

FILED MAY 5, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	No. 08-H-10937
)	
ANDREW JAMES PRENDIVILLE,)	OPINION ON REVIEW AND
)	ORDER
A Member of the State Bar.)	
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Andrew James Prendiville requests review of a hearing judge’s recommendation that he be suspended for two years and until he provides proof of his rehabilitation due to his failure to comply with the conditions of a private reproof. Prendiville asserts his misconduct warrants no more than a 30-day suspension. The State Bar requests that we adopt the hearing judge’s recommendation. Before oral argument, we notified the parties that we were considering whether a disbarment recommendation is appropriate under standard 1.7(b),¹ which provides for “disbarment unless the most compelling mitigating circumstances clearly predominate” when an attorney has a record of two or more impositions of discipline.

This is Prendiville’s fourth disciplinary proceeding. For approximately a decade, he repeatedly committed ethical violations involving his client trust account (CTA). Despite receiving an actual suspension and completing the State Bar’s Client Trust Accounting School twice, his ethical transgressions continued. In the present case, during a two-year period he disregarded a reproof condition imposed to rectify his recurring mishandling of his CTA. Prendiville’s repeated encounters with attorney discipline have neither rehabilitated him nor

¹Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to “standard(s)” are to this source.

deterred him from committing further misconduct. Based on our independent review of the record (Cal. Rules of Court, rule 9.12), we find that the absence of compelling mitigation, the repetitive nature of his wrongdoing and Prendiville's apparent indifference to prior disciplinary orders compel the conclusion that disbarment is appropriate under standard 1.7(b).

I. PROCEDURE ON REVIEW

Prendiville filed his request for review of the hearing judge's decision on July 17, 2009. After the parties completed briefing and before oral argument, we issued an order notifying the parties that we were considering a disbarment recommendation under standard 1.7(b). We provided the parties the opportunity to file supplemental briefs to address the applicability of the standard, including whether in this case "the most compelling mitigating circumstances clearly predominate." (Std. 1.7(b).) Both parties filed supplemental briefs.

A disciplinary hearing before the State Bar Court is an adversarial proceeding where the State Bar has the burden of proving misconduct by "clear and convincing" evidence. (Rules Proc. of State Bar, rule 213.) We have independently reviewed the record by this standard of proof. (*In re Morse* (1995) 11 Cal.4th 184, 207.) Our duty to conduct independent review authorizes us to increase the recommended discipline if we deem it appropriate, regardless of whether the State Bar appealed. (*Ibid.*) We find it appropriate in this case.

II. FACTS

A. Prendiville's Prior Disciplinary Record

Prendiville was admitted to practice in California on May 30, 1980, and has been disciplined on three prior occasions. In the first disciplinary matter, in January 1996, the Supreme Court placed him on probation for one year with a one-year stayed suspension for misconduct in six cases between 1993 and 1994. Four of those cases involved Prendiville's misdemeanor convictions for battery, abuse of a cohabitant, driving under the influence and

other traffic offenses. The remaining cases involved his repeated commingling of personal funds in his CTA, misappropriating client funds and issuing checks against insufficient funds.

Prendiville also failed to cooperate with the State Bar's investigation in one of the cases.

In his second disciplinary matter, in April 2000, the Supreme Court placed Prendiville on probation for three years and suspended him for six months after he committed misconduct in six additional cases between 1994 and 1996. In one case, Prendiville failed to perform competently, and in the remaining cases, he repeatedly commingled personal funds and/or failed to maintain client funds in his CTA. Prendiville was still on probation from his first disciplinary case when he committed the misconduct relating to his CTA.

Despite two prior disciplinary cases and completion of the State Bar's Client Trust Accounting School, Prendiville continued to commit CTA violations. In his third disciplinary matter, he stipulated in June of 2004 to a private reproof for repeatedly commingling and failing to maintain client funds in trust between 2002 and 2003. Again, this misconduct occurred while he was on probation from his second disciplinary matter. As a condition of his private reproof, Prendiville agreed to again complete the State Bar's Client Trust Accounting School.

B. Prendiville's Current Misconduct

The present disciplinary proceeding is based on Prendiville's failure to comply with the terms of his private reproof. He was required to comply with the reproof conditions for a period of two years from July 21, 2004, the effective date of the reproof order.² The relevant conditions of Prendiville's reproof were as follows:

²The Office of Probation sent Prendiville correspondence indicating August 19, 2004, as the effective date of his reproof. In this proceeding, the State Bar and Prendiville stipulated that the reproof order became effective on the date it was filed, June 30, 2004. Both dates are incorrect. The reproof order specifically states it "shall be effective 15 days after service" Since it was served by mail on June 30, 2004, it became effective on July 21, 2004. (Code Civ. Proc., § 1013, subd. (a).)

1) "[S]ubmit written quarterly reports to the Probation Unit on each January 10, April 10, July 10, and October 10 of the condition period attached to the reprobation."

2) "[A] final report . . . is due . . . no later than the last day of the condition period."

3) "With each Quarterly Report, [Prendiville] will provide a written statement by a Certified Public Accountant (CPA) which will certify that all of [Prendiville's] client trust accounts have been analyzed by the CPA and that it has been determined that each of the accounts have [sic] been reconciled and properly maintained."

In July 2004, the Office of Probation sent Prendiville a letter explaining the conditions of his private reprobation and reminding him that he was required to provide quarterly reports and CPA certifications. Prendiville testified that he understood the July 2004 letter because "the language [wa]s plain and understandable."

In August 2006, the Office of Probation called Prendiville and instructed him to submit his outstanding July 2006 quarterly report, a final report and the CPA certifications. Despite this request, he did not submit any additional documents.

Prendiville admits that he submitted his October 2005 quarterly report late, he did not submit a July 2006 quarterly report, he did not submit a final report, and he did not provide a single CPA certification. Also, Prendiville did not timely submit his quarterly reports for January 2005, July 2005, January 2006 and April 2006.

III. DISCUSSION

A. Culpability

Prendiville failed to submit any of the required CPA certifications, five out of eight of his probation reports were untimely, and he completely failed to submit one quarterly report and the

final report. Thus, we find that he willfully violated the Rules of Professional Conduct, rule 1-110³ by not complying with the conditions of his private reproof.

B. Aggravation

Prendiville's repeated failure to comply with several reproof conditions evidences multiple acts of misconduct. (Std. 1.2(b)(ii); see *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76 [violating three separate conditions of probation constituted multiple acts of wrongdoing].)

As discussed above, Prendiville has three prior records of discipline. This is a significant aggravating circumstance that weighs heavily on the outcome of this case. (Std. 1.2(b)(i).) His misconduct has spanned from 1993 to 2006, and he has been on disciplinary probation for six out of the last fifteen years.

C. Mitigation

We agree with the hearing judge that Prendiville cooperated with the State Bar by entering into a stipulation as to facts material to culpability. This entitles Prendiville to some mitigation credit. (Std. 1.2(e)(v); *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521 [stipulation to facts and culpability is mitigating].) However, the stipulated facts were not difficult to prove and therefore we do not consider his cooperation to be "compelling."

We depart from the hearing judge's finding that Prendiville is entitled to significant mitigation because he attempted in good faith to comply with his reproof conditions. (Std. 1.2(e)(ii).) In order to establish good faith as a mitigating circumstance, Prendiville must clearly and convincingly prove that his beliefs were honestly held and reasonable. (*In the Matter of*

³This rule requires that "A member shall comply with the conditions attached to public or private reprovals" All further references to "rule(s)" are to this source.

Thomson (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 976.) He testified he believed the requirement to provide CPA certifications “was only triggered if [he] had client funds.”

Prendiville asserts he did not possess any client funds during the entire reprobation period and thus was not required to provide the certifications. His belief is unreasonable in light of the following facts: 1) the reprobation order provided no exception to the requirement to provide CPA certifications; 2) Prendiville received and understood the July 2004 letter from the Office of Probation instructing him to provide quarterly CPA certifications beginning October 2004; and 3) in August 2006, a probation deputy instructed Prendiville by telephone to provide the outstanding CPA certifications. At the time of trial, Prendiville still had not submitted a single CPA report nor provided any explanation for this significant delinquency.

Prendiville also testified he believed he was not required to submit a quarterly report for July 2006 and a final report. He bases this belief on a purported telephone call in June 2006 with the probation deputy monitoring his file at the time. Prendiville claims he asked the probation deputy whether he was required to do anything else regarding his private reprobation and “she told me nope everything is done.” Even if we ignore the fact that this conversation was not reflected in the Office of Probation’s activity log maintained in Prendiville’s reprobation file, we nevertheless conclude his belief is unreasonable. The reprobation order provided no exception to the requirement to submit quarterly reports covering the entire reprobation period and a final report. Prendiville submitted multiple quarterly reports and each of these reports indicated on the front page when his final report was due. His purported conversation occurred prior to the due date for his final report and it is not credible that the probation deputy would have waived the final report without explanation. Finally, Prendiville’s belief regarding his outstanding reports should have been dispelled after a different probation deputy reminded him in the August 2006 telephone call to submit the July 2006 quarterly report and final report.

IV. LEVEL OF DISCIPLINE

The issue before us is the appropriate degree of discipline based on the facts unique to this case. We first review the applicable standards. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.) Standard 2.9 specifically addresses Prendiville's type of misconduct and calls for suspension when a member willfully violates rule 1-110. Due to Prendiville's extensive record of prior discipline, we also must consider standard 1.7(b), which provides for "disbarment unless the most compelling mitigating circumstances clearly predominate" when an attorney has a record of two or more impositions of discipline. Although Prendiville cooperated with the State Bar, this mitigating factor is neither compelling nor predominant.

Absent the most compelling mitigating circumstances, disbarment is the presumptive discipline. To avoid rigidly applying standard 1.7(b), we must consider the facts underlying the prior discipline. Ordinarily, we will recommend disbarment if the current misconduct is a repetition of offenses for which the attorney has previously been disciplined. (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 607.) We find such repetition here.

Prendiville contends there is no repetition or common thread between the present matter and his prior misconduct because this is the first time he violated any terms of probation. We disagree. One of the conditions Prendiville violated was directly related to his 10-year history of committing trust account violations. Each of his prior disciplinary matters involved his unethical use of his CTA by commingling, misappropriating client funds or failing to properly maintain client funds in trust. Despite completion of the State Bar's Client Trust Accounting School, Prendiville's unethical use of his CTA continued unabated. Even after completing the school a second time, he failed to file a single CPA certification required under the terms of a disciplinary order. In light of his repeated trust account violations, the requirement to provide a CPA certification from an independent third party was necessary to ensure that he was no longer

abusing his CTA. Prendiville completely flouted a condition directly related to his inability to properly manage a CTA. This inability has been the basis for Prendiville's three prior disciplinary matters. Therefore, we find a common link between the current misconduct and his prior discipline.

Prendiville's repetition of misconduct over a prolonged period suggests that he is either "unwilling or unable" to conform his behavior to the rules of professional conduct. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 111.) He has been on disciplinary probation three times and has committed additional misconduct during all three probationary periods. This raises grave concern that he is likely to commit future wrongdoing and is not a good candidate for additional probation. As a result, we find application of standard 1.7(b) appropriate and recommend Prendiville's disbarment. (*Morgan v. State Bar, supra*, 51 Cal.3d at p. 607 [std. 1.7(b) applied where four priors demonstrated pattern of professional misconduct]; *Barnum v. State Bar, supra*, 52 Cal.3d at pp. 111, 113 [std. 1.7(b) applied where no mitigation and attorney unwilling or unable to learn from past mistakes]; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841 [std. 1.7(b) applied where current offenses plainly echo four prior records and provide "disturbing repetitive theme"]; compare *Arm v. State Bar* (1990) 50 Cal.3d 763, 779-780 [decline to apply std. 1.7(b) where compelling mitigating circumstances predominate and absence of common thread between current and past discipline].)

V. RECOMMENDATION

Therefore, we recommend that Andrew James Prendiville be disbarred 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 effective date of the Supreme Court order herein.

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

VI. ORDER OF INACTIVE ENROLLMENT

Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c), Andrew James Prendiville, State Bar Number 93003, is ordered enrolled inactive effective 15 days after service of this order.

REMKE, P. J.

We concur:

EPSTEIN, J.

PURCELL, J.