 19, 2002 and May 10, 2006, UFCW sent respondent several letters advising him of the total benefits paid to date and requesting that respondent advise UFCW when a settlement had been reached. As of May 10, 2006, the total benefits paid by UFCW amounted to \$60,116.91. Respondent received the letters and knew that UFCW held a lien against Hagan's recovery in the amount of \$60,116.91.

In or about January 2003, respondent settled the first of the claims arising out of the automobile accident.

On or about January 17, 2003, Hagan executed a release of claims, accepting the \$15,000 settlement for the first claim.

On January 31, 2003, respondent received the insurance settlement proceeds for Hagan in the amount of \$15,000.

In or about February 2003, respondent deposited the \$15,000 in settlement funds into the client trust account maintained by respondent at Union Bank of California.

In or about February 2003, respondent provided Hagan with \$2,000 as an advance on her portion of the settlement funds.

In or about September 2003, respondent settled the second, and final, claim arising out of the automobile accident.

On September 18, 2003, respondent received the insurance settlement proceeds for Hagan in the amount of \$25,000.

On or about September 23, 2003, Hagan signed a Release of Claims, accepting the \$25,000 settlement of the second claim.

On or about September 30, 2003, respondent deposited the \$25,000 in settlement funds in another client trust account at Union Bank of California.

In or about October 2003, respondent informed Hagan that she would receive \$15,000 as her share of the settlement proceeds and the remainder of the funds would be used to pay her medical providers and respondent's attorney's fee. Hagan agreed to this disposition of her matter.

Between approximately November 2003 and the end of 2004, Hagan repeatedly called respondent's office to find out when she would receive her settlement funds. Although respondent did not return her calls, a member of his office staff advised Hagan that respondent was in the process of negotiating with UFCW for a reduction of the lien and this was delaying Hagan's receipt of her settlement funds.

In or about January 2005, respondent represented to Hagan that he was negotiating with UFCW for a reduction of the lien. Respondent was not in fact negotiating with UFCW and did not thereafter enter into any discussions with UFCW about a proposed compromise.

In or about April 2005, respondent advised Hagan that he wanted to send \$21,000 to UFCW, \$6,000 to various smaller medical providers and collect the remainder of the settlement amount as his attorney fee. Hagan refused to authorize this disposition noting that when she authorized settlement in her matters, respondent advised her that she would receive \$15,000 as

her share of the settlement. Respondent advised Hagan that he would withdraw as her attorney if she did not allow him to send \$21,000 to UFCW. Hagan agreed to respondent's withdrawal, requesting that he return all her paperwork and provide her with the \$38,000 in settlement funds. Respondent then stated that he would not withdraw and would instead negotiate with UFCW on Hagan's behalf. Subsequently, respondent did not contact Hagan.

Between June and October 2005, Hagan called respondent's office repeatedly and left numerous messages. Her calls were not returned.

On October 25, 2005, Hagan sent respondent a letter inquiring as to the status of her case. Respondent received the October 25, 2005 letter. Respondent did not respond to the letter or otherwise contact Hagan.

On January 6, 2006, Hagan sent respondent a certified letter informing him that she had been trying to reach him by telephone and asking respondent to contact her within seven days. Respondent received the January 6, 2006 letter. Respondent did not respond to the letter or otherwise contact Hagan.

On June 15, 2006, Hagan filed a lawsuit against respondent in Fresno County Superior Court, case No. 06 CE CG 01947. On July 28, 2007, respondent was successfully served by Hagan's process server. On November 12, 2008, the court awarded Hagan a judgment in the amount of \$38,000 plus court costs.

In or about May 2007, Hagan was able to locate an alternative phone number for respondent and speak to him regarding her case. Respondent claimed that he paid Hagan's medical bills. When Hagan informed him that her medical bills were not paid, respondent alleged that a member of his office staff lied to him about working on Hagan's case. Respondent then told Hagan that he would call her once he spoke to the office staff member in question. Subsequently, respondent did not call Hagan or otherwise contact her.

To date, respondent has not paid any portion of the \$38,000 remaining in settlement amount to Hagan, UFCW or any other medical provider.

Respondent was entitled to no more than 33-1/3% of Hagan's total settlement of \$40,000, plus costs incurred, if any. Respondent did not incur any costs. Accordingly, respondent was entitled to no more than \$13,333³ of the settlement funds.

After providing Hagan with the initial disbursement of \$2,000, respondent did not disburse the remaining \$24,667 (\$40,000 - \$13,333 - \$2,000) in settlement funds to either Hagan, UFCW or any other medical provider.

Conclusions of Law

Count 1: Failure to Promptly Pay Client Funds (Rules Prof. Conduct, Rule 4-100(B)(4))⁴

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver any funds or properties in the possession of the attorney which the client is entitled to receive.

By failing to pay any portion of the remaining \$38,000 settlement funds to Hagan, UFCW, or any other medical provider, respondent willfully failed to promptly pay or deliver to the client, as requested by the client, funds which the client is entitled to receive, in willful violation of rule 4-100(B)(4).

Count 2: Moral Turpitude (Bus. & Prof. Code, § 6106)⁵

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

³ Contrary to the allegation that respondent was entitled to no more than \$13,320, 33-1/3% of \$40,000 is \$13,333.

⁴ References to rules are to the Rules of Professional Conduct, unless otherwise indicated.

⁵ References to sections are to the provisions of the Business and Professions Code.

By failing to disburse the \$24,667 to Hagan, UFCW or anyone on Hagan's behalf, respondent misappropriated \$24,667 from Hagan's settlement funds. Thus, by misappropriating \$24,667 from Hagan's settlement funds and by repeatedly misrepresenting to Hagan that he was involved in negotiations to compromise UFCW's lien, respondent committed acts involving moral turpitude, in willful violation of section 6106.

Count 3: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By failing to promptly respond to Hagan's numerous telephone calls and letters, respondent failed to respond to a client's reasonable status inquiries in a matter in which he had agreed to provide legal services, in willful violation of section 6068, subdivision (m).

B. Case No. 07-O-14312 (The Lawson Matter)

On or about September 6, 2007, Candace Lawson ("Lawson") purchased a Rolex watch from Melrose Jewelers through the Melrose Jewelers' website. Lawson used her American Express card to make the purchase. A charge of \$3,225 was placed on the American Express card.

Upon receipt of the watch, Lawson noticed that the watch was damaged. She contacted Melrose Jewelers and requested a refund for the watch. Melrose Jewelers declined to refund her. Lawson contacted American Express and filed a chargeback on her American Express card in the amount of \$3,225.

On October 15, 2007, Lawson received a letter from respondent stating:

"You purchased a watch online through Ebay for \$3225 and after making a change of one link, the watch was resent and signed for, and you used a credit card, and then

filed a chargeback with the credit card company, causing my client to never receive payment.

“You are hereby notified that making a purchase and then cancelling payment is a form of interstate credit card fraud, and can result in the filing of felony charges against you.

“If you do not remove the chargeback within 3 days, my client will be left with no alternative but to file criminal charges against you. I can inform you that we have successfully prosecuted others for the same type of transaction, and some are now doing jail time for having bought a watch using fraudulent transaction to obtain the merchandise.”

Conclusions of Law

Count 4: Threatening Criminal Charges (Rules Prof. Conduct, Rule 5-100(A))

Rule 5-100(A) provides that an attorney must not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

By sending Lawson a letter demanding that she remove the chargeback or face criminal charges, respondent willfully threatened to present criminal charges in order to obtain an advantage in a civil dispute, in willful violation of rule 5-100(A).

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,⁶ stds. 1.2(e) and (b).)

A. Mitigation

No mitigation was submitted into evidence. (Std. 1.2(e).)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) On November 3, 2009, respondent was suspended for one year, stayed, and placed on probation for two years with an

⁶ Future references to standard(s) or std. are to this source.

actual suspension of 90 days for misconduct involving mishandling of settlement funds with gross negligence in one client matter. (Supreme Court case No. S176250; State Bar Court case No. 05-O-05201.)

Respondent committed multiple acts of wrongdoing by misappropriating settlement funds, by failing to communicate with his client and by threatening criminal charges to obtain an advantage in a civil dispute. (Std. 1.2(b)(ii).)

Respondent's misappropriation of \$24,667 harmed significantly his client. (Std. 1.2(b)(iv).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He has yet to reimburse his client.

Respondent's failure to cooperate with the State Bar before the entry of his default, including filing an answer to the NDC, is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.2, 2.3, 2.4, 2.6, and 2.10 apply in this matter.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety.

(*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Standard 1.7(a) provides that if the member has a record of one prior imposition of discipline, the degree of discipline in the current proceeding should be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

Standard 2.2(a) provides that culpability of willful misappropriation of entrusted funds must result in disbarment, unless the amount is insignificantly small or if the most compelling mitigating circumstances clearly predominate. Then the discipline must not be less than a one-year actual suspension, irrespective of mitigating circumstances. Here, respondent's misappropriation of \$24,667 is significant.

Standard 2.2(b) provides that the commission of a violation of rule 4-100, including commingling, must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

Standard 2.3 provides that culpability of an act of moral turpitude, fraud or intentional dishonesty must result in actual suspension or disbarment.

Standard 2.4(b) provides that culpability of a member's willful failure to perform services and willful failure to communicate with a client must result in reproof or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Finally, standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges disbarment. The court agrees.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Here, respondent had flagrantly breached his fiduciary duties to his client by taking the client funds without any explanation. And, no compelling mitigation has been shown.

Respondent's misappropriation weighs heavily in assessing the appropriate level of discipline. The "misappropriation in this case . . . was not the result of carelessness or mistake; [respondent] acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that [respondent] intended to permanently deprive his client of her funds." (*Grim v. State Bar Bar* (1991) 53 Cal.3d 21, 30.) "It is precisely when the attorney's need or desire for funds is greatest that the need for public protection afforded by the rule prohibiting misappropriation is greatest." (*Id.* at p. 31.)

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The misappropriation of client funds is a grievous breach of an attorney’s ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (See *Grim v. State Bar, supra*, 53 Cal.3d 21.) The court is seriously concerned about the possibility of similar misconduct recurring. Respondent has offered no indication that this will not happen again. Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding.

Respondent “is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law.” (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) His continued ability to practice law would place the public in peril. Therefore, based on the severity of the offense, the serious aggravating circumstances and the lack of any mitigating factors, the court recommends disbarment.

VI. Recommendations

Accordingly, the court recommends that respondent **Jon Michael Smith** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

A. Restitution

It is also recommended that respondent make restitution to the following client within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 5.136):

1. To **Sarah Hagan** in the amount of \$24,667 plus 10% interest per annum from April 1, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Sarah Hagan, plus interest and costs, in accordance with Business and Professions Code section 6140.5). Respondent must furnish satisfactory proof of payment thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

B. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.⁷

C. Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and former rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: August _____, 2011

RICHARD A. HONN
Judge of the State Bar Court

⁷ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)