

FILED MAY 9, 2012

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of	)	Case No. 08-O-11755
	)	
THOMAS M. WITTE,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 107542.	)	
_____	)	

BY THE COURT:*

I. SUMMARY

In this case, we examine Thomas M. Witte's conduct leading up to a probate court's 2008 order declaring him to be a vexatious pro per litigant.¹ In an action seeking attorney fees for representing an executor in a probate case, Witte filed unmeritorious pleadings, engaged in frivolous delay tactics, and attempted to re-litigate issues that had been decided or were not relevant to his claim for fees. The probate court found that his "behavior is not likely to cease without intervention by the court," and ruled that he was a vexatious litigant.

As a result of this ruling, the Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges in 2010, alleging that Witte: (1) committed acts of moral turpitude; (2) failed to maintain respect due to the court; and (3) failed to maintain just or legal

* Before Remke, P. J., Epstein, J., and Purcell, J.

¹ California Code of Civil Procedure section 391, subdivision (b)(3) defines "vexatious litigant" as one who: "In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

proceedings. The hearing judge concluded that Witte was culpable of each count, found five factors in aggravation and none in mitigation, and recommended disbarment.

Witte seeks review. He challenges the probate court's final substantive rulings on the estate issues, which are irrelevant to these proceedings. He also asserts the meritless claim he has alleged for years – that the probate case participants conspired to defraud the estate. Finally, he claims he did not receive a fair discipline trial. The State Bar supports Witte's disbarment.

After independent review of the record (Cal. Rules of Court, rule 9.12), we find Witte culpable of moral turpitude and dismiss the remaining charges as duplicative. Witte was suspended from the practice of law in 2006 as a result of his prior discipline, and has failed to show his fitness to practice law at standard 1.4(c)(ii) hearings² held in 2009 and 2010.

In sum, Witte engaged in a pattern of misconduct – throughout his prior discipline cases and in the present action – that demonstrates disrespect for the courts, counsel, his clients, and the legal system. Since this is his third discipline case in seven years, disbarment is the presumptive discipline under standard 1.7(b) absent compelling mitigation, which Witte did not prove. Finding no merit to his procedural and substantive challenges on review, we adopt the hearing judge's recommendation that Witte be disbarred.

II. PROCEDURAL CHALLENGES

Witte raises two procedural challenges on review. He claims that he did not receive a fair trial because the hearing judge: (1) improperly relied on the vexatious litigant ruling to find him culpable; and (2) wrongly denied his request for judicial notice of the probate trial transcript.

² Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii) (unless otherwise noted, all further references to “standard(s)” are to this source) requires that the member prove rehabilitation, present fitness to practice, and present learning and ability in the general law to be relieved of an actual suspension.

As to his first claim, Witte contends that the hearing judge did not independently assess the trial evidence but instead “rubber-stamped” the vexatious litigant ruling. The record does not support this claim.

The hearing judge considered all the evidence from the four-day discipline trial and over 100 admitted exhibits. That evidence included probate court filings, rulings, and other documents and testimony from Witte, three attorneys who had opposed him in the probate case, and a professional fiduciary who served as a successor executor of the estate. The hearing judge also appropriately evaluated witness credibility and found the State Bar’s witnesses were believable. We give the vexatious litigant ruling a strong presumption of validity since it is supported by both substantial and clear and convincing evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947 [strong presumption of validity for civil findings supported by substantial evidence although clear and convincing standard of proof for discipline proceedings].)³

In his second claim, Witte asserts that the probate trial transcript should have been admitted. We do not agree.

It is settled that the hearing judge “has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.” (Rules Proc. of State Bar, rule 5.104(F); *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499 [hearing judge has broad discretion to admit or exclude evidence].) Witte failed to show that the transcript itself was probative in light of the extensive evidence presented at the hearing below. Thus, the hearing judge did not abuse her discretion by denying his request for judicial notice. Witte received a fair discipline trial.

³ Clear and convincing evidence of a charge alleged against an attorney “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. [Citations.]” (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552, internal quotations omitted.)

III. FINDINGS OF FACT

The hearing judge's findings of fact are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) We adopt these findings as summarized below, adding relevant facts from the record.

A. Witte Represented an Executor in a Probate Case

On May 15, 2002, Margaret Curtis died. Her will devised her estate in equal parts to Henry, Barry, and Steven Leus. In the summer of 2004, Witte began representing Steven (Leus) as a beneficiary and as the executor for the Estate of Margaret J. Curtis (the Estate). Witte had virtually no experience handling probate cases.

In July 2004, the probate court granted Joellen James's petition to pay for work she completed for the Estate following Curtis's death. James presented evidence that for a year and a half after Curtis died, she cleaned the Estate home, ran errands, organized files and maintained the yards, charging \$17 per hour. The court entered judgment for James for \$48,951.33 and for return of her property, including furniture and compact discs (the James award). Witte failed to timely appeal this order but later challenged it in probate court, claiming that participants in the case had procured the James award by fraud. Witte's challenge was unsuccessful and the James award became the crux of his vexatious litigation.

In early 2005, the probate court removed Leus as executor because he improperly sold estate property to a relative at a discount, failed to file an accounting, disregarded the James award order, and paid Witte \$10,000 in attorney fees from the Estate without court authorization. Carolyn Young, a professional fiduciary, was appointed to replace Leus. Witte appealed Leus's removal, again challenging the James award as fraudulent. In July 2006, the Court of Appeal affirmed Leus's removal and dismissed Witte's claim of fraud.

After Leus was removed as executor, Witte continued to represent him as a beneficiary. Witte substituted out of the probate case in October 2006, due to his upcoming November 5, 2006 suspension from the practice of law based on his prior discipline case. After Leus hired new counsel, the parties reached a settlement and entered into a mutual release, which the probate court approved. In August 2007, after Young filed her accounting, the only task left to close the Estate was to allocate attorney fees among Leus's former attorney Daniel Sullivan, Young's attorney Judy Carver, and Witte.

B. Witte's Vexatious Litigation in Probate Court

Witte, Sullivan, and Carver filed petitions for ordinary and extraordinary compensation.⁴ In several filings purportedly addressing his fees, Witte presented frivolous issues, many of which the court had already resolved. He maintained that the James award was fraudulent, and asserted that he and Leus were being cheated out of money owed to them. Despite warnings from the court to address only his own attorney fees issue, Witte made claims on behalf of Leus that he had no standing to raise since he was suspended from practicing law.

Following a four-day trial on attorney fees, the court took the matter under submission. But before it issued the ruling, Witte filed two new frivolous requests unrelated to his attorney fees. The first was a "Proposed Statement of Decision" filed on March 25, 2008, which suggested that the probate court void seven final judgments from the Estate litigation. The court found this request "had no basis in fact, did not reflect issues and evidence presented at trial, and was frivolous and unmeritorious." Witte's second request, filed three days later, was an ex parte application seeking financial documents about the Estate from Young. Witte claimed he needed the documents for Leus for "other litigation that may result from this case." The probate court

⁴ Ordinary compensation is for services in probate cases based on a sliding scale of percentages of the estate's value. Extraordinary compensation is for unusual services for which the probate court may order payment. (*Estate of Hilton* (1996) 44 Cal.App.4th 890, 895.)

denied the request since Witte sought documents that were beyond the scope of the attorney fees hearing and applied only to Leus's interests. Fed up with Witte's relentless litigation, on April 8, 2008, Young filed a motion to declare Witte a vexatious litigant – the first such motion she has filed in over 30 years of practice.

In May 2008, the probate court issued its ruling on attorney fees. It awarded most of the \$29,064 available for ordinary compensation to Sullivan and Carver, and only \$3,119 to Witte for legal work of questionable value. The court also awarded extraordinary fees of \$7,677 to Sullivan and \$19,362 to Carver. Most of Carver's fees were compensation for responding to "a multitude of pleadings filed by Witte, lack of cooperation by Leus and Witte, appointment of [a] special administrator, Witte's appeal filed on behalf of Leus, recovering illegal payments from Witte, and participating in mediation." Witte received no extraordinary compensation since his conduct had caused economic harm to the Estate beneficiaries.

On July 3, 2008, the probate court ruled that Witte was a vexatious pro per litigant pursuant to Code of Civil Procedure section 391, subdivision (b)(3). The court concluded that, taken together, Witte's filings in the attorney compensation matter were "a wasteful attempt to relitigate matters already decided in previous court decisions."

C. Witte's Threats to Young

After the vexatious litigant ruling, Witte began to harass Young. In October 2008, he sent a letter to her bond company, accusing Young and her attorney, Carver, of fraud and theft of the James award. He implied that the court was going to vacate the initial attorney fees order and award him over \$65,000. Young considered this extortion because her status with the bonding company was critical to her 24-year career as a professional fiduciary.

Finally, in April, 2009, the probate court issued a judgment and order settling the Estate. A week later, Witte sent Carver a letter threatening to file a federal civil rights action against

Young, but offering to desist if she paid him \$15,000 and stipulated to vacate the vexatious litigant order.

Then, in May 2009, Witte wrote another letter to Carver. He offered that if Young would agree to vacate the vexatious litigant ruling, Witte would not appeal the order settling the Estate, would waive any claims against the Estate, and would not file a civil rights action. He warned: “Without a settlement of these claims, I will be required to continue to fight to clear my name regarding my actions in this case.” Shortly thereafter, the probate court discharged Young since she had completed her duties to the Estate.

IV. CONCLUSIONS OF LAW

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

Witte is charged with committing moral turpitude by engaging in vexatious litigation conduct. Count One alleges that Witte filed unmeritorious papers, failed to comply with court rulings, conducted unnecessary discovery, made baseless allegations of fraud, conspiracy, and misrepresentation, engaged in frivolous tactics designed to delay, and threatened Young.

The record establishes that these allegations are true. Witte pursued frivolous claims in probate court, disobeyed court rulings, engaged in frivolous delay tactics, and attempted to re-litigate final orders. Although he had standing to address his own compensation, Witte repeatedly attempted to litigate other substantive Estate issues such as making monetary demands for Leus, seeking Young’s removal, and objecting to Carver’s petition for fees and to Young’s accounting. Even after the probate proceedings ended, he threatened Young based on meritless legal positions. We find that Witte’s overall misconduct constitutes moral turpitude.

⁵ Section 6106 makes it cause for disbarment or suspension for an attorney to commit any act involving moral turpitude, dishonesty or corruption. Unless otherwise noted, all further references to “section(s)” are to the Business and Professions Code.

(*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 186 [“serious, habitual abuse of the judicial system constitutes moral turpitude”].)

Count Two: Failure to Maintain Respect for the Courts (§ 6068, subd. (b))

Count Three: Failure to Maintain a Just Action (§ 6068, subd. (c))

Counts Two and Three are based in large part on the same misconduct as alleged in Count One (moral turpitude). In *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060, the Supreme Court instructed that little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings. We therefore dismiss Counts Two and Three as duplicative.

V. AGGRAVATION AND MITIGATION

The State Bar must establish aggravation by clear and convincing evidence while Witte has the same burden to prove mitigation. The hearing judge found no mitigation and five factors in aggravation. We agree Witte failed to prove any factors in mitigation. We find four factors in aggravation, as detailed below.

A. Two Prior Discipline Cases (Std. 1.2(b)(i))

1. Supreme Court Case No. S145634, discipline effective November 5, 2006

Witte has been licensed to practice law since 1983. His first discipline case addresses misconduct he committed from 1993 to 2006 in three client matters. In two of the client matters, Witte: (1) failed to disburse settlement funds for more than four years (Rules Prof. Conduct, rule 4-100(B)(4))⁶; (2) failed to maintain client funds (rule 4-100(A)); (3) failed to support the law by violating a court order (§ 6103); (4) misled a judge (§ 6068, subd. (d)); (5) appeared without authority for a client who had terminated his services (§ 6104); (6) misappropriated \$6,000 in client funds (§ 6106); (7) failed to return client papers (rule 3-700(d)(1)); and (8) failed to support the law by being held in contempt (§ 6068, subd. (a)).

⁶ Unless otherwise noted, all further references to “rule(s)” are to the State Bar Rules of Professional Conduct.

The remaining client matter involved the very same estate in the case before us and two of its participants – Carver and Young. In 2005, Witte stipulated that he filed a pleading in the probate court that “denigrated Judy Carver’s and Carolyn M. Young’s understanding of the law because they were women.” His conduct violated section 6068, subdivision (b), by failing to maintain the respect due to the courts.

No aggravating factors were offered, and the case was mitigated by emotional/physical difficulties, severe financial stress, and family problems. Witte stipulated to four years’ probation and actual suspension for two years and until he established his rehabilitation, present fitness to practice and present learning in the law under standard 1.4(c)(ii).

2. Supreme Court Case No. S156691, discipline effective December 30, 2007

In his second discipline case, Witte failed to perform services in a single client matter between 2004 and 2005. The superior court sanctioned Witte and his client three times for not filing appropriate pleadings, timely responding to discovery, appearing at a mandatory settlement conference (MSC), and properly preparing the MSC statement. This case was aggravated by Witte’s prior record of discipline, but mitigated by his candor and cooperation. Witte stipulated to probation and a stayed one-year suspension because his misconduct occurred during the same time frame as his first disciplinary case, and he was already serving a two-year actual suspension.

B. Multiple Acts of Misconduct / Pattern of Misconduct (Std. 1.2(b)(ii))

Witte committed multiple acts of misconduct by filing several frivolous pleadings and harassing Young, thereby repeatedly abusing the legal system and its participants. These multiple acts are a factor in aggravation. However, the more serious aggravation for multiple acts is found in Witte’s pattern of misconduct, which includes his wrongdoing involved in the prior discipline cases. Dating back to the 1990’s, Witte has been violating court orders and

failing to respect the court and its process. His past misconduct combined with his vexatious litigation in the case before us establishes a significant pattern of wrongdoing. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14, citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367 [most serious instances of repeated misconduct over prolonged period of time characterized as pattern].)

C. Bad Faith and Overreaching (Std. 1.2(b)(iii))

Standard 1.2 provides that misconduct surrounded by bad faith, dishonesty, concealment, or overreaching is aggravating. Witte engaged in bad faith and overreaching by falsely accusing participants in the probate case of conspiracy. Since we considered this misconduct to find Witte culpable of moral turpitude, we do not find it to be an aggravating factor. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61 [where factual findings used to find culpability, improper to again consider them in aggravation].)

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

Witte harmed the public and the administration of justice. His vexatious litigation required the probate court to repeatedly rule on meritless motions, wasting valuable judicial time and resources. Also, Witte's groundless accusations of fraud and conspiracy caused those who were wrongly accused to worry about damage to their professional reputations. The totality of this harm constitutes considerable aggravation.

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

The hearing judge correctly found that Witte "expressed no remorse or recognition of the serious consequences of his misbehavior." On review, Witte continues to assert a conspiracy theory to justify his vexatious litigation despite rulings by the superior court, the court of appeal and the hearing department that this theory lacks merit. In fact, the hearing judge specifically found Witte's testimony that "everyone was conspiring to commit fraud and not to pay him

attorney fees” was implausible and lacked credibility. We give great weight to this finding and, upon our own review of the record, reject Witte’s claim that he had a good faith factual and legal basis for his actions in probate court. While the law does not require him to be falsely penitent, it “does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Witte has failed to do this. We assign the most significant weight to this aggravating factor because it shows that Witte does not recognize his wrongdoing and is therefore an ongoing danger to the public.

VI. 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 follow the standards whenever possible to ensure consistency in attorney disciplinary cases. (*In re Brown* (1995) 12 Cal.4th 205, 220.) Two standards apply here.

We begin with standard 2.3, which provides for actual suspension or disbarment for acts of moral turpitude, depending on “the extent to which the victim of the misconduct is harmed or misled and . . . 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.” Witte used his legal knowledge to repeatedly abuse the court system through his vexatious litigation. But his misconduct goes beyond vexatious litigation since it involves significant aggravation, a lengthy pattern of wrongdoing, and making inexcusable threats to Young. Given the totality of these circumstances, Witte should be disbarred under standard 2.3. (See *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45 [disbarment for multiple acts of moral turpitude and dishonesty, including unrestrained pattern of abuse of judicial officers and court system]; *In the Matter of Varakin, supra*, 3 Cal. State Bar Ct.

Rptr. 179 [disbarment for 30-year attorney sanctioned for filing frivolous motions and appeals over a 12-year period who lacked insight and refused to change].)

Our disbarment recommendation is also supported under standard 1.7(b). This standard is most apt here because it recommends disbarment for a third discipline unless compelling mitigation clearly predominates. (Std. 1.6(a) [most severe of applicable sanctions shall be imposed].) Since this is Witte's third discipline case, the critical issue is whether he presented mitigation compelling enough to warrant an exception to disbarment as the presumptive discipline. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment under std. 1.7(b) imposed where no compelling mitigation found].) We conclude he has not. The State Bar proved four factors in aggravation and Witte failed to establish *any* mitigation, much less compelling mitigation.

But we are mindful that the Supreme Court does not require strict adherence to the standards in every case. (*In re Young* (1989) 49 Cal.3d 257, 267, fn 11.) Rather, we consider all relevant facts and circumstances to determine the proper discipline. (*Id.* at p. 268.) Guided by these considerations, we examine the facts unique to Witte's case, including his prior discipline records, recognizing that "[m]erely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar. Ct. Rptr. 131, 136.)

In sum, Witte's current misconduct and his actions in the prior discipline cases reveal an escalating pattern of wrongdoing including delay, harassment, and disregard for the court process. He lacks insight into his harmful wrongdoing and has had countless opportunities to conform his behavior to the ethical demands of the profession. Yet, his continued misconduct "sadly indicates either his unwillingness or inability to do so." (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728 [disbarment for prior records of discipline]; *In the Matter of Rose* (Review Dept.

1997) 3 Cal. State Bar Ct. Rptr. 646 [disbarment where prior discipline coupled with probation did not rehabilitate attorney].) Witte should be disbarred under standards 1.7(b) and 2.3. We believe that only a full reinstatement proceeding following his disbarment will adequately protect the public, the courts, and the legal profession.⁷

VII. RECOMMENDATION

We recommend that Thomas M. Witte be disbarred from the practice of law in California and his name be stricken from the roll of attorneys.

VIII. RULE 9.20

We further recommend that Witte comply with the provisions of rule 9.20 of the California Rules of Court, and perform the acts specified in subdivisions (a) and (c) within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this case.

IX. COSTS

We further 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 and as a money judgment.

X. ORDER OF INACTIVE ENROLLMENT

Upon recommending that Witte be disbarred, the hearing judge properly ordered that he be involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar. That order became effective May, 27, 2011. Witte will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

⁷ Having independently reviewed all arguments set forth by Witte, those not specifically addressed have been considered and rejected as having no merit.