STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	Case Nos.: **09-O-17390-PEM** (10-O-03276; 10-O-07140; 10-O-09824; 10-O-11310)
DUANE LYNN TUCKER,	)	
Member No. 88199,	)	**DECISION**
A Member of the State Bar.	)	

Introduction[1]

In this disciplinary proceeding, respondent Duane Lynn Tucker stipulated to misconduct stemming from five separate client matters. Respondent and the Office of the Chief Trial Counsel of the State Bar of California (State Bar) entered into a stipulation of facts and conclusions of law in October 2011. That stipulation, however, was subsequently returned by the California Supreme Court for further consideration of the recommended discipline in light of the applicable attorney discipline standards.

While the parties remained bound by the facts and conclusions of law contained within the stipulation, they were permitted to add evidence at trial supporting mitigation and aggravation.

As illustrated below, the court finds respondent culpable on all the stipulated instances of misconduct. Based on the nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, this court recommends, among other things, that respondent be suspended for a minimum of two years.

---

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Significant Procedural History

Respondent and the State Bar entered into a pre-notice stipulation of facts and conclusions of law in October 2011. The court approved the stipulation on November 7, 2011. The matter was then transmitted to the California Supreme Court.

On June 21, 2012, the California Supreme Court issued an order returning the present matter for further consideration of the recommended discipline in light of the applicable attorney discipline standards. Although the stipulation was returned, the parties were still bound by it unless a motion to withdraw or modify the stipulation was granted.

On August 10, 2012, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent. The NDC was based on the same clients and case numbers reflected in the stipulation. On September 5, 2012, the court issued an order rescinding the filing of the NDC due to the fact that the State Bar did not first obtain leave of this court to withdraw or modify the stipulation.

The matter was set for trial. Respondent did not file a pre-trial statement or participate in the pre-trial hearing. Respondent appeared at trial and was permitted to testify. The parties were bound by the facts and conclusions of law contained within the stipulation; however, they were permitted to add evidence supporting mitigation and aggravation that was in the contemplation of the parties at the time the stipulation was signed.

This matter proceeded to trial on November 27, 2012. The State Bar was represented by Senior Trial Counsel Sherrie McLetchie and Deputy Trial Counsel Robert Henderson. Respondent represented himself. This matter was taken under submission on November 27, 2012.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on November 29, 1979, and has been a member of the State Bar of California at all times since that date.

Case No. 09-O-17390 – The Daly Matter

Facts

On April 2, 2008, John and Carmencita Daly (the Dalys) hired respondent to represent them in a chapter 11 bankruptcy. The Dalys paid respondent $10,000 in advanced fees.

In a chapter 11 bankruptcy, there is a required process governed by 11 U.S.C. sections 327- 330, regarding compensation of the attorney for the debtor. In order to represent the debtor, respondent needed to be employed by an order of the bankruptcy court. In order to be paid, respondent was required to prepare, file, and notice for hearing an application for compensation with the bankruptcy court. The code thereafter authorizes an award for reasonable compensation for actual necessary services rendered and reimbursement of actual necessary expenses.

Respondent failed to obtain an order of the court employing him as the attorney for the debtor.

On October 8, 2009, counsel for the trustee in the Dalys' bankruptcy filed a motion for disgorgement of the $10,000 paid to respondent. On December 11, 2009, the bankruptcy court ordered the disgorgement of the $10,000 in advanced fees.

As of October 17, 2011, respondent had disgorged $6,500 of the advanced fees. There is no clear and convincing evidence in the record that respondent has since refunded any portion of the remaining fees.

Conclusions of Law

Rule 4-200(A) [Illegal Fee]

Rule 4-200(A) states that a member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. By failing to obtain court approval as counsel for the debtor and by failing to obtain an award for compensation as counsel for the debtor, respondent collected an illegal fee, in willful violation of rule 4-200(A).

Section 6103 [Failure to Obey a Court Order]

Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment. By failing to disgorge the full $10,000 in advanced fees as ordered by the court on December 11, 2009, respondent failed to obey an order of the court, in willful violation of section 6103.

Case No. 10-O-03276 – The Herrera Matter

Facts

On or about August 1, 2009, Silvia Herrera (Herrera) hired respondent for a bankruptcy. At this time Herrera paid respondent a total of $4,000 in advanced fees and $274 in advanced costs. Thereafter respondent failed to file a bankruptcy on behalf of Herrera.

On December 28, 2009, Herrera demanded a refund of the $4,000 in advanced fees and $274 in advanced costs from respondent. Respondent received this demand, but did not refund the money.

On January 21, 2010, Herrera filed a complaint with the State Bar regarding respondent's conduct. As of no later than January 21, 2010, the attorney client relationship was terminated between Herrera and respondent.

At no time during respondent's representation of Herrera did respondent file a bankruptcy on behalf of Herrera. At no time since the advanced fees and costs were paid has respondent refunded the unearned fees and costs.

Conclusions of Law

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. By failing to refund the $4,000 in advanced fees, respondent failed to promptly refund unearned fees, in willful violation of rule 3-700(D)(2).

Rule 4-100(B)(4) [Failure to Promptly Pay Client Funds]

Rule 4-100(B)(4) requires that an attorney promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the attorney which the client is entitled to receive. By failing to pay the $274 in advanced costs, respondent failed to promptly pay or deliver client funds to which the client is entitled, in willful violation of rule 4-100(B)(4).[2]

Case No. 10-O-07140 – The Helmer Matter

Facts

In August 2009, Cliff Helmer (Helmer) hired respondent for representation in a matter involving the lender's lien on real property. Respondent filed case no. 2:09-cv-2977 in U.S. District Court for Eastern California. The case was dismissed on May 12, 2010.

Respondent and Helmer agreed in December 2010, that respondent owed a refund of $1,500 in advanced fees. To date, respondent has refunded $300 of the advanced fees.

[2] The stipulation contained a typographical error identifying this rule as rule 4-100(B)(3).

Conclusions of Law

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

By failing to refund the $1,500 in advanced fees to Helmer when the case was dismissed and by failing to refund the remaining $1,200 in advanced fees after agreeing that the amount was owed, respondent willfully failed to promptly refund unearned fees, in willful violation of rule 3-700(D)(2).

Case No. 10-O-09824 – The Tatmon Matter

Facts

On January 22, 2009, Sharon Tatmon (Tatmon) hired respondent to file a bankruptcy on her behalf. Tatmon paid $3,500 in advanced fees to respondent.

On March 14, 2009, Tatmon completed the credit counseling course required by the bankruptcy code. Tatmon provided respondent with the certificate shortly after completing the course. Respondent filed a chapter 13 bankruptcy on behalf of Tatmon in May 2009. This petition was dismissed in June 2009, for failure to file required documents.

Respondent filed bankruptcy once again on behalf of Tatmon on July 8, 2009, in case no. 09-46089 LT13. In this filing, some of the schedules were deficient.

On September 15, 2009, the bankruptcy trustee filed a motion for review of fees, seeking disgorgement of $2,500 of the advanced fees. On October 17, 2009, Tatmon wrote a letter to the bankruptcy trustee, supporting the request for disgorgement of $2,500 in advanced fees.

On December 2, 2009, the court ordered respondent to disgorge $1,500 in advanced fees to his client Tatmon, at a rate of $500 per month. On January 12, 2010, respondent made one $500 payment to Tatmon.

On March 16, 2010, Tatmon notified the bankruptcy trustee that respondent had failed to disgorge $1,000 in advanced fees. On March 29, 2010, the bankruptcy trustee filed a motion to

show cause as to why respondent should not be found in civil contempt for failing to follow the court's order to disgorge fees. On April 12, 2010, respondent disgorged the remaining $1,000 in advanced fees.

Respondent's bankruptcy filed on behalf of Tatmon was confirmed on December 8, 2009.

Conclusions of Law

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

By failing to disgorge the $1,000 to Tatmon until April 12, 2010, respondent failed to promptly refund unearned fees, in willful violation of rule 3-700(D)(2).

Section 6103 [Failure to Obey a Court Order]

By failing to disgorge the $1,000 to Tatmon until April 12, 2010, respondent failed to comply with an order of the court which required him to do or forbear an act connected with his profession, which he ought in good faith to do or forbear, in willful violation of section 6103.

Case No. 10-O-11310 – The Solis Matter

Facts

On December 16, 2008, Ricardo Solis (Solis) hired respondent for a bankruptcy matter. On that same date, Solis paid respondent $2,799 in advanced fees.

On December 20, 2008, Solis completed the credit counseling course required by the bankruptcy code. Solis provided respondent with the certificate shortly after completing the course.

Between December 16, 2008 and October 23, 2009, Solis contacted respondent's office approximately once every two to three months to check on the status of the bankruptcy. Solis never spoke with respondent. All communication was with respondent's secretary. Solis was never informed that the bankruptcy had not been filed.

In October 2009, Solis was informed that the credit counseling certificate had expired. On October 23, 2009, Solis once again attended a credit counseling course. Solis provided respondent with the certificate shortly after completing the course.

At the end of November 2009, Solis lost his home due to foreclosure.

Between October 23, 2009 and February 2010, Solis attempted to communicate with respondent to learn what was happening in the bankruptcy matter. Solis left multiple messages with respondent's answering machine, but never received any information from respondent.

In February 2010, respondent's answering machine was no longer available to Solis, as it was disconnected. Thereafter Solis began to receive letters and calls from bill collectors. Solis attempted to confirm that a bankruptcy had been filed on his behalf by going to the court in Oakland. No bankruptcy had been filed by respondent on behalf of Solis.

Between December 16, 2008 and October 2010, when Solis filed a complaint with the State Bar, respondent failed to file a bankruptcy on behalf of Solis. Respondent's services were so deficient so as to be worthless to Solis.

As of October 18, 2011, respondent had failed to refund the $2,799 in advanced fees to Solis. There is no clear and convincing evidence in the record that respondent has since refunded any portion of these fees.

Conclusions of Law

Rule 3-110(A) [Failure to Perform Legal Services with Competence]

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. By failing to file a bankruptcy on behalf of Solis from December 16, 2008 through October 2010, respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Section 6068, subd. (m) [Failure to Communicate]

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 respond to Solis's messages and by failing to inform Solis that he had not filed the bankruptcy, respondent failed to promptly respond to reasonable status inquiries and failed to keep a client reasonably informed of significant developments relating to his case, in willful violation of section 6068, subdivision (m).

Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

By failing to refund the $2,799 in advanced fees, respondent failed to promptly refund unearned fees, in willful violation of rule 3-700(D)(2).

Aggravation[3]

Prior Record of Discipline (Std. 1.2(b)(i))

Respondent has a record of two prior disciplines.

Effective November 2, 1992, respondent was publicly reproved with conditions in State Bar Court Case No. 90-O-15673. In this single-client matter, respondent disobeyed a court order and failed to report judicial sanctions. In mitigation, respondent was suffering extreme difficulties in his personal life and had no prior record of discipline. No aggravating circumstances were involved.

On November 18, 1996, the California Supreme Court issued order no. S056070, suspending respondent from the practice of law for a period of 90 days, stayed, with three years' probation. In this matter, respondent violated the terms of his public reproval by failing to make

[3] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

restitution. In aggravation, respondent had one prior record of discipline. In mitigation, respondent cooperated with the State Bar, acted in good faith, and was experiencing financial hardship.

While respondent has two prior records of discipline, the court notes that his first discipline was remote in time and his second discipline stemmed entirely from his inability to make restitution due to his poor financial welfare. Consequently, the weight of respondent's prior record of discipline, as a factor in aggravation, is reduced.

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

Respondent's misconduct resulted in significant financial harm to several of his clients, as they were denied the use of their money. In addition, respondent's inaction in the Solis matter contributed to his client losing his home due to foreclosure.

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

Respondent was found culpable of ten acts of misconduct stemming from five client matters. Multiple acts of misconduct are an aggravating factor.

Mitigation

Cooperation with the State Bar (Std. 1.2(e)(v))

Respondent cooperated with the State Bar's investigation and entered into a stipulation as to facts and conclusions of law. Respondent's cooperation with the State Bar warrants consideration in mitigation.

Extreme Emotional, Financial, and Physical Difficulties (Std. 1.2(e)(iv))

Respondent testified regarding emotional, financial, and physical difficulties he has been suffering from, including a congestive heart issue. While the court is sympathetic to respondent's situation, the lack of expert testimony on this subject precludes any more than nominal weight in mitigation.

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.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

In this case, the standards provide for the imposition of sanctions ranging from suspension to disbarment. (Std. 2.6.) Due to respondent's prior record of discipline, the court also looks to standard 1.7(b) for guidance. Standard 1.7(b) provides that when an attorney has two prior records of discipline, "the degree of discipline imposed in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate."

The standards, however, are guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards. [Citation.]" (*Id.* at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be disbarred pursuant to standard 1.7(b). The Supreme Court and Review Department have not historically applied standard 1.7(b) in a rigid fashion. Instead, the courts typically consider the facts and circumstances involving the attorney's present and prior disciplines. Disbarment has not been found to be the appropriate sanction in matters where the nature and extent of the attorney's prior record lacked the severity

to warrant disbarment. (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 704.)

Although respondent has been disciplined on two previous occasions, neither matter involved serious or extensive misconduct. As a result, respondent has never served a period of actual suspension. In addition, the court notes that respondent's second discipline was a byproduct of his financial hardship and inability to pay the restitution ordered in his first discipline. Therefore, after considering the totality of the circumstances, the court finds that a recommendation of disbarment would be excessive.

Turning to the applicable case law for guidance, the court finds *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, to be instructive.

In *Bledsoe*, the attorney was found culpable in four matters involving client abandonment. In addition, the attorney failed to participate in the State Bar's investigation of two of these matters. In aggravation, the attorney failed to participate in the proceedings at the State Bar Court Hearing Department level. In mitigation, the attorney had no prior record of discipline in 12 years of practice prior to the culmination of the misconduct. The California Supreme Court recommended that the attorney be suspended from the practice of law for five years, that execution of this suspension be stayed, and that he be placed on probation for five years, including a two-year period of actual suspension.

While *Bledsoe* is not directly on point, some similarities to the present matter exist. Both cases involve some client abandonment issues, including a failure to refund unearned fees. Although the present case has one more client matter, it involves a lesser degree of client abandonment and did not include a charge of failing to cooperate in a State Bar investigation. And while the attorney in *Bledsoe* had no prior record of discipline, this is counterbalanced by the

fact that he failed to participate in the disciplinary proceedings. Consequently, the court finds that the present matter warrants a level of discipline similar to *Bledsoe*.

After considering the standards and relevant case law and balancing the mitigation and aggravation, the court concludes that, among other things, a two-year period of actual suspension is appropriate to protect the public and preserve public confidence in the profession.

Recommendations

It is recommended that respondent Duane Lynn Tucker, State Bar Number 88199, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that respondent be placed on probation[4] for a period of three years subject to the following conditions:

1. Respondent is suspended from the practice of law for a minimum of the first two years of probation, and he will remain suspended until the following requirements are satisfied:

    i. Respondent must make restitution to John and Carmencita Daly in the amount of $3,500 plus 10 percent interest per year from December 11, 2009 (or reimburse the Client Security Fund, to the extent of any payment from the fund to John and Carmencita Daly, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

    ii. Respondent must make restitution to Silvia Herrera in the amount of $4,274 plus 10 percent interest per year from January 21, 2010 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Silvia Herrera, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

    iii. Respondent must make restitution to Cliff Helmer in the amount of $1,200 plus 10 percent interest per year from December 1, 2010 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Cliff Helmer, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

[4] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

iv. Respondent must make restitution to Ricardo Solis in the amount of $2,799 plus 10 percent interest per year from October 23, 2009 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Ricardo Solis, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles; and

v. Respondent must provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

4. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This

requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners and provide proof of passage to the Office of Probation during the period of his actual suspension. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).)

California Rules of Court, Rule 9.20

It is further recommended that respondent 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 in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is 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.

Dated: January 11, 2013

Pat McElroy
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on January 11, 2013, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DUANE LYNN TUCKER
PO BOX 43061
OAKLAND, CA 94624

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Robert Henderson, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on January 11, 2013.

George Hue
Case Administrator
State Bar Court